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THE
LAWYERS REPORTS
ANNOTATED

BOOK XXIII.

ALL CURRENT CASES OF GENERAL VALUE AND
IMPORTANCE WITH FULL ANNOTATION
BURDETT A. RICH, EDITOR, HENRY
P. FARNHAM, ASSISTANT.

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LAWYERS' REPORTS,

ANNOTATED.

PENNSYLVANIA SUPREME COURT.

William D. LONG *et al.*, *Appts.*,
v.

Thomas FORREST *et al.*, Trading as Gird-
wood & Forrest, *Defendants*,
and

Hugh McCallum *et al.*, Garnishees.

(150 Pa. 413.)

1. Citizens of a foreign state will not be
aided by the courts to obtain by garnish-

ment preference of their claims against a foreign
debtor in disregard of proceedings in his own
country for the sequestration of his estate and
the appointment of a trustee thereof in bank-
ruptcy.

2. It is not error to refuse to strike out
evidence admitted under an agreement of the
parties.

3. Evidence of fraud in the creation of
a debt is immaterial in a proceeding by
garnishment where the creditor and debtor are

NOTE.—The above case presents a question
which so far as foreign bankruptcy is concerned
has been decided in but few prior cases although
kindred decisions on the effect of foreign assign-
ments for creditors voluntarily made are more
numerous and these generally agree with the
present case. The decisions as to the effect of
bankruptcy transfers or those made under insolv-
ency transfers so far as they affect residents of the
place where they were made, are not agreed. See
the following *note*, divisions I, a, 6; I, b, 3, and I, c, 2.

Although the above case was decided some time
since it has been held for annotation on the im-
portant question suggested by it, in connection
with other phases of the question or analogous
questions which are presented in the following
cases. *BARTH v. BACKUS*, *post*, 47, and *GILMAN v.*
HUDSON RIVER BOOT & SHOE MFG. CO., *post*, 52, with
the latter of which is a *note* on the extraterritorial
effect of transfers of property to a receiver, which
is closely akin to the *note* which here follows.

*Transfer of property out of the state by bankruptcy
or insolvency proceedings or assignment for cred-
itors.*

I. PERSONAL PROPERTY.

a. Voluntary assignments.

1. Place of assignment.
2. Extraterritorial effect generally.
3. As against attachments in general.
4. Discrimination in favor of residents.
5. As to nonresident attachment creditors gen-
erally.
6. As to attachment creditors residing in the state
where the assignment was made.
7. Effect of assignee's possession.

b. Assignments under insolvency statutes.

1. In general.
2. As to resident creditors.
3. As to residents of state where insolvency trans-
fer was made.
4. As to other nonresidents.
5. Effect of assignee's possession.
6. Right of assignee to sue in other state.

c. Bankruptcy transfers.

1. English decisions.
2. American decisions.

II. REAL PROPERTY.

III. SHIPS ON HIGH SEAS.

I. PERSONAL PROPERTY.

a. Voluntary assignments.

The distinction taken in *BARTH v. BACKUS*, *post*,
47, between a voluntary assignment and a trans-
33 L. R. A.

fer by operation or under compulsion of an insolv-
ency or bankrupt law is one that has not always
been kept clear in the decisions, but which is of
much importance in an attempt to make the deci-
sions on the subject consistent and conformable to
recognized principles of law.

That the title to personal property will pass by a
purely voluntary assignment for creditors made in
another jurisdiction from that in which the prop-
erty may be situated is the general doctrine, which
is subject to some exceptions. As to these excep-
tions the courts are not all agreed. A discrimina-
tion is made by some courts in favor of their own
citizens claiming as creditors against assignees in
another state. Most of the cases hold that citizens
of the state in which the assignment was made are
bound by the assignment even if no other credi-
tors are bound by it, at least where the assignment
is purely voluntary. *BARTH v. BACKUS*, *post*, 47,
is distinguished from this in permitting nonresi-
dents, although of the state in which the assign-
ment was made, to defeat it by attachment, as in
that case the assignment is regarded, not as a vol-
untary assignment, but as one that is practically
in *invitum* under an insolvency statute.

Citizens of a third state, or nonresident creditors
who belong neither to the state in which they seek
to attach property, nor to that in which the assign-
ment for creditors was made, are in some cases al-
lowed the same rights as against the assignment as
if they were resident creditors, and in others are
not.

See, as to these discriminations, cases about at-
tachments, *infra*.

1. Place of assignment.

An assignment by a nonresident of property in
New York signed in another state but delivered in
New York, is a New York assignment. *Grady v.*
Bowe, 11 Daly, 259.

An assignment mailed in Missouri to an Ohio
trustee, who had prepared it under Ohio laws, for
the transfer of property in Ohio, is an Ohio assign-
ment, which takes effect in that state as against a
subsequent attachment from the time it was put
in the postoffice. *Johnson v. Sharp*, 31 Ohio St. 611,
27 Am. Rep. 529.

2. Extraterritorial effect generally.

In discussing the effect of the transfer of personal
property, which is lawful in the owner's domicile, it
is said by the Supreme Court of the United States,
in *Green v. Van Buskirk*, 74 U. S. 7 Wall. 129, 19 L.

both foreigners and the estate of the latter has been sequestered in his country and placed in the hands of a trustee.

(July 13, 1894.)

APPEAL by plaintiffs from a judgment of the Court of Common Pleas, No. 1, for Philadelphia County refusing to hold the garnishees liable to plaintiffs for a debt owing

by them to defendants, plaintiffs' debtors, whose estates had been sequestered and placed in the hands of one Thomas Jackson, as trustee, by the sheriff's court of Glasgow, Scotland. *Affirmed.*

The facts sufficiently appear in the opinion. *Messrs. Owen B. Jenkins and Henry C. Terry*, for appellants:

There was no legal proof in the court below

ed. 100: "There is no absolute right to have such transfer respected, and it is only on a principle of comity that it is ever allowed. And this principle of comity always yields when the laws and policy of the state where the property is located have prescribed a different rule of transfer with that of the state where the owner lives."

This statement of the general rule by the chief court of the nation applies to assignments for creditors although it was not made with particular reference to them.

A New York assignment for creditors is held by the courts of that state to be ineffectual as against a subsequent attachment in New Jersey of property in the latter state, where the assignment, being with preferences, was not in accordance with New Jersey law. *Guillander v. Howell*, 35 N.Y. 657.

Assignees for creditors, under a voluntary assignment of choses in action in another state, were denied the right to maintain actions in their own names in Massachusetts, in the case of *Orr v. Amory*, 11 Mass. 25.

But this decision is really based on the old doctrine which denied the assignability of choses in action, and is by no means an authority against the right of purely voluntary assignees to maintain actions. See the numerous cases below in which such right is either expressly or impliedly recognized.

As to rights of assignees under insolvency statutes to sue, see *infra*.

That the validity of an assignment for creditors depends on the law of the place where it was entered into, although intended to operate upon personal property elsewhere, is declared in *Fellows v. Commercial & B. Bank of Vicksburg*, 6 Rob. (La.) 345, in which case it was held that the assignment was not valid, even in the place where it was made.

That a voluntary general assignment for creditors in another state will pass title to personal property is also declared in *Re Paige & S. Lumber Co.*, 31 Minn. 130, in which the question arose in determining what property would pass by a subsequent assignment for creditors in that state.

In these cases there was no question of the priorities or conflicting rights of creditors.

Fraud in an assignment for creditors made in another state is sufficient to defeat it. *Bank of United States v. Huth*, 4 B. Mon. 423; *Kitchen v. Reinkay*, 42 Mo. 457.

An assignment for creditors may be set aside as fraudulent in the state in which it was made, although it assigns real and personal property in other states. *D'Ivernols v. Leavitt*, 23 Barb. 63.

A voluntary assignment by an insolvent debtor domiciled in another jurisdiction, although it operates by the will of the party and not by operation of law as in case of bankruptcy, will not be sustained when it constitutes a fraud on creditors, and compels them to release their claims for less than the whole debt or on terms different from their contracts. *The Watchman*, 1 Ware, 232.

An assignment for creditors, valid by the law of the state in which it is made and under which property has been converted into money and brought into that state, will not be set aside in a federal court at the instance of nonresident creditors, who had no lien on such property, in the absence of any

fraud in the assignment. *Livermore v. Jencke*, 62 U. S. 21 How. 126, 16 L. ed. 55.

In *Brashear v. West*, 32 U. S. 7 Pet. 608, 8 L. ed. 801, an assignment for creditors made in Pennsylvania was attacked in the circuit court of the United States in Kentucky by bill for an injunction against proceedings on judgment obtained in that court by the assignee. But, although the assignment was upheld as being valid in Pennsylvania, the extraterritorial effect of it was not at all discussed. It seems to have been assumed that if valid in Pennsylvania it was effectual for the purpose of this case.

An assignment for creditors with preferences, valid in the state in which it is made, will be upheld in another state in which such an assignment cannot be made with preferences. *Dundas v. Bowler*, 3 McLean, 397.

This was a suit by a foreign assignee to foreclose a mortgage, and the validity of the assignment was attacked by the defendant. *Ibid.*

A general assignment for creditors, which is valid in the state where it is made, will not be held invalid in another state merely because it has not the schedule or inventory attached which the laws of that state require for assignments made there. *Birdseye v. Baker*, 2 L. R. A. 92, 32 Ga. 142.

But an assignment for creditors made by a citizen of one state in another state, and recorded in his own state, where alone it is to receive its execution, the object of which is to give it an effect which he could not have if made in his own state, will not be upheld. *Chewning v. Johnson*, 5 La. Ann. 673, 52 Am. Dec. 610.

The fact that members of a partnership reside in a state where preferences in assignments are prohibited, will not prevent them from making in New York an assignment with preferences of property in that state. *Smedley v. Smith*, 15 Daly, 421; *Eastern Nat. Bank v. Hulshizer*, 2 N. Y. S. R. 122.

The nonresidence of a creditor does not relieve him from the effect of a state law prohibiting preferences, where a preference is made by a conveyance executed in the state of property there situated. *Macdonald v. First Nat. Bank of Corunna*, 18 L. R. A. 462, 47 Minn. 67.

But although an assignment with preferences made in New York is against the policy of Ohio laws, the assignee was allowed to recover against an Ohio debtor who vainly attempted to make a set-off, which was not good under Ohio law because not matured at the time of the assignment. *Fuller v. Steiglitz*, 37 Ohio St. 355, 22 Am. Rep. 312.

In this case it will be seen there was no conflicting claim of Ohio creditors involved, and no objection was made to the capacity of the assignee to sue in that state. *Ibid.*

An assignment in trust for creditors, with preferences, made in Virginia, was upheld in Maryland against an attack by a bill in equity to have it declared void, and to restrain the disposition of the property by trustees. *Baltimore & O. R. Co. v. Glenn*, 23 Md. 287, 32 Am. Dec. 688.

An assignment for creditors made in another state is effectual as against a subsequent transfer by the debtor of his interest in a fund held in trust as against a transferee who has notice of the general assignment. *Smith's App.* 104 Pa. 361.

of the existence of the Scottish bankruptcy acts and in the absence of such proof, the certified copy of a certificate (act and warrant) purporting to prove the appointment of Thomas Jackson as trustee, was immaterial and ineffectual, and should have been stricken out.

It was agreed that the certified copy of act and warrant be admitted in evidence without

further proof, but the appellant moved to strike out the said certified copy on the grounds (a) that it was not followed up by the complete record evidence of the alleged Scottish bankruptcy proceedings. A record cannot be offered in evidence by piecemeal, and the mere fact of a certificate stating a certain person has been appointed sequestrator in bankruptcy in a foreign country is totally immaterial, unless

An assignment to resident creditors of a debt or claim for the purpose of giving them a preference, made by a nonresident at his domicile, will not be upheld in Minnesota where preferences are not allowed as against other creditors in that state, and may be ground for the appointment of a receiver on application of such other creditors. *Re Dalpay*, 6 L. R. A. 108, 41 Minn. 522.

3. As against attachments in general.

It is to be understood in all cases where it is not otherwise stated, that an assignment made in another state, which is the subject of attack by attaching creditors is valid in that state.

As stated in the beginning of this note, there are many cases which discriminate in favor of resident creditors as against nonresidents, while other cases discriminate only against creditors who reside in the state while the assignment for creditors was made, and these latter cases seem to represent the more prevalent doctrine at the present time.

First as to resident creditors. A considerable number of decisions recognize, even as against resident attaching creditors, an assignment voluntarily made in another state if it does contravene the statutes or policy of the state where it is attacked.

Thus a voluntary assignment in another state will be upheld as against any subsequent attachment in New York. *Kelstadt v. Reilly*, 55 How. Pr. 373.

The same doctrine is declared in *Thompson v. Fry*, 51 Hun. 293, although in that case the attaching creditor, although having a place of business in the state, was a nonresident.

So a voluntary assignment for creditors in another state, the provisions of which do not violate the laws of Texas, will be upheld in that state as against a subsequent attachment. *Welder v. Muldox*, 60 Tex. 372, 50 Am. Rep. 617.

It is said in that case that the existence of Texas creditors would not change the result in the absence of any statute prohibiting a transfer by nonresident owners of property in the state. *Ibid*.

An assignment for creditors in Maryland, which includes a promissory note held by the insolvent against a resident of Pennsylvania, vests the note in the trustees as against Pennsylvania creditors, so as to prevent a subsequent garnishment in that state of the maker of the note. *Speed v. May*, 17 Pa. 91, 55 Am. Dec. 540.

But under the Pennsylvania Act of May 3, 1855, an assignment made in another state must be recorded in the county where the property is situated, or actual notice brought home to an attaching creditor in order to defeat an attachment in that state. *Philson v. Barnes*, 50 Pa. 280; *Warner's App.* 13 W. N. C. 505; *Chemical Nat. Bank v. Tuttle*, 17 W. N. C. 414; *Steel v. Goodwin*, 113 Pa. 238.

A voluntary assignment in another state in trust for creditors is valid in South Carolina as against subsequent attachment of personal property. *West v. Tupper*, 1 Bail. L. 198; *Greene v. Mowry*, 2 Bail. L. 163.

In these cases the residence of the attaching creditors is not considered, but in the subsequent case of *Russell v. Tunno*, 11 Rich. L. 301, it was considered on a claim that resident creditors would be

preferred to such assignment, but the assignment was nevertheless upheld.

So in *Gregg v. Sloan*, 76 Va. 497, an assignment in trust made in North Carolina, including a debt and mortgage in Virginia, although not recorded in Virginia, was held good as against a subsequent Virginia attachment. It does not appear whether the attaching creditors were residents or not.

In Florida a voluntary assignment for creditors in South Carolina, valid by the laws of that state, will transfer assets in Florida, including an open account, so as to defeat the interest of the assignors as against subsequent attaching creditors. *Walters v. Whitlock*, 9 Fla. 83, 76 Am. Dec. 607.

The residence of the attaching creditors is not stated.

A voluntary assignment in New York, not repugnant to Georgia laws, although containing preferences, was held valid in Georgia as against a subsequent garnishment by Georgia creditors. *Princeton Mfg. Co. v. White*, 68 Ga. 96.

An assignment in trust for creditors, made in Kentucky, which is not against the policy of the Maryland laws, although not recorded in Maryland as required in case of Maryland assignments, was upheld as against a subsequent attachment by a Maryland creditor. *Wilson v. Carson*, 12 Md. 54.

An assignment, without preferences, made in another state, will be upheld in Missouri as against subsequent attachment of a debt in that state, although the courts in the state where the assignment was made would deny validity to a similar Missouri assignment. *Zuppann v. Bauer*, 17 Mo. App. 678.

The residence of the attaching creditor in this case does not appear.

And in *Askew v. La Cygne Exch. Bank*, 83 Mo. 366, 53 Am. Rep. 590, a voluntary assignment for creditors, made in Kansas, without preferences, is held to pass personal property in Missouri as against a subsequent attachment by a Missouri creditor.

In New Jersey also a voluntary assignment for creditors, valid in the state where made, will be upheld against an attachment by a New Jersey creditor. *Frazier v. Fredericks*, 24 N. J. L. 162. In this case the assignment was without preferences, and did not contravene the statutes or policy of the laws of New Jersey.

In Kentucky a voluntary assignment made in another state will be upheld as to personal property as against attaching creditors in Kentucky, if the assignment is one which would be upheld by the policy of the laws of that state. *Coffin v. Kelling*, 88 Ky. 649.

This case practically overrules *Johnson v. Parker*, 4 Bush. 142, in which the extreme ground was taken that a voluntary assignment in another state although without preferences, will not defeat a subsequent attachment in Kentucky by a Kentucky creditor. The court said in respect to the claim of comity in recognizing the assignment made in another state: "Such ultra and suicidal comity could not be required or expected of any patriarchal and provident sovereign."

So in federal courts a general voluntary assignment, valid in the state in which it is made, will be upheld in another state as against an attachment by a resident of the latter state. *Caskie v. Webb*

the whole record was offered in evidence; and (b) unless it was shown that the Scottish bankruptcy act, etc., was in full force and effect in the place of business of the appellants, to wit, the province of Ontario, Canada, and also in force in the state of Pennsylvania.

The bankruptcy laws of England are penal and limited to their own territory.

8 Kames, Principles of Equity, 361.

They do not extend to her own colonies.

Mansfield, J., in 1 Cooke, Bankrupt Laws, 353; see also *Le Chevalier v. Lynch*, 1 Doug. 169.

Not even the laws of a sister state within our own federal union will be judicially noticed by the courts of this state without formal proof.

ster, 2 Wall. Jr. 131; *Rosenthal v. Mastin Bank*, 17 Blatchf. 318.

Likewise an assignment for creditors in another state will pass such an equitable interest in the stock owned by the debtor in a foreign corporation, even before the transfer of the stock on the books of the corporation, that a subsequent attachment of such stock by resident creditors having knowledge of the assignment will be defeated. *Black v. Zacharie*, 44 U. S. 3 How. 483, 11 L. ed. 690.

An assignment for creditors in New York by one citizen of that state to another, which is valid in that state, transfers to the assignee the title to a note and mortgage to secure it on land in Florida so as to defeat subsequent attachment by Florida creditors. *Van Wyck v. Read*, 43 Fed. Rep. 718.

In this case the assignment was made with preferences, but it appeared that such preferences were allowed in Florida also. *Ibid*.

In *Meeker v. Wilson*, 1 Gall. 419, assignees for creditors by assignment made in Philadelphia were held to have no right to a cargo included in the assignment which was attached in Massachusetts soon after the assignment, but the decision seems to have been put largely upon the ground that the assignees had omitted to take possession of the property within a reasonable time. The court expressly said: "No question has been made as to the effect of such an assignment to convey the property of the debtor lying in this state, so that it may not be subject to the attachment of creditors here."

A sale made to a citizen of one state by an insolvent in another state, which is affirmed by the assignee of the latter, is to be regarded in the state where the purchaser resides, on an attack by an attaching creditor claiming that it was fraudulent, as if there had been no assignment for creditors. *Harvey v. Watson*, 63 N. H. 466.

In Connecticut an assignment as security in another state in which it was valid was upheld against subsequent attachment by Connecticut creditors, although notice of the assignment had not been given as required by Connecticut law. *Clark v. Connecticut Peat Co.* 36 Conn. 303.

And a general voluntary assignment for the benefit of creditors made in another state operates to transfer a debt so as to defeat a subsequent garnishment of a resident who has been notified of the assignment. *First Nat. Bank of Rockville v. Walker*, 61 Conn. 154.

In Massachusetts attachment by creditors who have not assented to an assignment being recognized as a valid remedy will be also upheld in favor of Massachusetts creditors against an assignment in another state to which they have not assented. *Fall River Iron Works Co. v. Croade*, 15 Pick. 11; *Pierce v. O'Brien*, 129 Mass. 314, 37 Am. Rep. 380; *Ingraham v. Geyer*, 13 Mass. 146, 7 Am. Dec. 132; *Faulkner v. Hyman*, 142 Mass. 53.

And an attachment by a firm, some of the members of which are residents, will prevail against an assignment in another state to the same extent that it would do if all the members were residents, although part of them are citizens of the state in which the assignment was made. *Faulkner v. Hyman*, *supra*.

But after creditors have proved claims under a voluntary assignment in another state to an amount 23 L. R. A.

greater than the value of the property assigned, the assignment, if valid in the state in which it is made, will be upheld in Massachusetts as against an attachment by a resident creditor of a debt due to the insolvent debtor. *May v. Wannamacher*, 111 Mass. 202; *Means v. Hapgood*, 19 Pick. 105.

Although such decision is based on comity, the fact that in a similar case in such other state some years previous the decision had denied effect to a Massachusetts assignment, was held insufficient to defeat the rule of comity. *Means v. Hapgood*, *supra*.

An assignment made in another state in which it is valid, is valid as against trustee process by a citizen of Massachusetts who became a creditor by purchase of an overdue note after the assignment was made. *Richardson v. Forepaugh*, 7 Gray, 546.

It will be seen that the Massachusetts cases recognize an assignment made in another state so far as it would be valid if made in Massachusetts.

In general if an assignment made in another state is in violation of the policy of the laws of the state in which the property is situated, as in the case of prohibited preferences, it will not be upheld in that state, at least as against resident creditors.

Thus an assignment for creditors in Tennessee, with preferences contrary to the laws of Louisiana, is invalid as against subsequent attachment by a Louisiana creditor. *Beirne v. Patton*, 17 La. 590.

An assignment for creditors in another state with preferences, contrary to the policy of the law of Missouri, will not be sustained there as against resident attaching creditors. *Bryan v. Brisbin*, 26 Mo. 423, 72 Am. Dec. 219.

So in Illinois resident attaching creditors are not defeated by a prior voluntary assignment made in another state, with preferences. *Henderson v. Schaeff*, 36 Ill. App. 155. See *Heyer v. Alexander*, *infra*.

And in New Jersey a general assignment for creditors providing for preferences, which is made in another state, will not be recognized as against the claims of persons domiciled there. *Van Winkle v. Armstrong*, 41 N. J. Eq. 402; *Kimball v. Lee*, 40 N. J. Eq. 408; *Varnum v. Camp*, 18 N. J. L. 323, 25 Am. Dec. 476.

As an assignment for creditors with preferences made in New York is invalid in New Jersey as against New Jersey creditors, a deed creating a trust for creditors, which is in effect a general assignment for creditors subservient to the New York assignment, will be also invalid. *Fairchild v. Hunt*, 14 N. J. Eq. 367.

An assignment for creditors in Massachusetts will not be enforced in the District of Columbia against a resident of the District attempting to subject the property therein situated to his just debts, when the provisions of the assignment are unmistakably against the public policy of the District. *Hoover v. Kansas City Pkg. Co.* 21 Wash. L. Rep. 710.

An assignment by an insolvent in Massachusetts requiring creditors to give releases in order to get the benefit thereof will not defeat a subsequent attachment in Maine by a resident creditor. *Fox v. Adams*, 5 Me. 245.

But the decision is based on the general ground that a general assignment in another jurisdiction will not defeat attachment by a resident. *Ibid*.

Bollinger v. Gallagher, 144 Pa. 205.

(c) The act and warrant was irrelevant under the decisions in—

Harrison v. Sterry, 9 U. S. 5 Cranch, 289, 3 L. ed. 104; *Milne v. Moreton*, 6 Binn. 353, 6 Am. Dec. 466; *Green v. Van Buskirk*, 74 U. S. 7 Wall. 189, 19 L. ed. 109; *Philon v. Barnes*, 50 Pa. 234; *Warner's App.* 18 W. N. C. 505;

Chemical Nat. Bank v. Tuttle, 17 W. N. C. 415.

The Scottish bankruptcy acts cannot operate a legal transfer of property of bankrupts in Pennsylvania as against subsequently attaching creditors who are citizens of the United States though engaged in business in Canada, and the attachment of appellants was entailed to take the fund attached.

So in Massachusetts, as against a citizen who attaches property of a nonresident, a prior assignment for creditors, with preferences, in contravention of the policy of the laws of the state, will not be upheld. *Boyd v. Rockport Steam Cotton Mills*, 7 Gray, 402; *Zipcoy v. Thompson*, 1 Gray, 242.

But in *J. M. Atherton Co. v. Ives*, 20 Fed. Rep. 395, it was held that an attachment by a local creditor having notice of a general assignment for creditors in another state will not be upheld against the foreign assignee, although the assignment gives preferences, valid in the state where made, and which would not be void in the state where the attachment was made but which would be voidable there if petition was filed therefor within six months.

Under a state statute declaring that an assignment giving preferences shall be absolutely null and void, an assignment made in another state by a citizen of that state will be held altogether void as to property in the former state, although it conforms strictly to the law of the state in which it was made. *Sheldon v. Blanvelt*, 1 L. R. A. 685, 29 S. C. 453.

In this case the assignment was attacked by attaching creditors.

As in the Kentucky case of *Johnson v. Parker*, 4 Bush, 142, which was in effect overruled by *Coffin v. Kelling*, 38 Ky. 649, so in Illinois it was held in *Heyer v. Alexander*, *infra*, that an assignment for creditors made in another state will not defeat a subsequent attachment by resident creditors.

This decision is not based on any illegality of the assignment by preferences or otherwise, but is placed on the broad ground that resident creditors would be preferred to the assignee. It stands alone in this respect against the whole current of decisions elsewhere.

4. Discrimination in favor of residents.

It is said in *Heyer v. Alexander*, 106 Ill. 395, "That the states have the right to discriminate in favor of domestic creditors and against foreign creditors was fully recognized by the framers of the Federal Constitution, and the recognition of the principle was one of the grounds for providing for a general bankrupt act."

On this question also the court in *Chafee v. Fourth Nat. Bank of New York*, 71 Me. 514, 35 Am. Rep. 345, admitted the force of the objection that such a discrimination in favor of domestic creditors is in conflict with the constitutional provision for equal privileges and immunities of citizens, but denied that it was in fact unconstitutional on the ground that such privileges and immunities did not extend to special privileges enjoyed by citizens of a state by virtue of its local laws.

So in *Vanbuskirk v. Hartford F. Ins. Co.*, 14 Conn. 683, it was held not to be unconstitutional to uphold an assignment (here of a chose in action) against a resident of the state in which it was made, although it was not valid as against a Connecticut creditor for lack of notice.

But as to statutory transfers in insolvency proceedings the nonresidents are allowed the same privilege of attachment as residents if they are not residents of the state in which the insolvency proceedings are had. *Reynolds v. Adden*, 136 U. S. 350, 34 L. ed. 261.

33 L. R. A.

This seems to be decided on grounds of comity, and not as a constitutional right.

But in *Sturtevant v. Armsby Co.* (N. H.) July 31, 1891, the court says that while the assignment might prevail as against attachment by citizens of a foreign country, that citizens of another state in the Union have a constitutional right to the equal protection of the laws with citizens of New Hampshire, and attachments by the latter had been upheld by New Hampshire decisions as against such insolvency assignments in other states. The court does not mention any distinction between voluntary assignments and those made under the operation of insolvency statutes which are involuntary. 5. *As to nonresident attachment creditors generally.* See also preceding cases as to preferences.

That a general assignment in Pennsylvania is valid in Louisiana as against a garnishment in that state is held in *United States v. Bank of United States*, 8 Rob. (La.) 262. In this case the attaching creditor was the United States.

As to nonresidents who are not residents of the state in which the assignment was made the decisions differ.

Some courts deny them the same remedies as against the assignment which are allowed to residents.

Thus in Indiana the rights of a nonresident creditor to attach property must be regarded by the courts, in the absence of legislation to the contrary, as in all respects the same as those of resident creditors. *Catlin v. Wilcox Silver Plate Co.* 8 L. R. A. 62, 123 Ind. 477.

In this case the attachment was in conflict with a general assignment to receiver in a third state under a creditor's bill.

So in *Sheldon v. Blanvelt*, 1 L. R. A. 685, 29 S. C. 453, it is held that a nonresident has the same right to an attachment as against an invalid foreign assignment that a resident would have.

In this case the assignment contained preferences which were prohibited by express statutory provision in South Carolina where the attachment was made.

And an assignment with preferences made in Tennessee, which is against the policy of Georgia laws, is not valid in Georgia as against subsequent attachment, although all the attaching creditors are nonresidents, some of them being residents of Tennessee. *Stricker v. Tinkham*, 35 Ga. 170, 39 Am. Dec. 230; *Mason v. Stricker*, 37 Ga. 262.

In this case the assigned property was all in Georgia. The court held also that it would not reform the assignment by eliminating the illegal provisions. *Stricker v. Tinkham*, *supra*.

But in most cases nonresident creditors are denied the right to defeat an assignment which is valid where it was made although not in accordance with the law of the forum.

Thus in Illinois as assignment for creditors with preferences by a nonresident at his domicile, which is valid by the law of that state, will be sustained in another state where such preferences are prohibited, as against creditors of a third state who seek to attach the debtor's property. *May v. First Nat. Bank of Attleboro*, 122 Ill. 551, reversing on rehearing 7 West. Rep. 681.

So in Kentucky an assignment for creditors, valid in the state where made, although containing pref-

Harrison v. Sterry, Green v. Van Buskirk, and Warner's App. supra.

The assignee or bankrupt sequestrator of foreign debtors has no right to withdraw the debtor's effects from this country until our own citizens are satisfied.

Milne v. Moreton, supra.

The defendants having failed to comply with the laws of this state, have no standing in court.

Purdon's Dig. p. 192, pl. 14, Act May 8, 1855. If this is not done, a foreign attachment will bind the property.

Philon v. Barnes, Green v. Van Buskirk, Warner's App. and Chemical Nat. Bank v. Tuttle, supra.

Messrs. John R. Read and Silas W. Pettit, for appellees:

Appellants agreed that the certified copy of

erences contrary to the laws of another state, may be upheld in the latter, where there are no resident creditors. *Matthews v. Lloyd, 60 Ky. 625.*

And in Massachusetts a voluntary assignment made in another state will be upheld as against attaching creditors of a third state, if valid where it was made, although it makes preferences which are not allowed by the policy of the law of the forum. *Frank v. Bobbitt, 155 Mass. 112.*

So in Michigan an assignment for creditors made in another state will be enforced, unless opposed to some positive enactment, or the policy of the laws of the forum. *Butler v. Wendell, 57 Mich. 62, 58 Am. Rep. 320.*

In this case it was attacked by citizens of a third state in a garnishment proceeding.

In Missouri also an assignment in New York, valid by the laws of that state, will be upheld as against nonresidents of that state, and some of them residents of New York who ask to have assets in that state marshaled and a *pro rata* share distributed to them in payment of a judgment, which does not constitute a lien on the property of the insolvent. *Thurston v. Rosenfield, 42 Mo. 474, 97 Am. Dec. 851.*

And a trust assignment in Rhode Island, which has been held invalid in that state on account of a prior assignment, may, nevertheless, be upheld in Missouri as against attachment by a Massachusetts creditor, after the delivery of the deed in the state in which it was made. *First Nat. Bank of Attleboro v. Hughes, 10 Mo. App. 7.*

Failure to record in Connecticut an assignment made in Ohio does not leave a debt in Connecticut subject to attachment by a Pennsylvania creditor. *Atwood v. Protection Ins. Co. 14 Conn. 555.*

The court in this case distinguishes the case of *Richmondville Mfg. Co. v. Prall, 9 Conn. 430*, in which an assignment made in another state, with preferences, was held invalid as to shares of stock in Connecticut as against a subsequent attachment and sale in the state where the assignment was made. There was also in that case a failure to record the assignment as required by Connecticut law. The latter case distinguishes this by reason of the difference in the nature of the property involved in the two cases, regarding the shares of stock as particularly subject to the local law.

Again in New Jersey an assignment for creditors made in another state with preferences and valid in that state will be invalid only as to resident creditors. *Green v. Wallis Iron Works, 49 N. J. Eq. 48.*

So in a federal court an assignment for creditors valid in another state where it was executed will be held valid save as it conflicts with the rights of resident creditors and will defeat garnishment by a resident of a third state. *Schuler v. Israel, 27 Fed. Rep. 361.*

An assignment for creditors in New York will not be held in Vermont to be valid against an attaching creditor who had not been notified of the assignment,—at least, where it is not shown that such creditor is a citizen of New York, and that the law of New York on the subject differs from that of Vermont. *Ward v. Morrison, 25 Vt. 593.*

So in Vermont a change of possession to the assignee is held necessary to defeat an attachment of personal property in that state, even as to non-

residents, although such change of possession was not necessary by the laws of another state in which the assignment was made. *Rice v. Courtis, 32 Vt. 460.*

6. As to attachment creditors residing in the state where the assignment was made.

As to creditors of the state in which an assignment for creditors is made, it is generally held that the assignment will defeat their subsequent attachment of personal property in another state. *Whipple v. Thayer, 16 Pick. 25, 26 Am. Dec. 622; Daniels v. Willard, 16 Pick. 30; Burlock v. Taylor, 16 Pick. 38; Chartres v. Cairns, reported in footnote in 5 Cow. 578; Woodward v. Brooks, 3 L. R. A. 702, 123 Ill. 222.*

Thus it is said the execution of foreign assignments for creditors will be enforced by New Jersey courts as a matter of comity, except when it would injure its own citizens. *Halsted v. Straus, 32 Fed. Rep. 279.*

In this case New York creditors sought by attachment in the federal court in New Jersey to defeat a New York assignment.

And an attachment by a nonresident will not be upheld as against a prior assignment for creditors in the state in which he resides to an assignee who resides in the state where the suit is brought. *Benedict v. Parmenter, 13 Gray, 83.*

So an assignment for creditors passes to the assignee the title to personal property in another state, at least as against residents of the state in which the assignment is made, and in which the action is brought. *Cramton v. Valido Marble Co. 1 L. R. A. 120, 60 Vt. 291.*

An assignment for creditors in another state is valid as against a citizen of that state to defeat his subsequent trustee process after notice of the assignment. *Martin v. Potter, 11 Gray, 27, 71 Am. Dec. 689; Bholen v. Cleveland, 5 Mason, 174.*

An assignment for creditors made in another state where it was valid will pass the title to personal property in Pennsylvania as against residents of the state in which the assignment was made, although the assignment is not recorded as required by the Pennsylvania laws in respect to assignments made in that state. *Bacon v. Horne, 3 L. R. A. 265, 123 Pa. 453.*

So an assignment in Pennsylvania is held in Kentucky to be valid against subsequent attachment by Pennsylvania creditors who have knowledge of the assignment, although it is not recorded in Kentucky. *Forepaugh v. Appold, 17 B. Mon. 625.*

So an assignment (here of a chose in action and not a general assignment) made in New York was held valid in Connecticut as against a New York creditor, although it would be valid as against a Connecticut creditor because no notice had been given as required by Connecticut law. *Van Buskirk v. Hartford F. Ins. Co. 14 Conn. 582.*

So an assignment for equal benefit of creditors made in South Carolina is upheld in Georgia as against an attachment of personal property by a Georgia creditor. *Miller v. Kernaghan, 56 Ga. 155.*

A New York assignment, valid there without notice, will be upheld in Rhode Island, at least as against New York creditors who bring garnishment in Rhode Island. *Noble v. Smith, 6 R. I. 446.*

the act and warrant should be admitted in evidence. The fact itself is proved; its effect on the rights of the attaching creditors is the only real question in the case. The refusal of the court to strike it out is not the subject of exception or review in this case.

United States Teleg. Co. v. Wenger, 55 Pa. 262, 93 Am. Dec. 751.

A transfer of property *in invitum* is inopera-

tive *per se* beyond the territorial limits of the government under whose laws the transfer is made. Nevertheless, upon principles of international comity the courts will recognize such transfer and give effect thereto where no rights of creditors are concerned.

Hibernia Nat. Bank v. Lacombe, 31 Hun, 175; *Holmes v. Remsen*, 20 Johns. 259, 11 Am. Dec. 269; *Willits v. Waite*, 25 N. Y. 584;

And a New York assignment valid in that state, although not filed in Vermont, as required by Vermont law, is sufficient to defeat a subsequent garnishment in Vermont by a New York creditor. *Hanford v. Paine*, 32 Vt. 443, 73 Am. Dec. 586.

But the court in this case declared that it was not willing to place its decision upon the narrow ground of the residence of the attaching creditor, but that an assignment in another state would pass personal property, unless its operation is limited or restrained by local law or policy. *Ibid*.

And in Wisconsin a voluntary assignment in Rhode Island was held sufficient to transfer a claim against a Wisconsin debtor as against a subsequent attachment by a Rhode Island creditor, with notice. *Mowry v. Crocker*, 6 Wis. 323.

A Minnesota assignment for creditors was held in that state to pass personal property in Wisconsin as to sustain an action by the assignee in Minnesota for conversion against a Minnesota creditor, who has, after the assignment, sold the property upon execution in Wisconsin. *Covey v. Cutler*, (Minn.) Sept. 3, 1893.

A voluntary cession of property by a Louisiana debtor, including real estate in Mississippi, which is perfected by a judge's order before attachment proceedings by a citizen of Louisiana are begun in Mississippi, will be valid in Louisiana to defeat such attachment, and the attaching creditor being within the jurisdiction of the court may be compelled to deliver the proceeds obtained by him from his attachment to the Louisiana syndic. *Hayden v. Yale*, 45 La. Ann. —.

As against nonresident attaching creditors, who are domiciled in the state where the voluntary assignment for creditors was made, the fact that preferences were given thereby, which is contrary to the policy of the state in which the attachments are made, will not defeat the assignment. *Juilliard v. May*, 130 Ill. 87; *Lipman v. Link*, 30 Ill. App. 359; *Robert v. Baker*, 53 Conn. 319; *Richardson v. Leavitt*, 1 La. Ann. 430, 45 Am. Dec. 90; *Moore v. Bonnell*, 31 N. J. L. 90; *Train v. Kendall*, 187 Mass. 366.

And an assignment for creditors in another state with preferences, which are valid in that state, will be upheld in New Jersey against a subsequent attachment by a firm doing business in the state where the assignment was made, although one member of the firm is a resident of New Jersey. *Halsted v. Straus*, 32 Fed. Rep. 230.

On the other hand an assignment in Pennsylvania, with preferences, which were contrary to the policy of the laws in Delaware, was not upheld in Delaware against garnishment by a Pennsylvania creditor. *Mayberry v. Shisler*, 1 Harr. (Del.) 349.

Effect of assignee's possession.

There is no conflict as to the proposition that an assignment for creditors made in another state will be upheld, if it has been executed by a transfer of possession to the assignee.

Thus in *Forbes v. Scannell*, 13 Cal. 243, it is held that the title to personal property, of which actual possession has been taken by assignees for creditors in a foreign country, will remain vested in them on the arrival of the property in this country.

And an assignment for creditors executed in Canada, which was valid there, will be upheld in New 33 L. R. A.

York as against residents of Canada, who subsequently attach the debtor's property in New York, after the assignees have taken possession in that state, although the assignment did not conform to the law of New York. *Ockerman v. Cross*, 40 Barb. 463, affirmed in *Ockerman v. Cross*, 54 N. Y. 29.

So an assignment in another state is effectual to pass to the assignees a valid title to assets of which they take possession before an attachment. *Howard Nat. Bank v. King*, 10 Abb. N. C. 346; *Cook v. Van Horn*, 31 Wis. 291.

A voluntary assignment with preferences made in Utah where it is valid will be upheld in Idaho, when the assignee has taken possession of property in that state, as against a subsequent attachment, although in Idaho the statutes prescribe that assignments shall be made without preferences. *Barnett v. Kinney*, 147 U. S. 476, 37 L. ed. 247, reversing 2 Idaho, 706.

So in a New Jersey case the assignee under a foreign assignment was held to be entitled to a certain part of the property levied on which had been actually transferred to the assignee before levy although the assignment contained preferences against the policy of New Jersey law. *Varum v. Camp*, 13 N. J. L. 325, 25 Am. Dec. 476.

An assignment for creditors in New York, although containing preferences, when accompanied by delivery of the property, is valid as against a subsequent attachment in Louisiana by a New York creditor. *Whitenright v. Leavitt*, 4 La. Ann. 361.

And a valid New York assignment for creditors containing preferences, although such preferences are not upheld by Pennsylvania law, under which such a provision will be disregarded, will be upheld in Pennsylvania against an attachment of the property while it was in the hands of an agent of the assignee. *Law v. Mills*, 18 Pa. 185.

So assignees in a Rhode Island assignment who have taken possession of personal property in Massachusetts can maintain trover in Rhode Island against a Massachusetts deputy sheriff who took the property from them in attachment by a Massachusetts creditor, although it was claimed that the Rhode Island assignment was not valid in Massachusetts. *Hunt v. Lathrop*, 7 R. I. 53.

An assignment for creditors in Ohio, if not against the public policy of Indiana, is valid as to personal property in the latter state, where possession has been taken by the assignee, and subsequent attachment is thereby defeated. *Schroder v. Tompkins*, 53 Fed. Rep. 672.

See also as to possession by assignee in insolvency, *infra*, *Mead v. Dayton*, 28 Conn. 33.

The garnishment of an assignee is within the same principle, presupposing his possession.

A trustee in an assignment for creditors made in another state in which it is valid, although containing preferences contrary to the policy of the laws of Massachusetts, will not be liable in Massachusetts to trustee process to reach funds in his hands arising from the sale of property under the assignment in the state where it was made. *Cragin v. Lamkin*, 7 Allen, 365.

A citizen of the state who is made the assignee in an assignment for creditors in another state, which is there valid, cannot be charged at his dom-

Story, Conf. L. § 420; *Milne v. Moreton*, 6 Binn. 858, 4 Am. Dec. 466; *Upton v. Hubbard*, 28 Conn. 274, 78 Am. Dec. 870.

And even though there be creditors where the rights of domestic creditors are not concerned and the pursuing creditors are not citizens of the state whose process is invoked, the courts thereof will not sustain their claim in preference to that previously acquired by a re-

ceiver, trustee, or assignee obtaining title under the laws of another state, but the transfer will be given the same force and effect as in the state under whose statute it was made.

Merrick's Estate, 5 Watts & S. 9; *Lowry v. Hall*, 2 Watts & S. 181, 88 Am. Dec. 495; *Smith's App.* 104 Pa. 881; *Bentley v. Whittemore*, 19 N. J. Eq. 462, 97 Am. Dec. 671; *Moore v. Bonnell*, 81 N. J. L. 90; *Sanderson v.*

lell with trustee process in favor of another citizen of the state, but is bound, as well in conscience as by law, to execute his trust according to the terms of the conveyance under which he took the property. The legal fiction that personal property follows the person cannot be invoked to make property which he has not brought into the state subject to such attachment. *Wales v. Aiden*, 23 Pick. 245; *Martin v. Potter*, 11 Gray, 37, 71 Am. Dec. 868.

An assignee for creditors in Louisiana cannot be charged there as garnishee by a creditor who resides in a state where an assignment for creditors was made if the assignment is valid in the state where it was made. *Dord v. Bonnaffée*, 6 La. Ann. 563, 54 Am. Dec. 573.

b. Assignments under insolvency statutes.

1. In general.

In some cases it does not clearly appear whether the assignment in question was properly regarded as voluntary, or whether it was made under a statute which required a transfer of property by the insolvent, or as in the case of *BARTH v. BACKUS*, provided for a discharge of the debts of creditors who accepted the benefits of the assignment.

But it is believed that most cases under this subdivision are fairly to be regarded as within the latter class.

In *Smith v. Chicago & N. W. R. Co.*, 23 Wis. 287, an assignment in New York by an insolvent debtor of all his property to avoid a commitment to prison, made while he was under arrest, was held valid in Wisconsin to defeat a subsequent action by such debtor in that state upon a debt included within the assignment.

In this case the court declares that the assignment was made by the owner of the property himself, and does not discuss the question of the effect of the statute requiring such transfer in order to obtain his discharge from arrest; but there was no question in the case as to the rights of any Wisconsin creditor.

But an assignment to trustees in proceedings against absconding debtors, under a statute in the nature of a bankrupt law, being *in invitum*, will not transfer to the trustees the title to property which the debtor has taken with him into another state so as to defeat a transfer there in payment of a debt, and the fact that the property is subsequently brought back into the former state, of which the transferee as well as the debtor was a resident, will not defeat the title of the latter. *Johnson v. Hunt*, 23 Wend. 87.

The rule that transfers or assignments of personal property are governed by the law of the owner's domicile, unless contrary to the statute or policy of the state where the property is situated, applies only to voluntary transfers or assignments, which rest essentially on contract, and not to assignments by operation of law, or made under legal compulsion. *Cutlin v. Wilcox Silver Plate Co.* 8 L. R. A. 62, 123 Ind. 477.

That an assignment by operation of the law of another state does not operate as against citizens of the forum upon a debt or right of action in the latter jurisdiction was held in respect to the intervention of commissioners appointed in liquidation

under the laws of Louisiana in an attachment suit in New York. *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 367, 38 Am. Rep. 513.

An assignment for creditors made in another state, referring to a statute which contains an invalid provision in the nature of a bankrupt law, will not be held invalid merely because of such reference to the statute, as the presumption is that the assignor knew the law and intended to make simply a voluntary assignment. *Boese v. King*, 78 N. Y. 471.

The fact that an assignment for creditors made in another state was made under a statute will not prevent its operation outside of the state, if the statute was merely an affirmation of the common law upon the subject. *Butler v. Wendell*, 87 Mich. 68, 58 Am. Rep. 329.

But an assignment pursuant to statute which, although voluntary, is made to procure a release of debts under the provisions of the statute, can have no legal operation in another state as against an attachment of property there. *McClure v. Campbell*, 71 Wis. 360.

In this case the court says: "We think the question is not affected by the fact that the property when seized was in the possession of the assignee, or that the attaching creditor is a resident of the state in which the insolvency or bankruptcy proceedings were had." *Ibid.*

2. As to resident creditors.

The decisions generally agree in holding that as to resident creditors the courts will not uphold insolvency transfers by operation of law in another state.

In *Hall v. Boardman*, 14 N. H. 38, a general insolvency assignment in Massachusetts was held to pass title to personal property in New Hampshire so far as to defeat a subsequent garnishment by the holder of a note which, at the time of the assignment, was owned and held in Massachusetts, and on which suit was then pending in Massachusetts, but which had been afterwards transferred, overdue, to a person in New Hampshire.

The court regarded the Massachusetts discharge in insolvency as applicable to this note, and that the New Hampshire creditor, taking it overdue, was subject thereto. *Hall v. Boardman*, *supra*.

In *Dunlap v. Rogers*, 47 N. H. 281, 93 Am. Dec. 433, the court recognizes the fact that its earlier decisions as to the effect of the Massachusetts insolvency laws, so far as it concerns the discharge of debts to nonresidents, are overruled by decisions of the Supreme Court of the United States, and decides that garnishment by a resident creditor is not defeated by a prior insolvency assignment in Massachusetts.

To the same effect is *Dalton v. Currier*, 40 N. H. 237, holding that attachment by a New Hampshire creditor is not defeated by insolvency proceedings in Massachusetts.

So an assignee appointed in insolvency proceedings in Vermont has no right in New Hampshire to assets of the estate as against attaching creditors in that state, who have not recognized the insolvency proceedings, or become estopped to contest their validity. *Perley v. Mason*, 64 N. H. 6; *Carbee v. Mason*, *Id.* 10.

Bradford, 10 N. H. 365; *Bagby v. Atlantic, M. & O. R. Co.* 86 Pa. 291; *Parkins v. Olver Spring Paper Co.* 42 Phila. Leg. Int. 297; *Bacon v. Horne*, 3 L. R. A. 855, 123 Pa. 453; *Chemical Nat. Bank v. Tuttle*, 17 W. N. C. 415.

The appellants claim, however, that they come within the exception, and that they are American citizens and hence entitled to protection. They have both resided in Canada

for twenty-five years and engaged in business there, but claim to be regarded as American citizens because they have, or claim to have, retained their citizenship.

For the purposes of this case they have no title to be so regarded. A man's status for the purposes of trade is not determined by his citizenship, but by his domicile.

Wildes v. Parker, 3 Sumn. 593; *Livingston*

An insolvency assignment by officers of the law will not affect the title to personal property in another state as against an attachment by a resident creditor. *Felch v. Bugbee*, 43 Me. 9, 77 Am. Dec. 332.

An assignee under Canadian insolvency law does not get title to promissory notes in Michigan, which had never been in Canada, and which the insolvent had not himself assigned. *Wood v. Parsons*, 27 Mich. 152.

But a scheme of arrangement of the affairs of an embarrassed corporation in Canada, under a Canadian statute which is valid in Canada as to non-assenting bondholders within that dominion, will be upheld in this country also in respect to citizens of the United States. *Canada Southern R. Co. v. Gebhard*, 109 U. S. 537, 27 L. ed. 1020.

3. As to residents of state where insolvency transfer was made.

As to creditors who reside in the state in which the insolvency proceedings were had the courts of other states are quite generally inclined to hold the proceedings effectual, contrary to *McClure v. Campbell*, 71 Wis. 360, and in harmony with *LONG v. FORREST*.

So a garnishment in Pennsylvania by a Maryland creditor is held subject to pending insolvency proceedings in Maryland. *Mulliken v. Aughinbaugh*, 1 Penn. & W. 117.

Likewise a garnishment in Missouri by a Louisiana creditor is held to be defeated by insolvency proceedings, and the appointment of a syndic for the debtor in Louisiana. *Einer v. Beste*, 32 Mo. 240, 32 Am. Dec. 129.

But in Connecticut it is held that Massachusetts insolvency proceedings will not bar an attachment in Connecticut, although by a Massachusetts creditor. *Upton v. Hubbard*, 23 Conn. 274, 73 Am. Dec. 670.

In *South Boston Iron Co. v. Boston Locomotive Works*, 51 Me. 565, it is held that an insolvency assignment in Massachusetts will not defeat a pending garnishment in Maine, by a Massachusetts creditor.

On the other hand, in *Hoag v. Hunt*, 21 N. H. 106, it was held that, as against a citizen of Massachusetts, an insolvency assignment in that state would defeat subsequent garnishment in New Hampshire, saying: "Whatever debt the trustee owed the defendants passed by the assignment to the assignee."

See *infra*, I, c. 2, as to bankruptcy cases in which the same difference of decisions appears; also *supra*, I, a, 6, in respect to voluntary assignments as to which the cases generally agree so far as respects creditors residing where the assignments were made.

But where a Massachusetts creditor made an attachment in New Hampshire, it was held that subsequent attaching creditors in New Hampshire could not be granted their application to have the suit by the Massachusetts creditor continued in order to allow the debtor to obtain his discharge in Massachusetts, so as to remove the Massachusetts creditor out of the way of resident creditors. *Kilder v. Tufts*, 43 N. H. 126.

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or may have an injunction against another citizen of that state to prevent him from proceeding with an attachment by process of garnishment in another state obtained before the assignment in insolvency, but with knowledge of actual insolvency and with intent to obtain a preference over other resident creditors. *Cunningham v. Butler*, 142 Mass. 47, 56 Am. Rep. 637.

And an injunction against a citizen of the state to prevent his obtaining a preference over other creditors, contrary to the insolvent laws of the state, by attachment in another state, does not violate constitutional provisions as to the full faith and credit of judicial proceedings in other states, or as to equal privileges and immunities of citizens. *Cole v. Cunningham*, 133 U. S. 107, 33 L. ed. 538.

But a sale of a claim against one who is in fact insolvent, while a suit by attachment instituted by the creditor is pending in another state, made to a nonresident, with all rights acquired by the attachment, for the purpose of acquiring an advantage over other creditors and to avoid an injunction against prosecuting the suit in case insolvency proceedings are commenced, will be upheld as against a subsequent assignee in insolvency, and an injunction against further prosecution of the suit, or loaning his name for that purpose, cannot be granted in order to recover all the proceeds of the sale allowed to the assignee. *Proctor v. National Bank of the Republic*, 9 L. R. A. 122, 152 Mass. 233.

For full treatment of the question of injunction against suits in foreign jurisdictions, see *note* to *Thorndike v. Thorndike* (Ill.) 21 L. R. A. 71.

4. As to other nonresidents.

Nonresidents who do not reside in the state where the insolvency proceedings were had are generally allowed the same right as residents against insolvency transfers.

An attachment in a federal court by a foreign citizen must prevail against a syndic who claims merely by the declaratory powers of a state insolvent law, the property having never been in the actual custody of the syndic or the court. *Mississippi Mills Co. v. Ranlett*, 19 Fed. Rep. 191.

But a general assignment in insolvency in Massachusetts was held good in *Sanderson v. Bradford* 10 N. H. 200, as against garnishment by English creditors, although the assignment contained preferences not recognized in New Hampshire.

Again in *Smith v. Brown*, 43 N. H. 44, garnishment by a Connecticut creditor in New Hampshire holding a negotiable note payable in Massachusetts was discharged where the debtor had made an insolvency assignment in Massachusetts. The court held that the note was subject to the condition as to discharge in Massachusetts. But see *Dunlap v. Rogers*, 47 N. H. 231, 93 Am. Dec. 423.

A later New Hampshire case holds that an assignment under the insolvent laws of Massachusetts is invalid in New Hampshire as against an attaching creditor who is a resident of Illinois. *Sturtevant v. Armsby Co.* (N. H.) July 31, 1891.

So insolvency proceedings in Louisiana are held in Mississippi not to defeat a subsequent attachment in Mississippi by a creditor who is not a citi-

v. Maryland Ins. Co. 11 U. S. 7 Cranch, 506, 3 L. ed. 421; *The Indian Chief*, 3 C. Rob. 12; *The Harmony*, 3 C. Rob. 323; *The Venus*, 12 U. S. 8 Cranch, 258, 3 L. ed. 558.

By the law of England such a creditor, even if given such priority, would be treated as a trustee for the sequestrator to the extent that he has collected his claim out of property in a foreign jurisdiction.

sen or resident of Louisiana before the Louisiana syndic has asserted his claim in Mississippi. *Beer v. Hooper*, 32 Miss. 246.

And an assignment with preferences made in Pennsylvania by an insolvent corporation will not defeat a subsequent garnishment in Connecticut in favor of a Rhode Island creditor, although the garnishee had notice of the assignment. *Paine v. Lester*, 44 Conn. 196, 26 Am. Rep. 442.

The court says that it does not clearly appear whether the assignment is or is not voluntary, but regarded it as a "statutory and not a common-law conveyance." *Ibid*.

By comity also in Louisiana a citizen of another state will be allowed the same right as citizens of the state in which the court sits to deny the effect of a transfer in insolvency proceedings in a third state. *Reynolds v. Adden*, 126 U. S. 360, 34 L. ed. 361. See also *supra*, I, a. 4.

So in a federal court funds in the hands of a trustee, appointed on the application of an insolvent debtor under the Maryland insolvent laws, are not subject to attachment in that state under process from the federal court by a nonresident creditor. *Torrens v. Hammond*, 4 Hughes, C. C. 596.

The court in this case regards the decision as controlled by *Crappo v. Kelly*, 83 U. S. 16 Wall. 610, 21 L. ed. 430, which it says cannot be reconciled with a decision allowing a nonresident creditor to attach funds in the hands of the insolvent's assignee. *Torrens v. Hammond*, *supra*.

An attachment in a federal court is, by virtue of U. S. Rev. Stat., § 933, dissolved by an assignment for creditors made under the provisions of what is called an insolvent law of the state, by which attachments in the state court would be dissolved. *Mather v. Nesbit*, 13 Fed. Rep. 872. The residence of the creditor is not stated.

This so-called insolvent law did not authorize the discharge of the debtor, although it gave priority to those creditors who accepted its terms and released the debtor. *Ibid*.

5. Effect of assignee's possession.

The effect of the assignee's possession to give him a standing in another state which is universally recognized in the case of voluntary assignments is, although denied in *McClure v. Campbell*, 71 Wis. 350, as to statutory assignments, in other cases at least impliedly recognized or suggested.

Thus transfers by judicial operation under insolvent laws of a state are held by Georgia courts not binding upon citizens of other states, at least until the assignee has reduced the property in possession, or has done what is equivalent thereto. *Reynolds v. Adden*, 126 U. S. 349, 34 L. ed. 360.

Whether or not local creditors are bound by insolvent laws of another state, they are bound by specific transfer of the property of an insolvent corporation in pursuance of a decree of court, by the corporation itself to a receiver in the state in which it is domiciled, including promissory notes against persons in another state, and such transfer with possession of the notes by the assignee is effectual against a subsequent attachment by the local creditors. *Taylor v. Life Assn. of America*, 13 Fed. Rep. 498.

But the effect of possession of the notes is not 38 L. R. A.

Hunter v. Potts, 4 T. R. 183; *Sill v. Worrick*, 1 H. Bl. 665; *Phillips v. Hunter*, 2 H. Bl. 409.

McCullum, J., delivered the opinion of the court:

The debt for the collection of which the writ of foreign attachment was issued was contracted in a foreign country. *Long & Bisby*,

particularly dwelt upon in the above case as the ground of the decision and the decision might perhaps have been the same if the notes had not been in the assignee's possession.

The delivery of property to a creditor in another state, making a valid transfer there, is not affected by subsequent insolvency proceedings at the residence of the debtor, although the transfer, if made in that state, would be rendered void by the insolvency statute. *Mead v. Dayton*, 28 Conn. 38. See also *supra* I, a. 7.

6. Right of assignee to sue in other state.

In *Raymond v. Johnson*, 11 Johns. 488, it is said that an assignee under the insolvent law of another state cannot sue in his own name.

So a Louisiana syndic is held in Mississippi to have no right to sue in his own name on an open account. *Tully v. Herrin*, 44 Miss. 636; *Kirkland v. Lowe*, 38 Miss. 423, 60 Am. Dec. 355.

And assignees under the Massachusetts insolvent law cannot of right maintain suit in Connecticut. *Upton v. Hubbard*, 28 Conn. 374, 78 Am. Dec. 670.

And in *Betton v. Valentine*, 1 Curt. C. C. 168, it was held that the assignee of one, who has been on his own petition adjudged insolvent under the laws of Massachusetts, cannot, in Rhode Island, attack a transfer of personal property on the ground of its invalidity as against creditors.

But in *Hooper v. Tuckerman*, 3 Sandf. 311, an assignment under the insolvency law of Massachusetts, whether regarded as a voluntary assignment or not, being valid by Massachusetts law, is held sufficient to sustain a suit in New York by the assignees to set aside an earlier assignment of property in New York, which was made in Massachusetts, as void on its face to hinder and defraud creditors, and in fraud of the Massachusetts law.

So far as such transfers are held valid, as in case of citizens of the state in which they are made, it would seem necessary to hold that the assignee had capacity to sue and maintain his title.

The title of such an assignee is substantially the same as that of a receiver; and as to the right of a foreign receiver to sue, see *note to GILMAN v. HUDSON RIVER BOAT & SHOE MFG. CO.*, *post*, 52.

The effect of a discharge of an insolvent under a state insolvent law, although somewhat akin to the question of the transfer of title to property by assignments or proceedings in another state, is, nevertheless, a distinct subject which is not here considered.

a. Bankruptcy transfers.

1. English decisions.

In *Selkirk v. Davies*, 2 Dow. 237, 2 Ross, 97, *Lord Eldon* said: "It was at any rate clear that the English commission passed the personal property in Scotland and all other parts of the world," and it was held that the English bankruptcy proceeding defeated a subsequent arrestment of stock in Scotland.

This represents the English doctrine as to the effect of bankruptcy proceedings to transfer title to personal property of the debtor wherever it may be.

In *Joliet v. Deponthieu*, reported in a note to 1 H. Bl. 128, it was held that bankruptcy proceedings in

who are the plaintiffs in the attachment and the appellants here, are, and since 1863 have been, domiciled at Hamilton, in Canada, and engaged in business there. The defendants in the attachment are citizens of Scotland, and members of the firm of Girdwood & Forrest, wool brokers at Glasgow, which is indebted to the plaintiffs in the sum of \$1,798.85. McCallum, Crease & Sloan, who are the gar-

nisees in the attachment and the appellees in this issue, are citizens of Pennsylvania, doing business in Philadelphia, and indebted to the firm of Girdwood & Forrest in the sum of \$3,333.44. On the 11th of October, 1884, proceedings were instituted under the bankrupt laws of Scotland for the sequestration of the estates of the firm of Girdwood & Forrest, and of the several members thereof, for the benefit

Holland with the appointment of curators will defeat a subsequent attachment in London by an English creditor for moneys due the bankrupt, and that such attachment may be restrained by injunction.

In *Solomons v. Ross*, reported in the same note, the court goes still further and holds that the appointment of curators in Holland for a bankrupt gives them the right to the proceeds of an attachment which had been made before their appointment in a suit then pending.

In *Re Davidson*, L. R. 15 Eq. 388, 43 L. J. Ch. 347, 21 Week. Rep. 423, it is held that insolvency proceedings in Australia, on the petition of the insolvent, under which debts have been proved and are unpaid, will require the application to such debts all money paid into the court of chancery in England to the credit of the insolvent, whether domiciled there or not, as against a claim of the representatives of his estate in England.

But a fund due to an insolvent under a law in England, if he was domiciled in England, will be paid to his executrix who has proved his will in England as against a claim by his assignees in insolvency appointed in Australia; but otherwise if he was domiciled in Australia. *Re Blithman*, L. R. 2 Eq. 23, 35 L. J. Ch. 255, 12 Jur. N. S. 84, 14 L. T. N. S. & 35 Beav. 219. But this case does not decide as to the right of such assignees in the fund which is paid to his executrix.

In *Ex parte Blakes*, 1 Cox, Ch. 308, the court refuses to compel a bankrupt to make an assignment of debts in America, saying, in contemplation of our law the very instrument he is required to execute is of no effect. The court also says: "I had no idea of any country refusing to take notice of the rights of the assignees under our laws, and I believe every country on earth would do it besides."

It is said in 3 Burge, 907, that in *Waring v. Knight*, in a *neis prius* case, Lord Mansfield said that an attachment brought by an English creditor after the debtor's bankruptcy in England would not give the assignees the right to recover from the attachment creditor. Also that the same in substance was held by Lord Mansfield in *Cleve v. Mills*, 3 Burge, 908, *note*, at the cockpit.

But the English decisions have established the doctrine in England otherwise, and held that in such a case an English creditor who has made an attachment after knowledge of the English bankruptcy on property of the debtor in another country, may be sued for the proceeds by the assignees in assumpsit. *Sill v. Worswick*, 1 H. Bl. 691; *Hunter v. Potts*, 4 T. R. 182; *Phillips v. Hunter*, 2 H. Bl. 406; *Re Robinson*, 11 Ir. Ch. Rep. 385.

But assignees of an English bankrupt, who was a partner in two West India firms, were not allowed to recover from a partnership creditor, who had attached property in the West Indies, unless they could show that there was a surplus after paying the firm debts. *Brickwood v. Miller*, 3 Meriv. 579.

And an assignee of an English bankrupt cannot recover from a debtor to the bankrupt, who, after the bankruptcy, has been garnished in another jurisdiction. *Le Chevalier v. Lynch*, 1 Dougl. 170.

The recognition by the English courts of the rule 23 L. R. A.

that personal property wherever situated passes to a bankrupt's assignees is shown also in the decision that assignees of an Irish bankrupt can maintain a suit in England for assets. *Fergusson v. Spencer*, 2 Mann. & G. 367, 2 Scott. N. R. 229.

Also in the decision that two of three French syndics can by comity bring suit in England. In this case it does not appear that there was any objection made to the right of the syndics to sue as such, but only to the right of less than all to sue. *Alwon v. Fournival*, 1 Crompt. M. & R. 296.

2. American decisions.

The American decisions materially limit the rule laid down by the English courts, and refuse generally to allow a foreign bankruptcy to operate as a transfer of personal property which will defeat remedies of resident creditors.

Thus English bankruptcy proceedings are held inoperative to defeat a subsequent attachment by resident creditors. *Harrison v. Sterry*, 9 U. S. 5 Cranch, 289, 3 L. ed. 104; *Wallace v. Patterson*, 2 Harr. & McH. 463; *Saunders v. Williams*, 5 N. H. 213; *Robinson v. Crowder*, 4 McCord, L. 519, 17 Am. Dec. 762; *Topham v. Chapman*, 1 Mill, Const. 233, 12 Am. Dec. 637; *Milne v. Moreton*, 6 Binn. 353, 6 Am. Dec. 466; *Blake v. Williams*, 6 Pick. 285, 17 Am. Dec. 372.

A Scotch bankruptcy was held in *McNeill v. Colquhoun*, 3 N. C. 24, not to defeat the garnishment of an agent of the Scotch sequestrators, at least as to debts not yet collected by him: as to claims collected by him the court did not decide.

In *Taylor v. Geary*, Kirby, 313, it is held that a bankruptcy commission in England will not prevent subsequent attachment in this country by either American or British creditors.

And in *Harrison v. Sterry*, *supra*, assignees under an English bankruptcy were held to have no title to property in the United States and as against them the claims of attaching creditors, some of whom were British, were allowed, but without any discussion of the question whether or not British creditors should be denied the same right of attachment that was allowed to American creditors.

The court held generally that the bankrupt law of a foreign country is incapable of operating a legal transfer of property in the United States.

In *Topham v. Chapman*, *supra*, the court said that while the attaching creditors must be presumed to be American citizens, as it did not appear whether they were or not, it would make no difference if they were subjects of Great Britain, where the bankruptcy assignment was made.

But British creditors were denied the right, in *Devisme v. Martin*, Wythe (Va. Ch. Dec.) 133, to reach assets in this country of a British bankrupt; although it was said that it might be otherwise as to British subjects not domiciled in England.

And British creditors were not allowed in an early Maryland case (1766) to attach the property of a British bankrupt in Maryland. *Burk v. McClain*, 1 Harr. & McH. 288.

See, to the same effect, the main case of *Long v. Forrest*, also analogous cases, *supra*, I, a, 6, and I, b, 8.

The appointment of an assignee in bankruptcy in England will not prevent the bankrupt from

of their creditors, and on the 27th of that month Thomas Jackson was confirmed as trustee of said estates, with full right and power to sue for and recover the same wherever situated for the purposes of the trust. Subsequent to these proceedings, and with notice of them, Long & Bisby came to Pennsylvania, issued a writ of foreign attachment against

Girdwood & Forrest, and summoned McCallum, Crease & Sloan as garnishees.

The question presented by the facts above stated is whether the Canadian creditors of the firm of Girdwood & Forrest can, by process of attachment in Pennsylvania, acquire a preference over other creditors of that firm who reside in Scotland or elsewhere within the

maintaining an action at law in his own name against his debtor in this country. *Blane v. Drummond*, 1 Brook. 63.

This decision by the circuit court of the United States was rendered by Chief Justice Marshall in 1808. *Ibid.*

In *Mosselman v. Caen*, 34 Barb. 66, 4 Thomp. & C. 171, it was held that our courts will not recognize or enforce a right or title acquired under a foreign bankrupt law, or foreign bankrupt proceedings, so far as affects property within their jurisdiction, or demands against residents of the state; but it is said in *Re Waite*, 99 N. Y. 433, that these two cases are "unsupported by authority, and are, we think, opposed to sound principles, and are in conflict with the current of authority in this country."

In *Re Waite*, *supra*, it is held that a resident of this state, who is a member of a firm which has been adjudged bankrupt in England, in proceedings to which he was a party, is bound thereby to recognize the rights of the assignee in bankruptcy and cannot thereafter, in an accounting in New York, as assignee in insolvency for other parties, be credited with payments made by himself as such assignee to himself as a member of the firm, but that the English assignee in bankruptcy is entitled to such payment.

The doctrine which is declared in *Re Waite*, *supra*, to be thoroughly recognized and established in New York is that while the statutory title of foreign assignees in bankruptcy can have no recognition solely by virtue of the foreign statute, yet, under the comity of nations, their title will be recognized and enforced when it can be done without injustice to citizens of the state, or to the rights of creditors pursuing remedies under the state statutes, and when it will not conflict with the laws or public policy of the state.

The case of *Abraham v. Plestoro*, 8 Wend. 540, 20 Am. Dec. 734, reversing the decision of the chancellor in 1 Paige, 236, 3 L. ed. 690, has been the subject of much comment and contention, and it has been declared to be impossible to determine its effect. Since five opinions were rendered by members of the majority, expressing somewhat different views, it is not strange. But in *Re Waite*, *supra*, in which that case is carefully analyzed, it is said that the question of the effect of an English bankrupt assignment, as against the bankrupt, is left undecided, and that "the most obvious ground, in which all who voted for reversal seem to concur, was that an injunction was not a proper remedy."

In *Bird v. Caritat*, 3 Johns. 342, 3 Am. Dec. 453, it was decided that a suit is properly brought in the name of English bankrupts, but Chief Justice Kent said: "This is more a question concerning form than substance, for there can be no doubt of the right of the assignees to collect the debts due to the bankrupt, either by a suit directly in their own name or as trustees, using the name of the bankrupt." He added: "It is a principle of general practice among nations to admit and give effect to the title of foreign assignees."

In *Bird v. Pierpont*, 1 Johns. 113, the question was raised, but not decided, whether English assignees in bankruptcy of members of a firm should be made parties to a suit by the firm in this country.

In *Menck's Estate*, 5 Watts & S. 9, it is held that 23 L. R. A.

an English bankruptcy proceeding gives to the assignee an equitable interest in assets in this country subject to the right of American creditors, so that, in the absence of such creditors, the assignee may bring suit to collect assets.

So it is held in *Hunt v. Jackson*, 5 Blatchf. 342, that an assignee appointed in foreign bankrupt proceedings may be recognized and allowed to maintain suits to collect assets.

In *Dawes v. Boylston*, 9 Mass. 337, 6 Am. Dec. 72, the question of the effect of an assignment from assignees of an English bankrupt was involved as affecting the title of an administrator of the bankrupt to whom they had assigned certain assets, but the court does not seem to decide anything about the effect of the English assignment further than that it is not more effectual than it would be if obtained from the bankrupt directly.

A court of the United States has jurisdiction to decide the ownership as between an assignee in bankruptcy of a British subject in this country and the bankrupt himself, who, after his discharge, has become the alleged owner of a claim against the United States which has been sold in the bankruptcy proceedings, where the validity of such sale is attacked, although the fund for the payment of the claim is in the hands of British commissioners, to whom it has been paid by the United States in trust. *Phelps v. McDonald*, 99 U. S. 298, 25 L. ed. 473, reversing 2 McARTH. 273.

A compulsory payment under foreign attachment in London of a debt due to an English citizen from an American debtor is a valid defense against an attachment in New York, under the act giving relief against absent and absconding debtors, although this was prior in time to the English attachment. *Holmes v. Remsen*, 20 Johns. 229, 11 Am. Dec. 299, 4 Johns. Ch. 400, 1 L. ed. 902, 3 Am. Dec. 551.

This manifestly involves more than the effect of bankruptcy proceedings and touches the question of foreign judgments.

For effect of foreign bankruptcy on titles to real property, see division following.

II. REAL PROPERTY.

Substantial uniformity exists in respect to the doctrine that involuntary or compulsory transfers under bankruptcy or insolvency laws do not affect real property in another state. Therefore an exemption of a homestead by the federal bankruptcy court sitting in Virginia is held inoperative as to land in West Virginia in favor of a nonresident who is not entitled, under the laws of West Virginia, to claim a homestead in that state. *Gibbs v. Logan*, 23 W. Va. 203.

So bankruptcy proceedings in the southern district of Louisiana do not transfer title to land in Texas, and a purchaser at the bankruptcy sale in Louisiana does not get even an equitable title to such land. *Barnett v. Pool*, 23 Tex. 517.

And a decree in bankruptcy by the district court of the United States sitting in the western district of Louisiana did not pass to the assignee title to real estate in Texas, which was then a foreign state. *Oakey v. Bennett*, 52 U. S. 11 How. 33, 13 L. ed. 563.

The English decisions which, in respect to personal property, go further than the decisions in

British dominions, when the effects of the firm have been duly transferred under the laws of Scotland to a trustee for the benefit of all its creditors. *Harrison v. Sterry*, 9 U. S. 5 Cranch, 239, 3 L. ed. 104; *Green v. Van Buskirk*, 74 U. S. 7 Wall. 189, 19 L. ed. 109, and *Warner's App.* 18 W. N. C. 505,—are cited by the appellants to sustain their contention for a pref-

erence. But these cases are not in point. In *Harrison v. Sterry* the attachments were prior to the assignment. In *Green v. Van Buskirk* the main question was whether the judgment of an Illinois court in an attachment proceeding should have the same effect in New York on the title to the property attached as in the state in which it was rendered, and it was held

this country in holding bankruptcy proceedings sufficient to pass title to personal property wherever situated, hold the contrary doctrine in respect to real property, therefore it is held that any bankruptcy proceedings in England do not transfer the title to slaves in the island of Antigua, where they are regarded as real property. *Ex parte Rucker*, 3 Deacon & Ch. 704, 1 Mont. & A. 481.

An insolvency proceeding in Australia will not pass title to land in England, although it is said that possibly the insolvent might have been called upon to make over and transfer the title to his assignee; but not having done this, the title did not pass. *Waite v. Bingley*, L. R. 21 Ch. Div. 674, 51 L. J. Ch. 651, 30 Week. Rep. 698.

An insolvency proceeding in India does not pass title to real estate in Java, unless the law of that island makes the conveyance operative. *Cookrell v. Dickens*, 1 Mont. D. & De G. 54, 3 Moore, P. C. C. 98.

And the court in England has no authority to compel a bankrupt to convey his real estate in Scotland. *Selkirk v. Davies*, 2 Dow, 237, 2 Rose, 97.

In respect to voluntary assignments for creditors the decisions are not so uniform, and somewhat different questions arise.

The general doctrine seems to be fairly established that a voluntary assignment for creditors, if it is so executed as to constitute a sufficient conveyance, or accompanied by such conveyance, although it is made in trust for creditors, will be upheld in other states as to land there situated, unless the provisions of the assignment are against the policy of the local laws. In other words, that the same general rule which applies to all other voluntary transfers of real property applies to such assignment.

That a court has no jurisdiction to declare a mortgage to be a general assignment so far as it applies to lands in another state is decided in *Danner v. Brewer*, 69 Ala. 191, thus clearly recognizing the doctrine that the transfer of land must depend on the laws of the state in which it is situated.

But an assignment is not void because it undertakes to include real property in another state. *Watkins v. Wallace*, 19 Mich. 57.

In *Osborn v. Adams*, 18 Pick. 245, it is held that a statutory assignment for creditors in another state is void as to real property.

A general assignment for creditors in Pennsylvania was held in *McCullough v. Bodrick*, 3 Ohio, 234, to be ineffectual to pass title to Ohio lands, and that it would create at most only an equity, which would not change the descent of the legal title. The assignment in this case was of all the debtor's estate in trust, with the authority to any attorney to appear for the assignor in an amicable ejectment in the name of the assignee and confess judgment for the land. This clearly was not such a conveyance as is required to pass title in most places.

A conveyance by the insolvent debtor to effectuate a general assignment, being a mere voluntary conveyance in trust for creditors, was held in *Osborn v. Adams*, *supra*, to be without consideration and ineffectual as against subsequent attachments in the state where the land lies.

But the other decisions all recognize a different doctrine.

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Thus in *Rodgers v. Allen*, 3 Ohio, 489, it is held that the assignor for creditors in another state should make a formal deed of conveyance to his trustees, else the title would not pass to land in Ohio, and no equity enforceable by a court of chancery would be created as to such lands.

Where an assignment for creditors in New York is accompanied by a regular deed to the assignee, it is valid to pass title to Ohio lands as against a subsequent attachment in Ohio by resident creditors. *Sortwell v. Jewett*, 9 Ohio, 150.

A New Jersey assignment for creditors containing apt words and rightly executed as a conveyance is sufficient to pass title to land in Pennsylvania. *Lamb v. Fries*, 2 Pa. 53.

And a trust deed for a portion of the grantor's creditors made in another state may be upheld in Michigan as a common-law transfer against subsequent attachments in that state made before the registry of the instrument. *Palmer v. Mason*, 43 Mich. 152.

An auction sale by an assignee for creditors of lands situated in another state may be valid in the latter state, at least as against a nonresident who claims no part of the assets at the hands of the assignee. *Pemberton v. Klein*, 43 N. J. Eq. 98.

An assignment by an insolvent debtor to secure his discharge from arrest, under the insolvent laws of another state, cannot pass title to real estate in New Jersey. *Hutcheson v. Peshine*, 16 N. J. Eq. 107.

This is especially true where the assignment was for the benefit of the execution creditors only, while in New Jersey preferences are not allowed. *Ibid.*

In *Bentley v. Whittemore*, 18 N. J. Eq. 366, it was held that an assignment in another state with preferences, which is valid where it was made, is invalid as to lands in New Jersey, and that a conveyance by such assignee is therefore invalid.

But this decision was reversed in 19 N. J. Eq. 463, 97 Am. Dec. 671, by the court of errors and appeals, which held that a conveyance by an insolvent debtor, as auxiliary to an assignment for creditors made in another state, under which the assignees had acted and sold the land, was effectual as against a subsequent levy by creditors who were all non-residents, though only a part of them were residents of the state in which the assignment was made.

An assignment for creditors made in another state which gives preferences contrary to the policy of the laws of Iowa will be void as to real property in Iowa. *Moore v. Church*, 70 Iowa, 206, 59 Am. Rep. 439.

The law is the same notwithstanding the parties to the action are all residents of the state in which the assignment was made. *Ibid.*

An assignment for creditors containing preferences made in the District of Columbia, which is against the policy of Iowa laws, is held invalid as to Iowa lands, and will not be upheld, even for the equal benefit of creditors, against an attaching creditor, although he is a nonresident, and having obtained judgment, he may have such conveyance set aside as a cloud on title. *Loving v. Pairo*, 16 Iowa, 232, 77 Am. Dec. 108.

But a voluntary conveyance for creditors, though made with express reference and subject to the

that the judgment of a New York court, which denied to the Illinois judgment this effect, was erroneous. The contest was between the holders of a chattel mortgage and an attaching creditor of the mortgagor. Bates, who resided in Troy, N. Y., was the owner of certain iron safes in Chicago, Ill., and to secure

his indebtedness to Van Buskirk and others executed and delivered to them a chattel mortgage on the safes. Two days after the execution and delivery of this mortgage, Green, who was also a creditor of Bates and a citizen of New York, instituted attachment proceedings in Illinois, by virtue of which the safes

restrictions of a statute in another state, is effectual to convey land in Iowa, where the execution of the deed of assignment and the provisions of the statute are substantially in accord with the law of Iowa. *King v. Glass*, 73 Iowa, 205.

In this case two judges dissented on the ground that the statute governing the assignment was not substantially like that of the state in which the land was situated. *Ibid*.

Failure of acknowledgment in another state so as to prevent recording in Iowa will not defeat an assignment as against an attachment as the statute as to recording does not allow an attachment to defeat an unrecorded deed. *Munson v. Fraser*, 78 Iowa, 177.

An assignment for creditors with preferences made in Pennsylvania was upheld as to real property in Louisiana, of which the assignee was in possession, as against a levy by a creditor. *Merchants Bank of Baltimore v. Bank of United States*, 2 La. Ann. 660.

So although insolvency proceedings in another state cannot operate to convey title to real property, an attachment by a nonresident, whose domicile is in the state where the insolvency proceedings are had, may be denied a preference under his attachment, as against the insolvent's assignee on the ground of comity. *Eddy v. Winchester*, 60 N. H. 62.

An assignment for creditors, with a deed to the assignee made in Illinois, was held in Nebraska to be valid as against a citizen of Illinois in respect to Nebraska land,—especially where such citizen had claimed the benefit of the Illinois assignment, although no copy of the assignment had been filed in Nebraska. *Green v. Gross*, 12 Neb. 117.

So an assignment for creditors made in another state will be upheld as to real property in Maine as against nonresident creditors,—especially where they have assented to the assignment and accepted its benefits. *Chafee v. Fourth Nat. Bank of New York*, 71 Me. 514, 36 Am. Rep. 345.

The fact that a resident of the state in which an assignment was made accepts its benefits in that state does not estop him from denying the validity of the assignment as to real property in another state,—especially where he expressly reserves his right to do so and makes his claim only with respect to the property in the jurisdiction. *Moore v. Church*, *supra*.

A trust assignment in Delaware, which is valid there but which was not recorded in Maryland as the statute requires, although it was held not to transfer real property in Maryland; was held to convey at least an equitable right to unpaid purchase money for the lands which had been sold. *Houston v. Nowland*, 7 Gill & J. 450.

The validity of an assignment for creditors made in Rhode Island must be determined in Illinois as to real property in that state by the law of Illinois. *Gardner v. Commercial Nat. Bank of Providence*, 95 Ill. 293.

Title to a leasehold estate will pass by an assignment for creditors made in another state, but not to defeat attachments by resident creditors. *Eyer v. Alexander*, 108 Ill. 385.

A sale in Illinois by an assignee for creditors of real estate in Kansas will not be sufficient to convey title, if the sale is made without an order of court as required in such cases by the Kansas law, although the assignment for creditors in Illinois

conformed to the law of Kansas. *Thompkins v. Adams*, 41 Kan. 32.

III. SHIPS ON HIGH SEAS.

An assignment by the judge in an insolvency proceeding, under the Massachusetts statute is sufficient to transfer title to undivided shares in a ship on the high seas as against a subsequent attachment levied on the ship in a New York court. *Crapo v. Kelly*, 88 U. S. 16 Wall. 610, 21 L. ed. 430.

The majority of the court in this case considered that the title to the ship passed by the assignment, as if the ship had been at the time within the jurisdiction of the court, as, being on the high seas, it remains a portion of the territory of the state for that purpose, and that the subsequent return of the ship to an American port could not divest a title which had already vested in the assignee. *Ibid*.

The decision in *Crapo v. Kelly*, *supra*, reverses that of the court of appeals of New York in *Kelly v. Crapo*, 45 N. Y. 86, 6 Am. Rep. 35, by which the judgment of the general term had been reversed.

The above case was that of a transfer by operation of an insolvency statute and is therefore a stronger exercise of comity than that of the following cases in respect to voluntary assignments.

The New York court of appeals which denied effect to the transfer in the above case had held that a voluntary assignment by an insolvent debtor in North Carolina, including a vessel on the high seas, will be upheld in New York in a suit by the assignee to recover the vessel which has returned to a port of that state. *Moore v. Willett*, 35 Barb. 562.

An assignment for creditors in Virginia of an undivided half of a ship at sea was considered in a Louisiana case in which the ship had been attached, and the court, reciting the fact that the parties to the assignment were domiciled in Virginia and that the ship was at sea when it was made, said that this inquiry was "necessarily confined to the validity of the instrument according to the laws of Virginia." *Graves v. Roy*, 13 La. 454, 23 Am. Dec. 562.

And in a later Louisiana case it is held that a ship on the high seas will pass by an assignment in trust for creditors, so as to protect it from attachment on arriving at port in another state, even before it has been taken into possession by the assignees. *Southern Bank v. Wood*, 14 La. Ann. 561, 74 Am. Dec. 442.

In this case the attaching creditor was a citizen of the state in which the assignment was made, but this must be considered immaterial under the doctrine of *Kelly v. Crapo*, *supra*.

The same was held in *Thuret v. Jenkins*, 7 Mart. (La.) 318, 12 Am. Dec. 503, as to a bill of sale of a ship at sea.

The subject of bankruptcy and insolvency transfers of property beyond the jurisdiction is much the same as that of the transfer to a receiver of property beyond the jurisdiction. In fact there is no difference in the principle involved in these different modes of transferring the property of an insolvent to a representative of creditors, whether called assignee, syndic, curator, or receiver. But the cases which specifically relate to receivers of property outside the jurisdiction are considered in a separate note to the case of *GILMAN v. HUDSON RIVER BOAT & SHOE MFG. CO.* post. 52.

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were levied upon and subsequently sold in satisfaction of his debt. At the time this attachment was issued the mortgage had not been recorded in Illinois, possession of the safes had not been delivered under it, and Green did not know of its existence. By the laws of Illinois the mortgage was of no validity against the rights and interests of third persons, and the attaching creditor was on the footing of a purchaser. The proceedings were regular, and under these laws a justification of the creditor in the seizure and sale of the property. In a suit brought by the mortgagees against the attaching creditor in a New York court, for taking and converting the safes, it was adjudged, on appeal to the Supreme Court of the United States, that the attachment proceedings in Illinois constituted a valid defense. The points covered by the judgment were that a state has a right to regulate the transfer of personal property situate within its limits, and to subject the same to process and execution in its own way, by its own laws, and that the decrees of its courts, in conformity with these laws, are conclusive in other jurisdictions. In *Warner's Appeal*, the attaching creditors, at the time of issuing their attachment, had no actual knowledge of the assignment, and were therefore held to be within the protection of the proviso to the first section of the Act of May 3, 1855 (Pub. Laws, 415). It does not appear in the reports of the case that they were citizens of the state in which the assignment was made, and the question of comity between the states was not raised or considered. But in *Bacon v. Horne*, 123 Pa. 452, 3 L. R. A. 355, it was distinctly held by this court that a resident of a foreign state in which an assignment was made by a debtor for the benefit of his creditors could not come into Pennsylvania, and seize property of the assignor in a suit in foreign attachment. It was stated in the case last cited that the manifest object of the Act of 1855 was to protect our own citizens, and it was plainly intimated that none but Pennsylvania creditors can invoke its protection. It matters not whether the attaching creditor is a resident of the state in which the assignment is made, or of another state foreign to this juris-

diction. If he is a citizen of a foreign state, he can receive no aid here in an effort to obtain a preference in disregard of the assignment. *Lourey v. Hall*, 2 Watts & S. 181, 88 Am. Dec. 495; *Merrick's Estate*, 5 Watts & S. 9; and *Bacon v. Horne*, *supra*. This rule rests on comity between the states, and the only exception to it is in favor of our own citizens. The proceedings in Scotland or the sequestration of the estates of Girdwood & Forrest were founded on the petition of the members of the firm, and are operative against all its creditors residing there. We are now asked by creditors having their domicile in another part of the British dominions to disregard these proceedings, and allow them a preference upon the firm effects in Pennsylvania. This we cannot do without an abandonment of our well-settled policy in such cases,—a policy founded in comity and promotive of justice.

We have considered this case on the undisputed testimony, which shows the facts as we have stated them, and we have allowed to the certified copy of the act and warrant appointing Thomas Jackson sequestrator, which was admitted in evidence under the agreement of the parties, the effect which on its face belongs to it. It was not error to refuse to strike out evidence so admitted.

The appellants have reduced their claim against Girdwood & Forrest to judgment, and are seeking to obtain satisfaction of it out of property which they allege belongs to the defendants therein. The appellees admit that prior to October 11, 1884, they were indebted to Girdwood & Forrest, and that they have not paid the debt, but they aver that, by virtue of the proceedings in bankruptcy under the laws of Scotland, Thomas Jackson, the trustee, has a right to receive it which is superior to the claim of the appellants under their attachment. In the issue thus made the question is whether the debt attached belongs to Girdwood & Forrest, or to the trustee for the benefit of their creditors. The evidence relating to an alleged fraud upon the appellants can have no influence in the determination of it. The specifications of error are overruled.

Judgment affirmed.

NEW YORK COURT OF APPEALS.

John BARTH, Assignee, etc., of Wilkin Manufacturing Co., *Resp't.*,

v.

Erastus P. BACKUS, Sheriff, etc., *et al.*,
App'ts.

(140 N. Y. 230.)

1. The rule that a voluntary assignment for creditors is valid in other states when upheld by the law of the domicile of the owner does not apply

to an assignment which, though voluntarily made, is made under a statute which provides for a discharge of the debts of all creditors who accept any dividends under the assignment or otherwise participate therein, but such an assignment is to be treated as a transfer *in invitum* under insolvency or bankruptcy laws.

2. An attachment will be upheld as against a prior assignment for the benefit of creditors in another state, which is in fact a transfer *in invitum* under insolvent laws.

3. Attaching creditors, although non-

NOTE.—The above case with *LONG v. FORREST*, ante 33, and *GILMAN v. HUDSON RIVER BOOT & SHOE MFG. CO.* post, 52, present in different phases the question, which is constantly growing more important, of the effect of transfers of various kinds to representatives of an insolvent so far as re-

spects property outside the state in which the transfers are made. As to effect of transfer to receiver, see note to the case next following, *GILMAN v. HUDSON RIVER BOOT & SHOE MFG. CO.*, and as to other transfers for creditors, see note to *LONG v. FORREST*, the case next preceding.

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residents, who seek to question a preference in a prior assignment under an insolvent law of their own state are entitled to the same protection and preference under attachment laws as if they were residents.

4. Corporations as well as natural persons are included within the provisions of the Wisconsin statute for the discharge of insolvent debtors.

(November 23, 1893.)

APPEAL by defendants from a judgment of the General Term of the Supreme Court, Third Department, affirming a judgment of a special term for St. Lawrence County in favor of plaintiff in an action brought to secure possession of certain of the assets of the Wilkin Manufacturing Company, which had been attached by defendants to secure their claims. *Reversed.*

The facts sufficiently appear in the opinion.

Mr. Nelson L. Robinson, for appellant:

The statutes of Wisconsin under which the assignment of the Wilkin Manufacturing Company was made, constitute an insolvent law and the assignee obtained no title to the property in question as against the attaching creditors of the assignor.

Assignments made under insolvency or bankruptcy proceedings have no extraterritorial effect.

Burrill, Assignm. § 303, and cases cited; Bishop, Insolvent Debtors, § 286; 8 Am. & Eng. Encyclop. Law, 618, and cases cited; 11 Am. & Eng. Encyclop. Law, 176, 179 and cases cited; *Willits v. Waite*, 25 N. Y. 577; *Kelly v. Crapo*, 45 N. Y. 86, 6 Am. Rep. 35; *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 867, 38 Am. Rep. 518; *Reynolds v. Adden*, 136 U. S. 848, 34 L. ed. 360; *Rhawn v. Pearce*, 110 Ill. 550, 51 Am. Rep. 691; *Upton v. Hubbard*, 28 Conn. 274, 78 Am. Dec. 670; *Paine v. Lester*, 44 Conn. 196, 26 Am. Rep. 442; *McClure v. Campbell*, 71 Wis. 350.

This statute is clearly recognized to be an insolvent law by the supreme court of Wisconsin in *Hempstead v. Wisconsin Marine & F. Ins. Co. Bank*, 78 Wis. 375.

It is also expressly decided to be an insolvent law in *Holton v. Burton*, 78 Wis. 321.

An assignment, whether made on the motion of the insolvent or by decree of the court, is one in an insolvency or bankruptcy proceeding, provided that the debts due from the insolvent to his creditors may be compulsorily discharged in that proceeding.

Upton v. Hubbard and *McClure v. Campbell*, *supra*, and cases cited; *Mayer v. Hellman*, 91 U. S. 496, 23 L. ed. 377.

The court below erred in its conclusion that a corporation cannot be discharged from its debts under the statute, but that after making an assignment it should not "be enabled to begin anew and run again its course."

The word "person" is a general term and prima facie in a public statute, includes artificial as well as natural persons, unless it appears from the context that the word was used in a more limited sense.

8 Am. & Eng. Encyclop. Law, 625; 18 Am. & Eng. Encyclop. Law, 404; N. Y. Laws 1892, chap. 677, § 5.

It has been expressly held in Minnesota that 23 L. R. A.

the compulsory discharge of a corporation under a similar statute should be up held.

Mohr v. Minnesota Elev. Co. 40 Minn. 348; *Willis v. Mabon*, 16 L. R. A. 231, 43 Minn. 140.

A corporation generally has, like an individual, power to go into insolvency when unable to pay its debts, unless such right is restricted by charter or some statutory enactment.

3 Kent, Com. p. 898; *De Ruyter v. St. Peter's Church*, 3 N. Y. 238; 11 Am. & Eng. Encyclop. Law, 204, 206, and cases cited; Burrill, Assignm. 3d ed. 85, 401; Angell & A. Priv. Corp. § 191; *Tripp v. Northwestern Nat. Bank*, 45 Minn. 383.

The court below fell into error in assuming, as it seems, that the sole reason why assignments under an insolvency law have no extraterritorial effect, is because it is supposed that some preference might be given to home creditors were the laws otherwise, and that an assignment without preferences obviates such objection.

The compulsory discharge of a debt without full payment is the true reason on which all the decisions are based, and the question of preferences and an equal division of the assets of the corporation has nothing to do with the matter.

Thompson v. Fry, 51 Hun, 296; *Mayer v. Hellman*, 91 U. S. 496, 23 L. ed. 377.

The assignment made in Wisconsin by the Wilkin Manufacturing Company was repugnant to the laws and policy of the state of New York. Therefore the assignee obtained no right as against the attaching creditors to property situated in this state, and cannot contest in our courts claims lawfully levied here upon the property of his assignor by citizens of this state or by any other persons lawfully suing in its courts.

1 Rev. Stat. chap. 18, title 2, art. 1, § 9; *Harris v. Thompson*, 15 Barb 63; *Robinson v. Bank of Attica*, 21 N. Y. 406; *Sibell v. Remsen*, 33 N. Y. 95; *Vanderpool v. Gorman*, 3 Misc. 57; *King v. Sarria*, 69 N. Y. 24, 25 Am. Rep. 123; *Sondheim v. Gilbert*, 5 L. R. A. 432, 117 Ind. 75; *Phelps v. Borland*, 103 N. Y. 406, 57 Am. Dec. 755; *Warner v. Jaffray*, 96 N. Y. 248, 43 Am. Rep. 616; *Guillander v. Howell*, 35 N. Y. 657; *Keller v. Paine*, 107 N. Y. 83; *Green v. Wallis Iron Works*, 49 N. J. Eq. 43; *Faulkner v. Hyman*, 143 Mass. 53; *Ingraham v. Geyer*, 18 Mass. 148, 7 Am. Dec. 132; *Smith v. Chicago & N. W. R. Co.* 23 Wis. 267.

No voluntary assignment for the benefit of creditors made in another state will avail as against attaching creditors who are citizens of the state in which the forum is situated.

Hyer v. Alexander, 108 Ill. 385; *Faulkner v. Hyman*, *supra*; *Warner v. Jaffray*, 96 N. Y. 254, 43 Am. Rep. 616; *Filkins v. Nunnemacher*, 81 Wis. 91; *Kelly v. Crapo*, 45 N. Y. 95, 6 Am. Rep. 35.

That the attaching creditors bought the claims of the Wisconsin creditors with knowledge of the assignment, was not to be a bar.

McClure v. Campbell, 71 Wis. 350; *Proctor v. National Bank of the Republic*, 9 L. R. A. 122, 152 Mass. 223; *Warner v. Jaffray*, *supra*; *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 867, 38 Am. Rep. 513.

A foreign corporation may assign to a resident a claim against another foreign corporation on which it could not itself sue here.

McBride v. Farmers Bank of Salem, Ohio, 26 N. Y. 450; *Peterson v. Chemical Bank*, 33 N. Y. 31, 88 Am. Dec. 298; *Ebrin v. Oregon R. & Nav. Co.* 28 Hun, 269.

Messrs. Ledyard P. Hale and Thomas Spratt, for respondent:

A voluntary general assignment for the benefit of creditors if valid by the laws of the state where made, will transfer the title to personal property in this state, including a debt due from a resident.

Ockerman v. Cross, 54 N. Y. 29 (approved in *Warner v. Jaffray*, 96 N. Y. 248, 48 Am. Rep. 616); *S. O.* below more fully, *sub nom. Ackerman v. Cross*, 40 Barb. 465; *Kelly v. Orapo*, 45 N. Y. 86, 6 Am. Rep. 35; *Boese v. King*, 78 N. Y. 471; *Howard Nat. Bank v. King*, 10 Abb. N. C. 346; *O'Neill v. Nagle*, 19 Abb. N. C. 399; *Moore v. Willett*, 85 Barb. 663; *Williams v. Ingersoll*, 89 N. Y. 508; *Barnett v. Kinney*, 147 U. S. 476, 37 L. ed. 247; *Caskie v. Webster*, 2 Wall. Jr. 181; *Bholen v. Cleveland*, 5 Mason, 174; *Livermore v. Jenckes*, 62 U. S. 21 How. 126, 16 L. ed. 55; *Frank v. Bobbitt*, 155 Mass. 112.

It is the rule of both state and federal courts to uphold assignments which are valid by the law of the place of execution.

Rosenthal v. Mastin Bank, 17 Blatchf. 818; *J. M. Atherton Co. v. Ives*, 20 Fed. Rep. 894; *Balsted v. Straus*, 32 Fed. Rep. 279; *Van Wyck v. Read*, 43 Fed. Rep. 716; *Sanderson v. Bradford*, 10 N. H. 260; *Hanford v. Paine*, 32 Vt. 442, 78 Am. Dec. 586; *Burlock v. Taylor*, 16 Pick. 335; *Means v. Hapgood*, 19 Pick. 105; *Egbert v. Baker*, 58 Conn. 819; *First Nat. Bank of Rockville v. Walker*, 61 Conn. 154; *Moore v. Bonnell*, 31 N. J. L. 90; *Bentley v. Whittemore*, 19 N. J. Eq. 462, 97 Am. Dec. 671; *Law v. Mills*, 18 Pa. 185; *Smith's App.* 104 Pa. 381; *Gregg v. Sloan*, 78 Va. 497; *Princeton Mfg. Co. v. White*, 68 Ga. 96; *Sortwell v. Jewett*, 9 Ohio, 180; *Mry v. First Nat. Bank of Attleboro*, 123 Ill. 551; *Juillard v. May*, 130 Ill. 87; *Re Paige & S. Lumber Co.* 31 Minn. 136; *Thurston v. Rosenfeld*, 42 Mo. 474, 97 Am. Dec. 351; *Butler v. Wendell*, 57 Mich. 62, 58 Am. Rep. 329; *Weider v. Maddox*, 66 Tex. 373, 59 Am. Rep. 617.

The New York court will, in the exercise of judicial comity, treat the assignment the same as the Wisconsin court would a New York assignment.

Mowry v. Crocker, 6 Wis. 336; *Smith v. Chicago & N. W. R. Co.* 23 Wis. 267; *Cook v. Van Horn*, 81 Wis. 291.

The Wisconsin statute regulating assignments (*Sanborn & Berryman*, Anno. Stat. chap. 60, p. 1005,) does not alter their voluntary character; but, like the New York act, regulates the exercise of the right to assign and prescribes the duties of the assignee. The assignment in Wisconsin remains, as here, a voluntary general assignment for the benefit of creditors.

The defendants, New York banks, took these past due claims with the evident purpose of aiding a few of the Wisconsin creditors in circumventing the law which was binding upon them. They do not, therefore, oc-

cupy the position of New York creditors in good faith, for whose benefit the court will feel constrained to condemn the assignment. The court will apply the rule that it would if the Wisconsin creditors interested here were before it.

Bacon v. Horne, 2 L. R. A. 355, 123 Pa. 452; *Bagby v. Atlantic M. & O. R. Co.* 86 Pa. 291; *Warner v. Jaffray*, 96 N. Y. 248, 48 Am. Rep. 616; *Chafes v. Fourth Nat. Bank of New York*, 71 Me. 514, 86 Am. Rep. 845.

The right of a corporation to make an assignment in Wisconsin is not repugnant to our law, as it relates to matter of form and not of substance; it is a matter of domestic regulation and does not permit any different disposition of the assets of the corporation than there would be had under a receiver in New York. The New York court will look to the intent and effect of the transfer.

Ockerman v. Cross, 54 N. Y. 29; *Warner v. Jaffray*, *supra*.

The right of a corporation to make an assignment for the benefit of creditors is clear, unless prohibited by statute.

DeBuyter v. St. Paul's Church, 3 N. Y. 238.

Andrews, Ch. J., delivered the opinion of the court:

The general rule that the validity of a transfer of personal property is governed by the law of the domicile of the owner is in most jurisdictions held to apply to a transfer by voluntary assignment by a debtor of all his property for the benefit of creditors, as well as to a specific transfer by way of ordinary sale or contract; and the title of such assignee, valid by the law of the domicile, will prevail against the lien of an attachment issued and levied in another state or country subsequent to the assignment, in favor of a creditor there, whether a citizen or nonresident, upon a debt or chattel belonging to the assignor, embraced in the assignment, provided the recognition of the title under the assignment would not contravene the statutory law of the state or be repugnant to its public policy. The decisions are not uniform, but this is the general rule, supported by the preponderating weight of authority, and is the settled law of this state. *Ockerman v. Cross*, 54 N. Y. 29; *Bishop, Insolvent Debtors*, §§ 241, 265, and cases cited. But this general rule is subject to a qualification established in the jurisprudence of the American states,—that a title to personal property acquired *in invitum* under foreign insolvent or bankrupt laws, good according to the law of the jurisdiction where the proceedings were taken, will not be recognized in another jurisdiction where it comes in conflict with the rights of creditors pursuing their remedy there against the property of the debtor, although the proceedings were instituted subsequent to and with notice of the transfer in insolvency or bankruptcy.

Holmes v. Remsen, 20 Johns. 229, 11 Am. Dec. 269; *Kelly v. Orapo*, 45 N. Y. 87, 6 Am. Rep. 35; *Re Waite*, 99 N. Y. 433; 2 Kent, Com. 406, 407.

This exception proceeds upon the view that to give effect to such a transfer arising by

operation of law, and not based upon the voluntary exercise by the owner of the *ius disponendi*, would be to give the foreign law an extraterritorial operation, which the rule of comity ought not to permit to the prejudice of suitors in another jurisdiction. The cases in this state since the case of *Holmes v. Remsen*, *supra*, in which the chancellor sought to maintain the English doctrine on the subject, have uniformly sustained the rights of domestic attaching creditors against a title under a prior statutory assignment in another state or country, the several states of the Union being treated for this purpose as foreign to each other. *Willits v. Waite*, 25 N. Y. 577; *Johnson v. Hunt*, 23 Wend. 87; *Kelly v. Orapo*, *supra*.

The general question in this case involves the point whether the assignment made by the Wilkin Manufacturing Company, under the statutes of Wisconsin, is to be treated as a voluntary assignment, not in conflict with our laws or policy, or whether, in view of the compulsory clauses of the Wisconsin statute, that statute is to be regarded as in the nature of a bankrupt law, and ineffectual to transfer title to the property of the insolvent in our jurisdiction as against attaching creditors. In considering whether the title of the assignee in Wisconsin is paramount to the claims of creditors here, who, subsequent to the assignment, procured attachments against the debt owing to the Wilkin Manufacturing Company by the Canton Lumber Company, a reference to the Wisconsin statute under which the assignment was made becomes important. The original Wisconsin statute upon the subject of voluntary assignments by failing debtors was similar to the statute in this state upon the same subject. It was a statute prescribing the conditions of such assignments, and regulating the administration of the trust for the protection of creditors. In 1889 radical changes were made in the statutory system of Wisconsin, and the prior statute was amended. The amendments, among other things, provided that the assignor in a voluntary assignment for the benefit of his creditors, made under or in pursuance of the laws of the state, "may be discharged from his debts, as a part of the proceedings under such assignment, upon compliance with the provisions of this act." It further declared that every creditor of the insolvent debtor residing within or without the state who should accept a dividend out of the assigned estate, or in any way, by proving his claim or otherwise, participate in the proceedings under the assignment, shall be "deemed to have appeared in the matter of such assignment and the application for a discharge, and should be bound by any order or discharge granted by the court," subject to the right of appeal. Under the statute, a creditor, by accepting a dividend, thereby consented to a discharge of the debtor from the portion of the debt remaining over and above his share of the assets; and, unless a creditor comes in under the assignment, he is debarred from receiving anything out of the assigned property, unless, indeed, a surplus should remain after payment of the participating creditors in full.

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although it seems the debt would remain as a claim against the insolvent. The power to discharge a contract without payment or satisfaction, and without the consent of the parties, is a power which pertains to the sovereign alone. The statute of Wisconsin does not assume to discharge the debts owing by the insolvent assignor absolutely. But, as has been said, it deprives creditors who do not come in under the assignment of all share in the assigned estate, unless in the improbable contingency of a surplus. This coercive feature of the scheme, if contained in a voluntary general assignment for the benefit of creditors, would render the assignment void. *Grover v. Wakeman*, 11 Wend. 189, 25 Am. Dec. 624. The statute of Wisconsin, however, incorporates this feature, and the law is recognized by the courts of Wisconsin as an insolvent law. *Holton v. Burton*, 78 Wis. 321; *Hempstead v. Wisconsin Marine & P. Ins. Co. Bank*, 78 Wis. 375. This court had occasion in the case of *Boese v. King*, 78 N. Y. 471, to consider a similar provision in a statute of New Jersey, regulating voluntary assignments for the benefit of creditors in that state, and it was assumed that the provision in that act was in the nature of a bankrupt law. Effect cannot be given here to this coercive feature in the Wisconsin law, except by giving extraterritorial effect to the law of that state. The assignor had no power to make such a condition, and, if it is legal, it is by force of the Wisconsin statute alone. This feature is one of the distinguishing tests of an insolvent or bankrupt law. The assignment was voluntary in the sense that the Wilkin Manufacturing Company were not coerced into executing it, and the title to the property was vested in the assignee by its own act. But whether it is to be treated as voluntary in another jurisdiction when the claims of creditors there are in question is the point. The assignment purports to have been made under and in pursuance of the law of Wisconsin. The assignor, by proceeding under that law, presumably designed to avail itself of the provision for a discharge. This could only be accomplished by force of the law. The right of an insolvent or bankrupt to initiate voluntary proceedings in bankruptcy is a common feature in bankrupt laws, but that fact does not make the assignment voluntary, so as to give extraterritorial operation to the proceedings. This point was adverted to in the case of *Upton v. Hubbard*, 28 Conn. 274, 78 Am. Dec. 670, where the court said: "In our view there is essentially no difference whether in consequence of an act of bankruptcy, as in England, the bankrupt's estate is forced from him, or he himself sets the law in motion by a conveyance in bankruptcy in the first instance." Under the Wisconsin statute the transfer is voluntary, but the law then steps in and regulates the distribution of the assigned estate in accordance with conditions which the sovereign alone can impose. It would, we think, be disregarding the substance to hold that the voluntary feature of the law distinguishes it from the class of bankrupt or insolvent statutes which, by general consent in this country, are held to be ineffectual to transfer the

title of the insolvent to property in another state, as against attaching creditors there.

It is claimed, however, in behalf of the plaintiff, that, assuming that the title of the assignee would be subordinate to the lien of attachments issued here at the suit of resident creditors, this priority cannot be availed of in behalf of Wisconsin creditors who, knowing of the assignment, seek to gain a preference under our attachment laws, and that the banks to whom the claims were assigned after maturity, and who took with notice of the assignment stand in no better position than the original creditors. In some of the states, which refuse to recognize the validity of the title of a foreign assignee, even in case of voluntary assignment, where it comes in conflict with the claims of domestic creditors, a distinction is made; and it is held that, where the domicile of the foreign assignee and the creditor is the same, the latter will be bound by the title of the former, good by the law of the common domicile. *May v. Wannemacher*, 111 Mass. 202; *Sanderson v. Bradford*, 10 N. H. 260; *Moore v. Bonnell*, 81 N. J. L. 90. The principle of comity in these states is held to apply so as to subject nonresidents to the operation of the foreign law, but not so as to prevent domestic creditors from pursuing their remedy in defiance of the foreign assignment. *Faulkner v. Hyman*, 142 Mass. 53. The question is not an open one in this state. We have refused to adopt the distinction made in some of the states, and have placed the right of a creditor coming here from the state of the common domicile upon the same footing as that of a citizen or resident creditor, and have sustained the lien of an attachment issued here at the instance of a foreign creditor after proceedings in insolvency had been instituted in the state of the common domicile of the insolvent and creditor. *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 367, 38 Am. Rep. 518. There the debtor and attaching creditor were Louisiana corporations. The attachment was issued after the debtor bank had been placed in liquidation under the laws of that state, and commissioners had been appointed to take possession of and administer its assets. Danforth, J., after stating the general rule that the law of Louisiana could have no operation here, referring to the point now under consideration, said: "The plaintiff, as we have seen, although a foreign creditor, is rightfully in our courts pursuing a remedy given by our statutes. It may enforce that remedy to the same extent, and in the same manner, and with the same priority, as a citizen. . . . Once properly in court, and accepted as a suitor, neither the law, nor court administering the law, will admit any distinction between the citizen of its own state and that of another." How far our courts will enforce the title of a foreign assignee in bankruptcy as between the assignee and the bankrupt or his creditors, where all the parties have a common domicile abroad,

was much discussed in the case of *Abraham v. Plestoro*, 8 Wend. 548, 20 Am. Dec. 738, and that case, with others, were reviewed in the case of *Re Waite*, *supra*. The authority of *Hibernia Nat. Bank v. Lacombe* upon the point now in question was expressly recognized and approved in *Warner v. Jaffray*, 96 N. Y. 248, 48 Am. Rep. 616, and it must be regarded as establishing the law of the state on the subject. In *Warner v. Jaffray* the court refused to interfere with liens acquired by citizens of this state upon personal property in another state under the laws of that state, belonging to an insolvent resident here, under proceedings commenced after a voluntary assignment for the benefit of creditors, valid by the laws of this state, had been made and delivered. It was in substance held that creditors of the assignor, citizens of this state, were not, because of such citizenship, precluded from taking proceedings in another state, hostile to the assignment, for the purpose of acquiring priority in respect of personal property situated there, embraced in the assignment. See also *Johnson v. Hunt*, *supra*. The courts of this state accord to our citizens the same liberty to proceed in another jurisdiction in hostility to assignments executed here which they accord to citizens of other states coming here, and instituting proceedings in hostility to transfers in insolvency, valid by the laws of their domicile. The rule in New York on the question is also the rule in other states. *McClure v. Campbell*, 71 Wis. 350; *Rhawn v. Pearce*, 110 Ill. 350, 51 Am. Rep. 691; *South Boston Iron Co. v. Boston Locomotive Works*, 51 Me. 585; *Upton v. Hubbard*, *supra*.

It follows, therefore, that the attachments in question created valid liens on the debt attached in priority to the title under the assignment, assuming the claim of the plaintiff that the banks stood in no better position than the Wisconsin creditors.

The point that the provisions in the Wisconsin statute providing for a discharge of insolvent debtors apply to natural persons only, and not to corporations, is opposed to the statutory construction of the word "person," defined in the Revised Statutes of that state; and there is nothing in the charter of the corporation, so far as appears, or in the statutes of Wisconsin, which takes from this corporation the general powers which, in the absence of any statutory or charter restriction, belong to corporations to make an assignment in insolvency. *De Ruyter v. St. Peter's Church*, 8 N. Y. 288. This judgment is not, we think, in accord with the law of this state, and must therefore be reversed. The case was argued at our bar with great ability, and the researches of the several counsel have materially lightened the labors of the court.

The judgment should be reversed, and a new trial granted.

All concur.

WISCONSIN SUPREME COURT.

Alfred GILMAN, Admr., etc., of Winthrop
W. Gilman, Deceased, *Appt.*,
v.

HUDSON RIVER BOOT & SHOE MFG.
CO. *et al.*, William M. Ketcham, Inter-
venor, *Resp.*

(84 Wis. 60.)

A receiver of a foreign corporation appointed in another state in proceedings to dissolve the corporation has a right to a debt due the corporation as against an attempt at garnishment of the debt by a non-resident creditor of the corporation who is a citizen of the state in which the corporation existed and in which the receiver was appointed.

(January 10, 1893.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Milwaukee County in favor of the intervenor as receiver of the Hudson River Boot & Shoe Manufacturing Company in a garnishment proceeding to reach a debt due from Hubbard & Baker to such corporation. *Affirmed.*

Statement by Pinney, J.:

The case was that the plaintiff, in his representative capacity as administrator of the estate of Winthrop W. Gilman, deceased, on the 24th day of September, 1891, was a

creditor of the Hudson River Boot & Shoe Manufacturing Company, a corporation created and existing under the general laws of the state of New York, in which state the plaintiff also resided, in the sum of \$947.87, and commenced an action in the circuit court of Milwaukee county, in which Hubbard & Baker, of West Superior, Wis., were garnished, as being indebted to the said corporation, September 26, 1891; and on the 14th of the following month they filed their answer, admitting an indebtedness to the defendant of \$545.41, and paid that sum into court. On the 8th of February, 1892, by stipulation between the plaintiff's attorneys and the attorneys for William M. Ketcham, the interpleading claimant, he was allowed to interplead in respect to his claim to said money, and serve his answer within twenty days thereafter. In his answer he alleged that he was a resident and citizen of New York, and that on and prior to the 29th of July, 1891, the defendant, the Hudson River Boot & Shoe Manufacturing Company, was a corporation, organized and existing under the laws of that state, and the garnishees were indebted to it in the sum stated in their answer and so paid into court. That on the 28th of July, 1891, proceedings were commenced in the supreme court of the state of New York in and for Dutchess county, in a case entitled "In the matter of the applica-

NOTE.—*Rights of receiver as to property outside of the jurisdiction in which he is appointed.*

It is well established that the appointment of a receiver in another jurisdiction will be given effect by a court only as an exercise of comity in respect to property outside of the jurisdiction of the court in which the receiver was appointed; but the extent to which this comity will be carried is not entirely settled.

An assignment made by a receiver in another state under order of the court of a debt against a local corporation was considered in Hoyt v. Thompson, 5 N. Y. 333, but was not decided, although an opinion was expressed on each side of the question by different judges.

But on subsequent hearing, Hoyt v. Thompson, 19 N. Y. 307, it was decided that no extraterritorial effect could be given to such a transfer by operation of statute, and that comity did not regard its recognition to the extent of divesting the title of the citizens of the state in which the action was brought.

Receivers appointed by a circuit court of the United States sitting in one state for a railroad company whose line extends into other states do not acquire control of that portion of the property situated in another state so as to deprive a circuit court in that state of the right to appoint other receivers of such property. Atkins v. Wabash, St. L. & P. R. Co. 29 Fed. Rep. 161.

But receivers of a foreign insurance company appointed in the state of its creation are entitled to the assets of the company for distribution among all the creditors as against a local receiver appointed for the benefit of policy holders in that state only, and an ancillary receiver may be appointed to convert the assets into money and remit the proceeds to the foreign receiver. Parsons v. Charter Oak L. Ins. Co. 31 Fed. Rep. 306.

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In foreclosure suits brought in several states on railroad mortgages in which the same person was appointed receiver in each state, it was held that the proceedings in each state were independent; but the question of the power of a receiver under an appointment in another state was not raised. *Re United States Rolling Stock Co.* 55 How. Pr. 293.

After the decision in 55 How. Pr. 293, a petition to amend the complaint and order appointing the receiver so as to render the action collateral or ancillary to that pending in another state, in which the greater part of the railroad was situated, was made, but the court refused to transfer to the tribunal of another state its own administration of the receivership. Taylor v. Atlantic & G. W. R. Co. 57 How. Pr. 9.

An insolvency assignee of a foreign corporation, which has been adjudged insolvent on a petition, under Vermont Rev. Laws, § 1820, has a right of action in that state on an insurance policy for a loss occurring in that state as against a receiver of the corporation appointed in the state of its domicile. Platt v. Continental L. Ins. Co. 62 Vt. 166.

As to attachment.

In the main case of GILMAN v. HUDSON RIVER BOOT & SHOE MFG. CO. the court recognized the right of the receiver as against garnishment by a citizen of the same state in which the receiver was appointed.

In harmony with this is the decision in Bagby v. Atlantic, M. & O. R. Co., 36 Pa. 291, that a Virginia receiver is entitled to the assets in Pennsylvania as against subsequent garnishment by Virginia creditors.

Likewise the decision in Merchants Nat. Bank v. McLeod, 38 Ohio St. 174, that an attachment in Ohio of the rolling stock of a Kentucky railroad by a Kentucky creditor pending an application in

tion of a majority of the trustees of the Hudson River Boot & Shoe Manufacturing Company for a final order dissolving said corporation," for the purpose of effecting a voluntary dissolution of the corporation and the distribution of its effects, which proceedings were carried on under and in pursuance of title 11 of the Code of Civil Procedure, chap. 17, §§ 2419-2430, entitled "Proceedings for the voluntary dissolution of a corporation" (8 Bliss' N. Y. Code, § 2418). That a petition had been presented to the supreme court, in substance as required by the statute, by a majority of the trustees, stating, among other things, that the stock, effects, and other property of the corporation were not sufficient to pay the just demands for which it was liable, or to afford a reasonable security to those who might deal with it, and that the petitioners deemed it beneficial for the interests of the stockholders that it should be dissolved: a schedule being annexed thereto containing a true account of all the creditors of the corporation and unsatisfied engagements, a statement of the name and place of each creditor, etc., a statement of the sum owing to each creditor or other person, etc., a statement of the true cause and consideration of the indebtedness to each creditor, a full, just, and true inventory of all the property, etc., of the corporation, a statement of each incumbrance upon its property, and a full, just, and true account of the capital stock of the corporation, specifying the name of each stockholder, which was duly verified. The court made

an order July 29, 1891, requiring all persons interested to show cause before the court, at special term to be held October 31, 1891, why the said corporation should not be dissolved. That on the same day, upon notice and verified petition of the president of the corporation, served upon the attorney-general of the state of New York, he consented that the motion be granted, and the court appointed the claimant, William M. Ketcham, temporary receiver of the property of said corporation, with the powers and duties specified in section 1788 of the Code of Civil Procedure of that state, and he qualified as such. That on the same day, upon motion and consent of the attorney-general thereto, the said supreme court ordered that the creditors of the said corporation, and each and every one of them, be, and they were thereby, restrained from bringing any action against the corporation for the recovery of any sum of money, and they were thereby enjoined from taking any further proceeding on any such actions theretofore commenced. That this order was served personally upon the plaintiff on the 5th of August, 1891, in New York. That on the 31st of October, 1891, pursuant to the order to show cause and due notice thereof given to each of the creditors, stockholders, and persons interested in said corporation or its affairs, the court ordered and adjudged that the said corporation be, and it was thereby, dissolved, and that William M. Ketcham, the interpleading claimant, was appointed permanent receiver, and qualified as such; and by virtue of such proceedings

Kentucky for a receiver in foreclosure is subject to the rights of the receiver subsequently appointed, as the attachment reaches only the mortgagor's interest, which is out off by the foreclosure proceedings.

But the superintendent of the insurance department in Missouri, who was vested by decree under statutory authority with the assets of an insolvent insurance company, was held in Virginia entitled to debts due to the company in that state, as against a subsequent attachment by a policy holder whose residence was presumably in Virginia. *Bockover v. Life Asso. of America*, 77 Va. 85. See also *Parsons v. Charter Oak L. Ins. Co.* 31 Fed. Rep. 305.

The court in the Virginia case quotes from the language of *Chief Justice Waite* in *Relfe v. Rundie*, 103 U. S. 222, 26 L. ed. 337, saying that, "such superintendent was the statutory successor of the corporation for the purpose of winding up its affairs, . . . he is the trustee of an express trust, . . . he is an officer of the state, and as such represents the state sovereignty while performing its public duties connected with winding up of the affairs of one of its insolvent and dissolved corporations."

But the fact that such superintendent is considered a successor of the corporation in one sense, and as a representative of the state in another sense, would not seem to create any greater right to remove the assets from the state and from the reach of Virginia creditors than if he were merely a receiver appointed by the court.

But as against resident creditors the appointment of a receiver in another state is held insufficient to prevent attachment. *Cleveland Rolling Mill Co. v. Crawford* (Ill. C. C.) 9 Ry. & Corp. L. J. 171; *Webster v. Judah*, 27 Ill. App. 294.

So trustees appointed in an attachment suit having title by operation of law cannot defeat a garnishment in another state by citizens of their own 23 L. R. A.

state. *Rhawn v. Pearce*, 110 Ill. 350, 51 Am. Rep. 691.

So in Louisiana a receiver appointed by a foreign court under a creditor's bill will not be allowed to claim property against creditors who subsequently attach it before the receiver has obtained possession. *Lichtenstein v. Gillett*, 37 La. Ann. 522.

This case holds that nonresidents will be allowed the same rights that belong to residents as attaching creditors as against a receiver appointed in another state than that of plaintiff's domicile. *Id.*

To the same effect it is held in Indiana that a general deed of assignment made in another state to a receiver there appointed will not be recognised as against the claims of attaching creditors, although they are nonresidents, belonging in a third state, and the attachment was made after the receiver's appointment but before he obtained actual possession of or lien on the property. *Catlin v. Wilcox Silver Plate Co.* 3 L. R. A. 63, 123 Ind. 477.

A Tennessee receiver of an insolvent corporation was denied the right to assets in Pennsylvania as against a subsequent garnishment by a Kentucky creditor. *Warren v. Union Nat. Bank*, 7 Phila. 156.

In an early New York case also it was held that trustees of a foreign corporation appointed by the legislative power in the state where it was created will take property in another state subject to the specific liens of attachments levied before the trustees had obtained possession. *Fenton v. Lumberrans Bank, Clarke*, 208, 7 L. ed. 116. The residence of the attaching creditors is not considered.

Again in another case in which it appeared that the attaching creditors were residents it was held that receivers appointed in another state for a foreign corporation, by the charter of which all its property was to vest forthwith in receivers on committing an act of insolvency, must take assets in New York subject to the claims of creditors who

he became vested with the right and title to all the property, effects, and credits of every description belonging to said corporation, and became entitled to receive the said sum of \$589.45, so admitted by said garnishees to be due, and theretofore paid into court; and that the plaintiff, at the time of the service upon him of said injunctive order, was and still is a resident of the state of New York, and prior to the time when said garnishees made and filed their answer they had notice of the appointment of the claimant as such receiver. The claimant demanded judgment that the clerk pay over said sum to him, and for his costs. The plaintiff demurred to the petition, on the ground that it did not state facts sufficient to constitute a cause of action or claim to the fund disclosed and paid into court, and for that the claimant had no legal capacity to maintain the petition. Motion was made to strike out the demurrer as frivolous, and the court so ordered, with \$10 costs, and that the claimant have judgment, with leave to the plaintiff to take issue upon said claimant's intervening petition, or such other proceedings as he might be advised, within twenty days. Plaintiff appealed from the order.

Messrs. Rietbrock & Halsey for appellant.

Messrs. Williams & Robinson, for respondent:

As a matter of comity, though not of right, a foreign receiver is permitted to take property as against attaching creditors who reside with-

in the jurisdiction of the court appointing the receiver.

High, Receivers, 193; *Bagby v. Atlantic M. & O. R. Co.* 86 Pa. 291; compare *Warren v. Union Nat. Bank*, 7 Phila. 156; *Hurd v. Elizabeth*, 41 N. J. L. 1; *Merchants Nat. Bank v. McLeod*, 38 Ohio St. 174; *Hunt v. Columbian Ins. Co.* 55 Me. 290, 93 Am. Dec. 592; *Paradise v. Memphis Farmers & M. Bank*, 5 La. Ann. 710; *McAlpin v. Jones*, 10 La. Ann. 552; *Graydon v. Church*, 7 Mich. 36; *Lycoming F. Ins. Co. v. Wright*, 55 Vt. 526; *Einer v. Beste*, 32 Mo. 240, 82 Am. Dec. 129; *Thurston v. Rosenfield*, 42 Mo. 474, 97 Am. Dec. 851; *Green v. Gross*, 13 Neb. 117; *Chafee v. Fourth Nat. Bank of New York*, 71 Me. 514, 36 Am. Rep. 345; *Boulevard v. Davis*, 9 L. R. A. 601, 90 Ala. 207; *Re Waite*, 99 N. Y. 433; *Runk v. St. John*, 29 Barb. 585; *Peters v. Foster*, 56 Hun, 607; *Dyer v. Power*, 39 N. Y. S. R. 136.

Where the attaching creditor is a resident neither of the state where the suit is brought nor of the state where the receiver is appointed, he is perhaps to be treated the same as a resident of the state where the suit is brought, not being himself found by the decree appointing the receiver.

Paine v. Lenter, 44 Conn. 196, 26 Am. Rep. 442.

An injunctive order of interlocutory decree of a court of New York is not binding upon this court. Each state can give as much force to an injunction of another state as it sees fit. It must, however, be taken into consideration in determining whether or not comity will be extended in this case.

have attached the property before it came into possession of the receivers, although after the insolvency. *Willits v. Waite*, 25 N. Y. 577.

For this distinction between attaching creditors on account of residence, see similar cases in *note to Long v. Forrest*, *ante*, 33, relating to foreign assignments by insolvent.

It is still more clear that a pending garnishment will not be defeated by the appointment of a receiver in another state. *Hunt v. Columbian Ins. Co.* 55 Me. 297, 92 Am. Dec. 592; *Bartlett v. Wilbur*, 53 Md. 485; *Taylor v. Columbian Ins. Co.* 14 Allen, 353.

So the appointment of a receiver is sufficient to give him title to notes of the debtor within the jurisdiction, and in that state the receiver's title will be unaffected by a subsequent garnishment in another state. *Osgood v. Maguire*, 61 N. Y. 524.

After receiver gets possession.

A receiver appointed in another state, who has had actual possession of personal property and sent it for sale to a state in which it is attached as the property of the debtor, can maintain replevin therefor as against the attaching creditor. *Cagill v. Woodbridge*, 8 Baxt. 580, 35 Am. Rep. 716.

Although his rights as receiver cannot be recognized in another jurisdiction, he can maintain the action in his individual capacity for such property, of which he had taken possession. *Ibid.*

But in conflict with this a California case holds that property in the possession of a receiver of an insolvent corporation appointed in one jurisdiction is not exempt when taken into another jurisdiction from attachment by resident creditors of the insolvent corporation. *Humphreys v. Hopkins*, 6 L. R. A. 702, 61 Cal. 537.

This California case seems to stand against all others that expressly decide the question.

In New York it is held that receivers of another

state cannot be sued and property in their hands attached in a state in which they have the property in the exercise of their duty. *Killmer v. Hobart*, 58 How. Pr. 452.

So in Illinois it is held that a receiver who has once obtained possession of property within the jurisdiction of the court which appointed him, and has given bond as receiver, cannot be deprived of its possession when he takes it in the performance of his duty into a foreign jurisdiction by creditors who reside there. *Chicago, M. & St. P. R. Co. v. Keokuk N. L. Packet Co.* 108 Ill. 317, 45 Am. Rep. 557.

And in Connecticut property sent into the state by a receiver of a corporation appointed by another state for the purpose of completing certain work in the former state is not there subject to attachment by a resident creditor. *Pond v. Cooke*, 45 Conn. 123, 29 Am. Rep. 668.

This decision is put on the ground that the property had once vested in the receiver by the law of the state where it was situated, and that the law of another state will not divest him of his right to it on taking it into such state in the performance of his duty. *Ibid.*

And a receiver of an insolvent corporation who brings materials from another state and performs a contract can maintain suit for the proceeds of the contract as against garnishment by the creditors of the corporation, although the contract was made and performed in the name of the corporation. *Cooke v. Orange*, 48 Conn. 401; *Blake Crusher Co. v. New Haven*, 46 Conn. 473.

Right of foreign receiver to sue.

The general doctrine was laid down in some of the earlier American cases that a receiver appointed in another state would not be allowed to bring a suit in his own name as receiver on the ground that his appointment had no extraterritorial effect. But

Williams v. Hintermeister, 26 Fed. Rep. 889.

A voluntary assignment for the benefit of creditors, valid by the laws of the state where made, is, "by the principles of judicial comity and public policy," good in Wisconsin, if not in effect an assignment in bankruptcy.

Mowry v. Crocker, 6 Wis. 826; *Smith v. Chicago & N. W. R. Co.* 28 Wis. 268; *Willits v. Waite*, 25 N. Y. 577.

Full faith and credit are given to the judgment of a state court, when, in courts of another state, it receives the same faith and credit to which it was entitled in the state where it was pronounced.

The only inquiry can be whether the supreme court of New York had jurisdiction to render such a decree, and whether the appellant was subject to that jurisdiction, and was brought into that proceeding. Neither of these facts is disputed.

Dobson v. Pearce, 12 N. Y. 156, 62 Am. Dec. 152; *Folger v. Columbian Ins. Co.* 99 Mass. 267, 96 Am. Dec. 747; *Re Waite*, 99 N. Y. 433; *Williams v. Hintermeister*, *supra*.

The general rule in regard to foreign receivers does not necessarily apply to receivers of a corporation.

All persons dealing with this corporation, the Hudson River Boot & Shoe Manufacturing Company, have assented to that method of winding up its affairs, and have agreed that the assets thereof shall vest in a receiver upon the dissolution of the corporation, and become a trust fund for the benefit of all of the creditors. Especially is this true of the creditors who are residents of the state of New York.

Relfe v. Rundle, 103 U. S. 232, 26 L. ed. 337; *Parsons v. Charter Oak L. Ins. Co.* 81 Fed. Rep. 805; *Taylor v. Life Asso. of America*, 18 Fed. Rep. 493; *Davis v. Life Asso. of America*, 11 Fed. Rep. 783.

The principle that the assets of an insolvent corporation shall be regarded as a trust fund for the benefit of all the creditors is certainly in harmony with the doctrine of this court.

Bullin v. Loeb, 78 Wis. 404.

Pinney, J., delivered the opinion of the court:

It is not disputed but that the proceedings in the supreme court of New York were properly instituted and conducted, and the dissolution of the corporation regularly adjudged, upon the voluntary application of its trustees, and the respondent appointed receiver of all its property, assets, and estate according to the statute of that state, with a view of applying the proceeds equally to the payment of all its creditors, and the distribution of any residue equally to and among its stockholders. The plaintiff in this action was at the time, and still is, a resident and citizen of the state of New York, of which state the corporation was a citizen, and he was served with an injunction in that proceeding restraining him, as a creditor of the corporation, from commencing any suit against it to enforce the collection of his debt, in order that the property and assets of the corporation might be properly and judiciously administered and applied by the receiver under the authority of the court ap-

while the later cases do not recognize the foreign appointment as creating an absolute right to sue, they largely extend to him by the exercise of comity the privilege of maintaining a suit, where this will not defeat or impair the remedies of resident creditors.

The earlier doctrine is followed in *Hope Mut. L. Ins. Co. v. Taylor*, 3 Robt. 273, holding that an action is properly brought in the name of a foreign corporation, although a receiver has been appointed for it at its domicile, since he cannot sue in his own name.

Where the jurisdiction to appoint a receiver in another state was denied and not proved, his right to sue was denied in *Kronberg v. Elder*, 18 Kan. 150.

And the receiver of a foreign corporation was denied the right to sue on a note payable to the corporation, where it did not appear that the payee had ever assigned it to him. *Farmers & M. Ins. Co. v. Needles*, 62 Mo. 17.

A denial of the right of a receiver appointed by the circuit court of the United States in Wisconsin to bring an action as such in the federal court in New York was made in *Brigham v. Luddington*, 12 Blatchf. 297.

So in *Hazard v. Durant*, 19 Fed. Rep. 471, it was held that a receiver cannot sue in another state in his own name merely by force of his appointment as receiver, and where he has no title by assignment or conveyance.

And a receiver appointed in proceedings supplementary by a state court cannot sue in a federal court to set aside as fraudulent against creditors a general assignment by the debtor, when there is an assignee in bankruptcy, as the title to property does not pass to him by virtue of his appointment, and the assignment in bankruptcy covers such property. *Olney v. Tanner*, 21 Blatchf. 540, affirming 10 Fed. Rep. 101.

23 L. R. A.

Also in Maryland it was held that a receiver appointed in one state has no extraterritorial power to institute proceedings in regard to property not subject to the jurisdiction of the court from which he received his appointment. *Day v. Postal Teleg. Co.* 66 Md. 354. Especially as against the jurisdiction of another court previously invoked.

And seemingly not in harmony with the main case, it was held in an earlier Wisconsin case that a receiver appointed in another state cannot sue in Wisconsin to set aside a transfer of property on the ground that it is fraudulent as to creditors. The court says that judicial comity goes to no such length. *Filkins v. Nunnemacher*, 81 Wis. 91. To the contrary are New York and New Jersey cases, *infra*.

These decisions which deny a foreign receiver's right to sue are largely based on *Booth v. Clark*, 58 U. S. 17 How. 322, 15 L. ed. 164, in which a receiver appointed in a creditors' suit in New York was not allowed to recover assets in the District of Columbia, such as a Mexican claim; but in that case although the general doctrine denying extraterritorial effect to a receiver's appointment was declared the receiver had in fact no right to the assets anywhere as they had passed to an assignee in bankruptcy.

But the more liberal doctrine is followed in most modern cases which in effect restrict the right of a foreign receiver to sue only so far as necessary to protect conflicting rights of particular creditors and not when the denial of his right to sue will benefit no one but the defendants whose liability to the receiver's estate is the matter for adjudication.

Thus a foreign receiver may be allowed to sue to collect assets, when, after long lapse of time, no resident creditors have appeared. *Boulware v. Davis*, 9 L. R. A. 601, 90 Ala. 207.

pointing him, and in the regular and orderly administration of its estate. The proceeding did not contemplate a discharge of the debtor as upon the surrender and application of his property under insolvent laws, but the property of the corporation was passed and vested, pursuant to the statute, in the respondent as its receiver, and the corporation was dissolved, so that no other than the receiver had a right to assert or maintain any title to it thereafter, and he could do so only for the purpose of its equal and just application to the payment of its creditors, and the just division of any residue to and among its stockholders. The effect of such voluntary dissolution was to place all its property and assets *in custodia legis*, to be collected and applied by the receiver. There is nothing in the statute of New York, or in this proceeding under it, in conflict with or in contravention of the laws or public policy of this state, as declared by its statutes and the decisions of its courts, nor does the present proceeding interfere, or tend to interfere, with or prejudice the rights of any citizen of this state. The case concerns citizens of New York alone, the garnishees having paid the fund into court and been discharged. The case is therefore free from all objections which, by the general current of authority, might prevent or induce the courts of Wisconsin to refrain from giving, in a spirit of just interstate comity, the same force and effect here to the proceedings in the supreme court of the state of New York in question as would be accorded to them there. There are many cogent reasons, in our judgment, why we should accord to them such effect upon principles of comity. The situation, in brief, is that after the plaintiff had been enjoined, by a competent court of the juris-

diction in which he resided, from bringing any action against the corporation, his debtor, for the recovery of any sum of money, so that he should not obtain any undue preference over its other creditors, in violation of the purpose and policy of the law of New York and the proceeding thus instituted, and after an adjudication absolutely dissolving the corporation had been made, and after the title to its property, effects, and credits had been vested in the claimant as such receiver, the plaintiff came into the circuit court of this state, and commenced an action to recover his demand against a dissolved corporation. The question is one wholly between parties residing in New York, and bound by the proceedings in question, neither of whom is in any position to invoke the assistance of the courts of this state to defeat or deny full effect to the proceeding in New York, or the title resulting from it. It is clear that the adjudication of dissolution, and the appointment of the receiver vesting in him the title to the chose in action in question, were binding on these parties, and the courts of New York would have enforced the receiver's title had this controversy originated there. The plaintiff asks us to aid him in violating the law of his own state, and evading the process of its courts. Our own citizens, in a proper case, would no doubt be protected against the effect of such extraterritorial act and adjudication, if injurious to their interests, or in conflict with the laws and public policy of Wisconsin, and effect would not be given to it at the expense of injustice to our own citizens. The transfer of this debt, valid in New York, must, we think, be held valid on principles of comity here. When, therefore, the garnishee process was served, there was no debt due to the corporation upon which it

So a foreign receiver who has obtained a judgment may sue upon that in another state as an individual. *Wilkinson v. Culver*, 28 Blatchf. 416, 25 Fed. Rep. 639.

The addition of the words receiver, etc., in the title of the case may be rejected as surplusage. *Ibid.*

The same doctrine was recognized in *Merchants Nat. Bank v. McLeod*, 38 Ohio St. 174, allowing a receiver of a Kentucky corporation in a foreclosure suit to bring suit in Ohio for rolling stock included in the mortgage.

So in *Lycoming F. Ins. Co. v. Wright*, 55 Vt. 523, the receiver appointed at the domicile of the foreign corporation is held entitled to sue in Vermont, where there are no intervening rights of creditors.

And the receiver appointed in another jurisdiction is allowed in Louisiana to bring suit for property which was stolen from him. *McAlpin v. Jones*, 10 La. Ann. 552.

An assignment to a receiver under order of court was held in Michigan to give him power to sue as assignee of a legal interest in the property assigned, and a description of him as receiver was regarded as mere *descriptio personae*, there being no domestic creditors affected by the suit. *Graydon v. Church*, 7 Mich. 36.

And receivers appointed in another state were allowed to sue on a bond and mortgage transferred by the court to them as successors of other receivers, to whom the obligations were executed. *Iglehart v. Bierce*, 36 Ill. 123.

And a receiver appointed in another state, who brings into the state materials and performs there a contract in the exercise of his duty can recover

the proceeds of the contract. *Cooke v. Orange*, 49 Conn. 401.

The legal effect of the appointment of a receiver in a foreign jurisdiction in transferring to him the right to collect property will be so far recognized in New Jersey as to sustain a suit by him for the recovery of such property. *Hurd v. Elizabeth*, 41 N. J. L. 1.

The rule that the receiver of a foreign corporation may, simply as a matter of comity, be allowed to recover property, is recited in *National Trust Co. of N. Y. v. Miller*, 33 N. J. Eq. 165, in which case, however, an ancillary receiver had been appointed.

The same rule is declared in *Bidlack v. Mason*, 26 N. J. Eq. 230, which was the case of a motion for a receiver where the complainant was a receiver appointed in another state.

So in New York a foreign receiver may maintain an action when there are no local interests adverse to his suit. *Dyer v. Power*, 30 N. Y. S. R. 136; *Peters v. Foster*, 55 Hun. 607.

In Indiana also as a matter of comity, receivers duly appointed and qualified in other states are allowed to maintain suits to the extent of their authority. *Metzner v. Bauer*, 38 Ind. 427.

In this case there was no question as to any conflict of interest between resident creditors and the receiver. *Ibid.*

A receiver appointed in another state may be allowed by comity to bring suit against a resident to enforce his liability as stockholder in an insolvent corporation. *Pugh v. Hurlt*, 52 How. Pr. 22.

Receivers appointed in another state may, by

could act, and the money that has been paid into court belongs to the receiver claimant; and, no principle of public policy or rights of citizens of Wisconsin intervening, by a fair and liberal spirit of comity our courts ought to give the same force and effect to the proceedings in question as they would have in the courts of New York.

The tendency of modern adjudications is in favor of a liberal extension of interstate comity, and against a narrow and provincial policy, which would deny proper effect to judicial proceedings of sister states under their statutes and rights claimed under them, simply because, technically, they are foreign, and not domestic. In the recent case of *Cole v. Cunningham*, 188 U. S. 107, 88 L. ed. 538, the subject was very fully considered, and the various cases were cited; and it was there held that a creditor who is a citizen and resident of the same state with his debtor, against whom insolvent proceedings have been instituted in said state, is bound by the assignment of the debtor's property in such proceedings, and if he attempts to attach or seize the personal property of the debtor, situated in another state and embraced in the assignment, he may be restrained by injunction by the courts of the state in which he and his debtor reside; that every state exercises, to a greater or less extent, as it deems expedient, the comity of giving effect to the insolvent proceedings of other states, and where the transfer of the debtor's property is the result of a judicial proceeding, as a general rule, no state will carry it into effect, to the prejudice of its own citizens. *Reynolds v. Adden*, 186 U. S. 853, 854, 34 L. ed. 362. In *Bagby v. Atlantic, M. & O. R. Co.*, 86 Pa. 291, it was held that, where a receiver of a corporation has been appointed by a court of

competent jurisdiction in another state, a creditor who resides in that state, and is bound by the decree of its court appointing the receiver, cannot, in an attachment or execution, recover the assets of the corporation in another state, which the receiver claims. In *Bacon v. Horne*, 123 Pa. 452, 453, 2 L. R. A. 365, speaking to this point, the court said: "As before observed, both of these parties, plaintiffs and defendant, are residents of New York. They come into this state to obtain an advantage by our law which they could not obtain by their own. They are seeking to nullify the law of their own state, and ask the aid of our court to do so. This they cannot have. If for no other reason, it is forbidden by public policy, and the comity which exists between the states. This comity will always be enforced when it does not conflict with the rights of our own citizens." To the same effect is the case of *Re Waite*, 99 N. Y. 433, 439, 448, and also *Phelps v. McCann*, 123 N. Y. 641. In *Toronto General Trust Co. v. Chicago, B. & Q. R. Co.*, 123 N. Y. 37, 47, it was said that "foreign receivers and assignees, taking their title to property by virtue of foreign laws or legal proceedings in foreign courts, may come here and maintain suits in our courts when they do not come in conflict with the rights or interests of domestic creditors;" and the general rule laid down in *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 867, 38 Am. Rep. 518, must be considered as qualified by these cases. The same doctrine is laid down in *Woodward v. Brooks*, 128 Ill. 222, 3 L. R. A. 702, where it is held that, if an assignment is valid in the state where made, it will be enforced in another state as a matter of comity, but not to the prejudice of the citizens of the latter, who may have demands against the assignor;

erence, bring suit to recover property, where there is no conflict of interest between foreign and domestic creditors, as in a suit to set aside a void conveyance by judicial sale of land situated in another state. *Runk v. St. John*, 20 Barb. 585.

So a sequestrator appointed in another state, who is substantially an assignee of a corporation of that state, may bring suit to recover property which is alleged to have been transferred for the purpose of defrauding creditors in the other state. *Barclay v. Quicksilver Min. Co.* 6 Lans. 26.

And a receiver of partnership assets, appointed by a competent court of another state, may maintain an action in New Jersey to set aside a sale of the assets situated in New Jersey by one partner in fraud of another, when there are no creditors of the firm and the only one to be benefited is the partner defrauded. *Sobernheimer v. Wheeler*, 45 N. J. Eq. 614.

In a bankruptcy case in the northern district of Illinois, it was held that a receiver of a corporation in another state might prove a debt against the bankrupt. *Ex parte Norwood*, 3 Biss. 504.

Trustees appointed to wind up a foreign corporation may be substituted in another jurisdiction for the corporation in a pending suit, on the ground that they are a quasi corporation. *New Jersey Protection & L. Bank v. Thorp*, 6 Cow. 46.

The superintendent of the insurance department of a state in which a corporation was created, who is made by operation of law the successor of the corporation, is entitled to appear in a suit in another state against the corporation and claim a

removal of the case on the ground of citizenship. *Relfe v. Rundle*, 103 U. S. 222, 26 L. ed. 337.

An officer of a corporation, for which a receiver is appointed, who is served with an injunction against interfering with the receiver's right to the assets, cannot avoid the effect thereof by going into another state; and this rule is not changed by the fact that he is himself a creditor of the company. A receiver in the latter jurisdiction may be appointed to take charge of the assets in that state. *Williams v. Hintermeister*, 36 Fed. Rep. 889.

For the right of the assignees in insolvency or bankruptcy and syndics to bring suit in other jurisdictions, see note to *LONG v. FORREST*, *ante*, 33 on the subject of insolvency transfers as affecting title to property outside the jurisdiction.

Title to land.

The appointment of a receiver does not give him title to real property in another state, or authorize him to maintain an action in the state of his appointment to contest the title of purchasers under execution in the state where the property is situated. *Simpkins v. Smith & P. Gold Co.* 50 How. Pr. 55.

The title to land in Texas held by a trustee is held not to pass to his receiver appointed in Tennessee so as to defeat an attachment of the land in Texas by creditors of the real owner. *Moseby v. Burrow*, 52 Tex. 366.

For effect of assignments for creditors, insolvency and bankruptcy transfers on land as well as personal property outside the jurisdiction, see note to *LONG v. FORREST*, *ante*, 33. B. A. R.

that while it is contrary to public policy to allow the property of a nonresident debtor to be withdrawn from the state, and thus compel creditors to seek redress in a foreign jurisdiction, yet for all other purposes between the citizens of the state where the assignment is made, if valid by the *lex loci*, it will be carried into effect by the courts of Illinois; and this rule is held not to be in conflict with *Rhuon v. Pearce*, 110 Ill. 350. The assignment in this case was voluntary, it is true, and not by proceedings *in invitum*.

We are unable to see upon what substantial ground it can be maintained that the title of the receiver in this case, founded upon the voluntary dissolution of the corporation, does not stand on equally as favorable ground as that of an assignee for the benefit of creditors. *Parsons v. Charter Oak L. Ins. Co.* 31 Fed. Rep. 305; *Relife v. Rundle*, 108 U. S. 222, 225, 26 L. ed. 337, 339; *Williams v. Hintermeister*, 26 Fed. Rep. 889. In *Merchants Nat. Bank v. McLeod*, 38 Ohio St. 174, it was held that a receiver appointed under the authority of the court of one state, and vested with the title to property temporarily in another, might, under the comity between states, by an action brought in the latter state in his own name, assert his right to the possession of it, where such right was not in conflict with the rights of the citizens of the latter state, nor against the policy of its laws; nor is there anything in the case of *McClure v. Campbell*, 71 Wis. 350, in conflict with this conclusion. Mr. Justice Lyon had in view in that case the question of giving effect to foreign insolvency proceedings resulting in a discharge of the debtor prejudicially to the interests of citizens of the state wherein the assignee attempted to enforce the assignment. In *Filkins v. Nunnenmacher*, 81 Wis. 91, the question was whether judicial comity would allow a receiver, appointed in a creditors'

suit in another state, to maintain a suit in Wisconsin to set aside an alleged fraudulent conveyance, from the debtor to the defendant, of property within the latter state, and presented an entirely different question from the one in this case, which is whether a foreign receiver can be heard to assert in the courts of this state a title to property which he claims by an assignment, valid and binding against all the parties to the litigation, and is more nearly analogous to the question involved and decided in *Cook v. Van Horn*, 81 Wis. 291. The question is not materially different from that involved in *Smith v. Chicago & N. W. R. Co.*, 23 Wis. 267, where it was determined that effect would be given to the courts of this state, subject to the qualifications here stated, to an assignment made in another state by a party in order to avoid imprisonment in proceedings supplemental to execution for refusal to apply rights in action—corporate stocks—to the payment of a judgment; and it is evident that, if the title depended wholly upon the coercive power of the court, the result would have been the same. The principle is universal that the assets of insolvent corporations are to be regarded as a trust fund for the benefit of all the creditors, and "that kind of diligence by which one creditor of an insolvent corporation secures to himself a prior right to its property, and an unequal advantage over the other creditors, is without merit, and more selfish than just." *Ballin v. Loeb*, 78 Wis. 404. The public policy of Wisconsin and New York in this respect are in accord. For these reasons we are of the opinion that the claim of the receiver, as stated in his intervening petition, to the fund in court, *must be sustained*, and that the Circuit Court properly overruled the plaintiff's demurrer thereto.

NORTH DAKOTA SUPREME COURT.

John W. JASPER, *Respt.*,

v.

Arthur E. HAZEN, *Appt.*

(.....N. Dak.)

*1. Under section 25, chap. 120, Laws 1891, this court is required, upon appeal, to review questions of fact in cases tried by the court or referee, when exceptions to the findings are duly taken and returned. But this court will not try the case *de novo*. The findings below are presumed to be correct. Appellant must show error, and a finding based upon parol evidence will not be disturbed unless the error be made clearly to appear.

*3. To support a finding that a deed ab-

*Headnotes by BARTHOLOMEW, Ch. J.

solute on its face was intended as a mortgage only, the evidence must be clear, convincing, and satisfactory, and of such a character as will leave in the mind of the chancellor no hesitation or substantial doubt. In reviewing questions of fact upon appeal, in this class of cases, the same strict rule must be applied by the appellate court.

*5. Evidence in this case examined, and held sufficient to warrant the trial court in holding that a deed absolute in form was in fact given as security only.

(March 3, 1894.)

APPEAL by defendant from a judgment of the District Court for Cass County in favor of plaintiff in an action brought to recover the value of certain real estate which defendant

NOTE.—The decision in the above case touches a question which, although very practical, seems to have been developed but little, and which is treated more fully in the present case than anywhere else. It is interesting in connection with the fact that the statutory provision above discussed was 23 L. R. A.,

taken from Wisconsin, to notice the recent Wisconsin case of *Klein v. Valerius*, 22 L. R. A. 608, holding unconstitutional a new statute of that state attempting to give a review of facts in the supreme court unaffected by the decision of the lower court.

was alleged to have obtained under an absolute deed intended for a mortgage and to have subsequently sold to third persons. *Affirmed.*

The facts sufficiently appear in the opinion. *Mr. Sumner Ladd, with Messrs. Benton & Amidon, for appellant:*

Parol evidence is not admissible to vary the terms of a written instrument and a court of equity ought to be extremely cautious in its consideration of such testimony.

Andrews v. Essex F. & M. Ins. Co. 8 Mason, 8.

The evidence upon which a deed absolute on its face will be adjudged a mortgage, must be clear, convincing, and equal in force to that upon which a deed will be reformed under the grounds of mistake.

Kent v. Lasley, 24 Wis. 654.

The fact must be made out by clear and strong evidence; a mere preponderance of proof is not sufficient, and whenever the degree of proof required in cases like this is mentioned, the rule is stated the same as in suits to reform instruments.

Sloan v. Becker, 34 Minn. 491; *McClelland v. Sanford*, 26 Wis. 595.

The burden rests upon the moving party of overcoming the strongest presumption arising from the terms of a written instrument. If the proofs are doubtful or unsatisfactory, if there is a failure to overcome this presumption by testimony entirely plain and convincing beyond reasonable controversy, the writing will be made to express correctly the intention of the parties. A judgment of the court, a deliberate deed or writing, are of too much solemnity to be brushed by loose and inconclusive evidence.

Howland v. Blake, 97 U. S. 624, 24 L. ed. 1027; *United States v. Maxwell Land Grant Co.* 121 U. S. 825, 381, 30 L. ed. 949, 959; *United States v. Budd*, 144 U. S. 154-161, 36 L. ed. 384-386; *Mead v. Westchester F. Ins. Co.* 64 N. Y. 453; *Ford v. Joyce*, 78 N. Y. 618; *Tufts v. Larned*, 27 Iowa, 330; *Flinn v. Barkley*, 7 Ind. 69; *Stockbridge Iron Co. v. Hudson Iron Co.* 103 Mass. 46; *Story*, Eq. Jur. 11th ed. § 157; 2 Pom. Eq. Jur. § 859; *Henkle v. Royal Exchange Co.* 1 Ves. Sr. 817.

To convert a deed absolute on its face into a mortgage by parol testimony, such testimony must be clear and specific, of a character such as will leave on the mind of the court no hesitation or doubt; and failing in this, the effort to impeach the legal character of the deed must be regarded as abortive.

Lance's App. 112 Pa. 456; *Henley v. Hoteling*, 41 Cal. 22; *Tilden v. Streeter*, 45 Mich. 533; *Johnson v. Van Velsor*, 43 Mich. 208; *Kercheval v. Doty*, 31 Wis. 476; *Townsend v. Peterson*, 12 Colo. 491; *Satterfield v. Malone*, 1 L. R. A. 35, 35 Fed. Rep. 445; *Munger v. Casey* (Pa.) March 11, 1889; *Pierce v. Traver*, 13 Nev. 526; *Phillips v. Croft*, 43 Ala. 477; *Bingham v. Thompson*, 4 Nev. 224.

Sometimes a great disproportion between the actual value of the land and alleged purchase price lends aid in controversies of this kind in determining what the real transaction was. Here, however, there was no great disproportion.

See *Howland v. Blake*, 97 U. S. 624, 627, 24 L. ed. 1027, 1029.
23 L. R. A.

The case may be decided upon a principle governing a class of cases of the same nature. Among them are:

Where a written instrument is sought to be reformed upon the ground that by a mistake it does not correctly set forth the intention of the parties; or where the declaration of the mortgagor at the time he executed the mortgage, that the equity of the redemption should pass to the mortgagee; or where it is insisted that a mortgagor by a subsequent parol agreement surrendered his rights (*Howland v. Blake*, 97 U. S. 624, 24 L. ed. 1027. See also *Kent v. Lasley*, 24 Wis. 654).—It is the duty of the court to examine the testimony and determine whether it satisfies the rule of evidence applicable to the case.

1. Courts of review, in affirming the decision of trial courts in cases to which this rule of evidence is applicable, have not applied the general rule that where there is a conflict in the evidence the weight of evidence will not be examined, but on the contrary courts of review in affirming decisions in such cases have invariably examined the evidence and expressly determined its sufficiency or insufficiency to satisfy the rule for which we contend.

2. Courts of review have frequently reversed the decision of trial courts in this class of cases upon the sole ground that the evidence in support of the decision was not sufficient to satisfy the rule, although it would have been amply sufficient to support a decision, upon an ordinary issue.

Upon an ordinary issue of fact, appellate courts do not review or examine the testimony in case of conflicting evidence, but dispose of the question in the briefest possible manner by simply citing the general rule.

Compare *Cadman v. Peter*, 118 U. S. 78, 30 L. ed. 78, with *Hathaway v. First Nat. Bank of Cambridge*, 184 U. S. 494, 33 L. ed. 1004; *Etheridge v. Wisner*, 86 Mich. 166, with *Thompson v. Homan*, 77 Mich. 134.

If it had been considered by courts of review that the general rule was also applicable to cases requiring the strict proof, it is incredible that they would have been at such pains in every case to examine the testimony.

Courts of review have frequently reversed the decision of trial courts in this class of cases upon the sole ground that the evidence in support of the decision was not sufficient to satisfy the rule.

Nevius v. Dunlap, 38 N. Y. 676.

Ensign v. Ensign, 120 N. Y. 655, however, is based upon the provisions of the 1876 Code of Civil Procedure.

The ground of this decision is more fully explained in *Re Ross*, 87 N. Y. 514; *Case v. Peters*, 20 Mich. 298; *Vary v. Shea*, 36 Mich. 388; *Tilden v. Streeter*, 45 Mich. 533; *Reynolds v. Campbell*, Id. 529.

That the supreme court of Michigan applies the general rule relative to conflicting testimony, upon an ordinary issue, see *Etheridge v. Wisner*, *supra*; *Newton v. Holley*, 6 Wis. 592; *Lake v. Meacham*, 13 Wis. 356; *Kercheval v. Doty*, 31 Wis. 477; *Harter v. Christoph*, 32 Wis. 246; *Sable v. Maloney*, 48 Wis. 331; *Meiswinkel v. St. Paul F. & M. Ins. Co.* 6 L. R. A. 300, 75 Wis. 147.

That the supreme court of Wisconsin applies

the general rule without examining the evidence, upon ordinary issues, where the testimony is conflicting.—

See *Robbins v. Pond Du Lao*, 82 Wis. 840; *Smith v. Ewing*, 151 Pa. 256; *Pancakes v. Cauffman*, 114 Pa. 118; *McCall v. Bushnell*, 41 Minn. 87; *Randall v. Burk Twp. of Minnehaha County* (S. Dak.) Nov. 24, 1898.

Such had been the unvarying practice of courts of review in the states in which this strict rule of evidence has been established and defined, as late as 1891. Since that date three decisions have been rendered by the supreme court of California declaring a different rule.

These cases are *Brison v. Brison*, 90 Cal. 828; *Mahoney v. Bostwick*, 96 Cal. 53; *Penney v. Simmons*, 99 Cal. 80.

In the first of these cases the statement that the finding of the trial court was conclusive was a mere dictum.

The next case, *Mahoney v. Bostwick*, *supra*, is based entirely upon the former case.

In *Penney v. Simmons*, *supra*, the trial court decided in favor of the deed.

Mr. Charles A. Pollock, with Mr. M. A. Hildreth, for respondent:

The rule which excludes parol testimony to contradict or vary a written instrument has reference to the language used by the parties. It does not forbid an inquiry into the object of the parties in executing and receiving the instrument.

Brick v. Brick, 96 U. S. 51 625 L. ed. 256; *Hughes v. Edwards*, 22 U. S. 9 Wheat. 489, 6 L. ed. 142; *Pierce v. Robinson*, 18 Cal. 116.

The Supreme Court of the United States, and the circuit and district courts, and most of the state courts are uniform in admitting parol evidence to show that an absolute conveyance is in fact a mortgage.

Jones, Mortg. 8d ed. §§ 285 *et seq.*; *Russell v. Southard*, 58 U. S. 12 How. 189, 18 L. ed. 937; *Peugh v. Davis*, 96 U. S. 382, 24 L. ed. 775; *Morris v. Nixon*, 42 U. S. 1 How. 118, 11 L. ed. 69; *Babcock v. Wyman*, 60 U. S. 19 How. 289, 15 L. ed. 644.

The intention of the parties is the only true and infallible test, and this intention is to be gathered from the circumstances surrounding the transaction and the conduct of the parties, as well as from the face of the written contract.

Peugh v. Davis, *supra*; *Montgomery v. Spect*, 55 Cal. 352.

Whether a conveyance absolute on its face will take effect as a mortgage, depends primarily if not exclusively on the nature of the consideration.

Pierce v. Robinson and *Morris v. Nixon*, *supra*.

The supreme court of Nevada, in the case of *Pierce v. Traver*, 18 Nev. 526, has gone so far as to say that inadequacy of price alone authorizes a court to declare a deed absolute on its face to be a mortgage.

The findings were fully justified by the evidence.

See *McMillan v. Bissell*, 63 Mich. 66. See also *Kuhn v. Rumpff*, 46 Cal. 299; *Allen v. Fogg*, 66 Iowa, 229; *Manufacturers Bank of Milwaukee v. Ruges*, 59 Wis. 221; *Madigan v. Mead*, 81 Minn. 94; *Rockwell v. Humphrey*, 57 Wis. 410; *Ingall v. Ahwood*, 58 Iowa, 238; 28 L. R. A.

Starks v. Redfield, 52 Wis. 349; *Gay v. Hamilton*, 38 Cal. 586; *Raynor v. Lyons*, 87 Cal. 452; *Cunningham v. Hawkins*, 27 Cal. 603; *Montgomery v. Spect*, 55 Cal. 352; *Taylor v. McLain*, 64 Cal. 514.

Courts of equity watch with extreme jealousy all contracts made by a party while under imprisonment; and if there is the slightest ground to suspect oppression or imposition, in such cases, they will set the contracts aside.

1 Story, Eq. § 289.

Findings by the trial judge will not be disturbed on appeal where there is evidence to sustain them.

1 N. W. Rep., Digest (new) beginning on page 286, pars. 2036-2056; *Bateman v. Blaisdell*, 88 Mich. 357.

Courts have, in innumerable cases, declared a deed, absolute on its face, a mortgage.

6 Am. & Eng. Encyclop. Law, 675-677, and the numerous cases cited; *Belton v. Avery*, 2 Root, 279, 1 Am. Dec. 70; *Dunham v. Dwy*, 15 Johns. 554, 8 Am. Dec. 282; *Nichols v. Reynolds*, 1 R. I. 80, 36 Am. Dec. 238; *Moore v. Madden*, 7 Ark. 580, 46 Am. Dec. 298; *Hall v. Savill*, 8 G. Greene, 87, 54 Am. Dec. 485; *Devolf v. Strader*, 26 Ill. 225, 79 Am. Dec. 371; *Campbell v. Dearborn*, 109 Mass. 180, 13 Am. Rep. 671; *McMillan v. Bissell*, 63 Mich. 66.

While Hazen was not Jasper's attorney in the fullest extent, similar relations of trust and confidence existed—a debtor giving a deed to his attorney—for money advanced is relieved from its absolute features.

Horn v. Keteltas, 46 N. Y. 605.

The statute provides that the findings of fact and the conclusions of law must be separately stated.

Comp. Laws, § 5067.

In all cases tried either by court, referee, or jury, questions of fact may be reviewed in the supreme court, and in either case the review is the same, only that in cases tried by a court or referee the findings stand as a special verdict, and like a special verdict, the findings must pass on every material issue.

Schwartz v. Skinner, 47 Cal. 6; *Mulcahy v. Glazier*, 51 Cal. 626.

Under the old chancery practice an appeal took up the whole case and the chancellor examined the pleadings and evidence without reference to the findings of the lower court and decided such a decree as seemed proper. Hayne, New Trial, 860.

In Wisconsin a statute restoring the old chancery practice was passed some years ago. Before the statute the supreme court of Wisconsin held the findings of fact as a special verdict. After the statute the findings of a trial court were not binding upon it, because where an appellate court tries the case anew findings become immaterial.

In California it was contended that in an equity case, as under the old chancery practice, an appeal took up the whole case and that an appellate court would re-examine the evidence as if it were a court of original jurisdiction, but this theory was soon exploded.

Tenkesbury v. Magrath, 38 Cal. 247; Hayne, New Trial, § 288; *Lick v. Madden*, 36 Cal. 213, 95 Am. Dec. 175.

This case, therefore, cannot be measured by

the rules of old chancery practice. It must be determined by the rules as laid down by our code.

The general proposition may be stated that appellate courts will not disturb the findings of a trial court where the evidence reasonably tends to support the findings.

Leary v. Leary, 68 Wis. 664; *Sipple v. Isham*, 46 Hun, 866; *Berberet v. Edina*, 19 Mo. App. 550; *Henderson v. Henderson*, 110 Ind. 816; *Melinger v. Parsons*, 51 Iowa, 58; *Fender v. Powers*, 67 Mich. 433; *Mathias v. O'Neill*, 94 Mo. 520; *Lake Erie & W. R. Co. v. Griffin*, 107 Ind. 464; *Egbert v. Rush*, 7 Ind. 706; *Miller v. Evansville Nat. Bank*, 99 Ind. 272; *State v. Wasson*, Id. 261; *Pence v. Garrison*, 93 Ind. 845; *Rudolph v. Lane*, 87 Ind. 115; *Fort Wayne, J. & S. R. Co. v. Husselman*, 65 Ind. 73; *Hayden v. Cretcher*, 76 Ind. 108; *Meeker v. Bonbrake*, 108 U. S. 66, 27 L. ed. 654; *Ellis v. Ward*, 137 Ill. 509; *Coari v. Otam*, 91 Ill. 273.

It has been held even in those jurisdictions where equity cases are retried in the appellate court the judgment of the trial court is prima facie right, and will not be disturbed unless clearly and satisfactorily wrong.

Ely v. Daly, 40 Wis. 52; *McAteer v. McAteer*, 81 S. C. 319; *Frederick v. Frederick*, 31 W. Va. 566; *Bitter v. Stock*, 12 Cal. 402; *Johnson v. Johnson*, 125 Ill. 510; *Waterman v. Buck*, 58 Vt. 519; *Cosby v. Buchanan*, 81 Ala. 574; *Smith v. Yoke*, 27 W. Va. 642.

And this rule operates with peculiar force in an appellate court, where the findings of the commissioner have been approved and sustained by the chancellor.

Hendy v. Scott, 26 W. Va. 710; *Boyd v. Gunnison*, 14 W. Va. 1; *Graham v. Graham*, 21 W. Va. 693; *Smith v. Yoke*, 27 W. Va. 639; *Prichard v. Evans*, 31 W. Va. 137; *Doonan v. Glyn*, 23 W. Va. 715; *Miller v. Ausenig*, 2 Wash. Terr. 23; *Oropin v. Gardner*, 64 Mich. 399; *Bauman v. Blaisdell*, 83 Mich. 357.

Doolittle v. Wheeler, 18 Neb. 186, held: "Where the evidence on each side is of nearly equal weight and the only objection to the finding and judgment is that they are against the weight of evidence, they will not be set aside."

See also *Brown v. Babb*, 58 Iowa, 750; *Noyes v. Gill*, 85 Minn. 289.

James v. Jordan, 87 Minn. 43, held: "In a case tried without a jury findings of fact on oral testimony will not be disturbed by this court on appeal where there is evidence reasonably tending to support the same."

See *Coffman v. Acton*, 74 Iowa, 147; *McCauley v. Jones*, 11 Neb. 513; *Buckel v. McAteer*, 35 Neb. 515; *Smith v. Crosby*, 47 Wis. 160; *Batcheller v. Batcheller*, 144 Ill. 471; *Stickel v. Bender*, 37 Kan. 457; *Donohoe v. Mariposa Land & Min. Co.* 66 Cal. 317.

In *Mahoney v. Bostwick*, 96 Cal. 53, the court unanimously held that the question as to whether the evidence is of such a character as to come up to the rule that it is plain and convincing is after all a question of fact for the trial court to determine.

Brisson v. Brisson, 90 Cal. 823.

The rule is universal that appellate courts will not disturb the findings of a trial court in

an equity action, and this principle applies to all classes of actions.

Newcomb v. White (N. M.) Jan. 28, 1890; *Blauvelt v. Woodworth*, 81 N. Y. 285; *La Fitte v. Rups*, 18 Colo. 207; *Castner v. Richardson*, 18 Colo. 496; *Hamlin v. Philips* (Cal.) June 6, 1893; *Re Irvine's Estate* (Cal.) Aug. 30, 1893; *Jones v. Sullivan* (Colo.) June 12, 1893; *Hicks v. Porter*, 90 Tenn. 1; *Aldridge v. Aldridge*, 120 N. Y. 617; *Baird v. New York*, 96 N. Y. 567; *Morrison v. Howe*, 11 Ky. L. Rep. 821; *Voss v. Venn*, 132 Ill. 14; *Hanks v. Rhoads*, 128 Ill. 404; *Duren v. Hall* (Me.) Jan. 3, 1888; *Campbell v. Trustees Cincinnati Southern Railway* (Ky.) Jan. 10, 1888; *Johnston v. Smith*, 88 Ga. 779; *Kent v. Lasley*, 24 Wis. 654; *Ely v. Daly*, 40 Wis. 53.

It is contended that this is an exceptional case. The exception exists more in name than anything else.

The court cannot disturb the finding as there is evidence in the record reasonably tending to support that finding. The quality of that evidence was for the trial court. It is only when that quality stands uncorroborated in the record, that the appellate court will overturn the findings of fact. Surely this court will not disturb the findings of a fact, in a civil action, any quicker than it would disturb the verdict of a jury in a criminal action, if there was any evidence to support such a verdict. It has been held in *People v. Stone*, 117 N. Y. 489; *State v. Howell*, 100 Mo. 628; *Clarke v. People*, 16 Colo. 511; *State v. Rainbarger*, 74 Iowa, 196; *Jameson v. Young*, 2 Litt. (Ky.) 388; *Warwick v. State*, 47 Ark. 568; *Wakeman v. Jones*, 1 Ind. 517; *People v. Moore*, 52 Mich. 568; *People v. Smallman*, 55 Cal. 185; *State v. Hopkins*, 38 La. Ann. 84; *Trimnier v. Bomar*, 20 S. C. 358; *Smith v. Phillips*, 77 Va. 543, and *Crumpton v. United States*, 138 U. S. 861, 34 L. ed. 958,—that a judgment in a criminal case will not be disturbed on the ground that the verdict is not supported by the evidence, unless there is a total failure of evidence, or it is so weak that the necessary inference is that the verdict is the result of passion, prejudice, or partiality.

Why have courts so tenaciously held to this rule? It is because they cannot judge of the credibility of witnesses upon paper.

Bartholomew, Ch. J., delivered the opinion of the court:

This case is before us for the third time. Upon the first appeal a verdict of a jury in respondent's favor was set aside upon the ground that the case should have been tried in equity, and not at law. The case is reported in 1 N. Dak. 75, where a full statement of the issues is given, which need not be here repeated. The case was again reversed, on a question of pleading, in 2 N. Dak. 401. It comes before us again upon the merits, judgment for respondent having been entered below upon findings of fact and conclusions of law. These findings are somewhat extended, and every issue made by the pleadings is found in respondent's favor. It is claimed that many of these findings are not supported by the evidence. A reference to the pleadings, as set forth in the former

opinion, discloses that the plaintiff, who is respondent here, sought to compel the appellant to account for the value of certain property, real and personal, which it was claimed appellant held as trustee, *ex male-facto*, for respondent, and which he had wrongfully converted to his own use. It will also appear that appellant held the real estate, for the value of which it was sought to compel him to account, by a deed absolute on its face, but which respondent insisted was in fact given to secure the performance of an act which had long since been performed. It is thus apparent that, in considering the evidence necessary to establish appellant's liability in this case, two somewhat different rules of law must be applied. Liability for the value of the personal property may be established under what we may term the "general rule," while liability for the value of the real estate can only be fixed under the strict rule to be hereafter considered.

Speaking now only of the personal property, the rule that the findings of fact of a trial court, like the verdict of a jury, will not be disturbed by an appellate court when they have substantial support in the evidence, has been so often announced, and is so familiar to the profession, that no authorities need now be cited in its support. But section 5287, Comp. Laws, re-enacted as section 25, chap. 120, Laws 1891, in speaking of the powers of the supreme court on appeal, says: "Any question of fact or of law decided upon trials by the court or by referee may be reviewed when exceptions to the findings of fact have been duly taken by either party and returned." To what extent this provision modifies or controls the general rule above announced is an interesting question that has never been directly passed upon by this court. Nor, so far as we can ascertain, was this provision ever construed by the supreme court of the late territory prior to its re-enactment by our state legislature. The provision was incorporated in the Laws of the Territory of Dakota in 1887; and *Waldron v. Chicago & N. W. R. Co.* 1 Dak. 336, and *Caledonia Gold Min. Co. v. Noonan*, 3 Dak. 189, both of which announce the general rule, were decided prior to that time. This same provision was enacted in Wisconsin in 1860. The first case arising thereunder was *Snyder v. Wright*, 13 Wis. 689. From that case, and from *Fisher v. Farmers Loan & T. Co.* 21 Wis. 73, and *Garbutt v. Prairie du Chien Bank*, 22 Wis. 384, it is quite clear that the supreme court of Wisconsin felt itself compelled to pass, to some extent at least, upon questions of fact, in cases of this character. The construction placed upon the statute by that court ought to be binding upon us, as we adopted the law after such construction. The difficulty lies in determining just how far that learned court intended to go. That the statute ingrafted a change upon the former practice is certain. To review is to re-examine judicially. Yet we are constrained to believe that the legislature did not intend a "trial *de novo*," in the usual acceptation of that term. It did not intend that this court should

take up the parol evidence as preserved in the bill of exceptions, and pass upon it without any reference to the decision below. Rather, it intended—and such, we think, is the effect of the Wisconsin decisions—that, when a finding of fact made by the trial court was brought into this court for review upon proper exceptions, it should come like a legal conclusion, with all the presumptions in favor of its correctness, and with the burden resting upon the party alleging error of demonstrating the existence of such error. He must be able to show this court that such finding is against the preponderance of the testimony, and, where the finding is based upon parol evidence, it will not be disturbed, unless clearly and unquestionably opposed to the preponderance of the testimony. *Randall v. Burk Twp. of Minnehaha County* (S. Dak.) 57 N. W. Rep. 4.

Of the probative force and value of depositions and documentary evidence, this court may be in as good situation to determine as the trial court; and when the finding is based upon this character of evidence, and it reasonably appears to this court, upon a full examination thereof, that the finding is against the weight of the evidence, we think it would be our duty, under the statute, to disturb the finding. But every practitioner of extended experience knows how absolutely essential it is, in order to ascertain the truth from parol evidence, that the tribunal who is to pass upon the evidence should see the witness upon the stand. The printed page containing the evidence gives, oftentimes, a radically different impression from that made at the hearing. The opportunity of observing the witnesses, and their interest or lack of interest in the case, their prejudices and passions, their mental capacities and powers of observation and memory, and the use they have made of these powers, their entire deportment on the stand, and conduct under cross-examination,—these and many other circumstances that attend personal observation,—are undoubted auxiliaries in ascertaining truth. Of all these helps this court is deprived, while the trial court possesses them fully. It is obvious that, if these things be disregarded, mistakes will be made, and injustice be done. As the finding of fact based upon parol evidence comes to us with all presumptions in favor of its correctness, we must, in reaching our conclusions, throw into the balance in support of the finding, not only the full effect of the printed evidence in the bill of exceptions, but also the full effect of the inferences and impressions that might reasonably and legitimately be drawn from personal observation of the witnesses; and it is only when the scales unmistakably incline the other way, when the finding is thus weighed, that we are warranted in disturbing it. Applying these principles to the evidence in this case bearing upon appellant's liability for the value of the personal property, and it becomes so clear that the findings cannot be disturbed that it would be a waste of time to analyze the testimony.

More difficult questions confront us when we turn to the other branch of the case, and

apply a different rule of law to the evidence. As already stated, appellant's liability for the value of the realty depends upon whether or not a deed absolute on its face was intended to operate as such, or as security only. The rule which admits parol testimony to show that a deed absolute in terms was in fact intended only as security for the performance of some act is too well established to require authorities in its support. Nor do learned counsel in this case greatly differ as to the character and quantity of proof required in such cases. The presumption that an instrument executed with the formality of a deed, or a contract deliberately entered into, expresses on its face its true intent and purpose, is so persuasive that he who would establish the contrary must go far beyond the ordinary rule of preponderance. To demand less would be to lose sight of this presumption, which is one of the strongest disputable presumptions known to the law. Hence, courts have, with great uniformity, in this class of cases, required the proof that should destroy the recitals in a solemn instrument to be clear, specific, satisfactory, and of such a character as to leave in the mind of the chancellor no hesitation or substantial doubt. *Eames v. Hardin*, 111 Ill. 634; *Gassert v. Bogk*, 7 Mont. 585, 1 L. R. A. 240; affirmed in *Bogk v. Gassert*, 149 U. S. 17, 37 L. ed. 631; *Locke v. Moulton*, 96 Cal. 21; *Ensminger v. Ensminger*, 75 Iowa, 89; *Howland v. Blake*, 97 U. S. 624, 24 L. ed. 1027; *Kent v. Lasley*, 24 Wis. 654.

But while counsel agree, practically, that the strict rule thus announced must be applied by the trial court, they disagree entirely as to the rule that should be applied in this court. Counsel, at the request of the court, have filed supplemental briefs upon this question, the great value of which, and the aid that we have received therefrom, we desire here to acknowledge. The statute we have already considered has no direct bearing upon this question, except so far as it requires us to pass, to any extent, upon the weight of testimony. Having once decided that it is our duty to review the evidence, as already indicated, then, whether we apply the rule that requires a mere preponderance, or the rule that requires that clear and convincing testimony that leaves no substantial doubt, is left untouched by the statute.

Respondent contends—and his first proposition is correct—that the case comes to this court with the presumption that the chancellor applied the proper rule at the trial. He then argues that this court ought not to attempt to control the conscience of the chancellor, and ought not to say that he was not convinced, or ought not to have been convinced, beyond any substantial doubt, by a certain amount of admittedly competent evidence, when he himself says he was so convinced, and that if he was so convinced the rule was met, and the findings should stand, unless reversible under the general rule that they are against the clear weight of the testimony. The position is not without plausibility. It has the support of the eminent supreme court of California. *Brisson v. Brisson*, 90 Cal. 323-334; *Mahoney v. Bostwick*, 23 L. R. A.

96 Cal. 53-58, and *Penney v. Simmons*, 99 Cal. 380. Possibly, such is the rule in Texas. See *Ulmann v. Jasper*, 70 Tex. 446.

The case of *Ensign v. Ensign*, 120 N. Y. 655, is cited by respondent, but does not support his contention, as an examination of the case and of the New York statute will disclose. Section 1337, N. Y. Code Civ. Proc. 1876, in defining the power of the court of appeals in cases taken to that court on appeal, among other provisions, contains the following: "Except that a question of fact arising upon conflicting evidence cannot be determined upon such appeal unless when special provision for the determination thereof is made by law." And the next section provides for a review upon the facts in the court of appeals, when the general term of the supreme court has reversed, upon questions of fact, a judgment entered upon the report of a referee, or upon the decision of a court without a jury. And in *Re Rose*, 87 N. Y. 514, where these statutes are fully explained, *Judge Earle* says that this latter provision is the only one giving the court of appeals power to review questions of fact depending upon conflicting evidence. This statement renders the language in *Ensign v. Ensign* readily understood, where the court says: "The referee's determination of the issue having been affirmed by the general term, this court cannot reverse, if there is any evidence tending to sustain the finding of fact on which the judgment rests." *Van Tuyl v. Westchester F. Ins. Co.*, 67 Barb. 72, cited by respondent, fairly supports his position. That was a case of reformation of contract. The statement is bald, and there is no discussion of the question. In the much later case of *Erwin v. Curtis*, 43 Hun, 292, the general term of the court discusses the point briefly. That was a case brought to declare a quitclaim deed to be a mortgage. The court cites the authorities which hold that the parol evidence, in such case, must be "clear, satisfactory, and convincing," and also the authorities which require the "triers of fact in civil cases to give a verdict to the party in whose favor the evidence preponderates." The court then says: "It is necessary for us, in reviewing the question of fact, as to whether this deed was proven to be a mortgage, to determine the rule governing us, and we hold it to be as stated in," etc., (naming the cases that announce the strict rule). And the court adds: "With this conclusion in mind, we have carefully examined the evidence bearing on the question, and all the circumstances surrounding the parties and the transaction, and we cannot say that there was error committed in the finding below." It is clear, in this case, that the appellate court adopted for its own guidance, and enforced, the strict rule. In the California cases there is no discussion of the point we are considering. The court simply announces, in general terms, that it will apply the same rule of law to these exceptional cases that is applied to cases generally, and that, sitting as a court for the correction of errors of law, it will not disturb a finding which declares a deed absolute to be a mortgage, if such finding has any substantial support in the testimony.

Nor do we find the question discussed anywhere, except the brief discussion in 48 Hun. But we do find in the courts of last resort in many of the states, and in the Federal Supreme Court, the strict rule has been unquestioningly adopted and enforced. We find courts saying, in this class of cases, that, if they could be governed by the preponderance of the testimony, their ruling would be in one direction, but as the law requires the evidence to be clear, convincing, and satisfactory, beyond substantial doubt, they are compelled to rule in the other direction. We find other cases where the trial court has held that a deed absolute on its face was not intended as a mortgage, and the appellate court says that the clear, convincing, and satisfactory evidence shows that it was so intended, and reverses the finding. Some of the cases cited below, as will be seen by inspection, come from states where the appellate court sits as a court for the correction of errors of law, only, in all appeal cases, and where the holding would seem to lead directly to the conclusion that, where the law requires a specific character of evidence to warrant a particular finding, to make such finding in the absence of such character of evidence was as much an error of law as to make a finding in an ordinary case supported by no substantial evidence. We cite the following cases, in all of which the strict rule has, in effect, been applied in the appellate court: *Holland v. Blake*, 97 U. S. 624, 24 L. ed. 1027; *Coyle v. Davis*, 116 U. S. 108, 29 L. ed. 583; *Cadman v. Peter*, 118 U. S. 78, 30 L. ed. 78; *Nevius v. Dunlap*, 88 N. Y. 676; *Decoreux v. Sun Fire Office of London*, 51 Hun, 147; *Case v. Peters*, 20 Mich. 298; *Vary v. Shea*, 36 Mich. 888; *Tilden v. Streeter*, 45 Mich. 538; *Reynolds v. Campbell*, 45 Mich. 529; *McMillan v. Biwell*, 63 Mich. 66; *Low v. Graff*, 80 Ill. 360; *Bartling v. Brasuhn*, 102 Ill. 441; *Newton v. Holley*, 6 Wis. 592; *Lake v. Meacham*, 18 Wis. 356; *Kercheval v. Doty*, 31 Wis. 477; *Harter v. Christoph*, 32 Wis. 246; *Lavassar v. Washburns*, 50 Wis. 200; *Meiswinkel v. St. Paul F. & M. Ins. Co.* 75 Wis. 147, 6 L. R. A. 200; *Pancake v. Cauffman*, 114 Pa. 118; *McCall v. Bushnell*, 41 Minn. 37; *Bingham v. Thompson*, 4 Nev. 224.

We think these cases have gone upon the correct theory. It will not do to say that the strict rule is for the guidance of the trial court only. It is safe to say that there will always, in this class of cases, be some evidence to support the plaintiff's claim. If, then, when the case reaches this court, we are conclusively bound to say that the chancellor correctly applied the strict rule of law, that fact requires us to say that the evidence conforms to the findings, and not the findings to the evidence. Moreover, it is this strict rule of law upon which the titles to real estate rest for protection. Remove it, and few titles would be secure. He whose title is assailed in this manner invokes the rule in his defense; and, if that rule is to be applied only in the trial court, then, in case of defeat, he can never bring his case to this court, because at the threshold, he must abandon the very essence of his defense. We think such a holding would, in effect, abrogate the rule.

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Trial courts, however learned and conscientious, are just as liable to make mistakes upon this point as upon others. We must be governed, in considering this branch of the case, by the rule that requires the evidence to be clear, convincing, and satisfactory. But, in applying this rule, we must be controlled by the same principles that control in applying the general rule. The case comes to us with the presumption in favor of the legality and correctness of the findings. Appellant must establish error, and, where a finding is based upon parol evidence, its error must clearly and unquestionably appear, or it will not be disturbed. This disposes of all preliminary questions and leaves only the consideration of the evidence bearing upon appellant's liability for the value of the realty.

What is the character of the proof in this case? At the time of the transaction, the respondent was a farmer, and a man of limited attainments; a German by birth; unable to read writing with accuracy, and unable to write, in English, more than his name. Appellant was an energetic, experienced business man. He was an officer in a money-lending corporation, and, as such, had loaned respondent money, and taken a mortgage to secure the same on the land in controversy. It does not appear that the parties had been otherwise connected in business. On or prior to said March 20, 1885, respondent was arrested, charged with a felony. His preliminary hearing before the magistrate had been fixed for the subsequent day, and respondent had been required to give a bail bond in the sum of \$500 for his appearance. Under these circumstances, respondent applied to appellant to sign the bail bond as surety. The bond was signed by appellant, and the deed in question was executed. Respondent says the deed was executed to secure appellant against the liability on the bond. Appellant says it was a sale absolute, the consideration therefor (\$500) to be retained by him until relieved from liability on the bond. It will be convenient to recite here that respondent appeared before the magistrate as required by the bond, and upon his preliminary hearing he was bound over to appear at the next term of the district court, and his bail fixed at \$1,500, which he was unable to procure; and he remained in the county jail until in June following, when he was indicted, tried, convicted, and sentenced to a term in the state penitentiary, from which he was released in the spring of 1888. The evidence is presented in the abstract at great length, and, as was our duty, we have studied it carefully; and it is necessary to refer at some length to the portion thereof which bears directly upon the question of the character of this instrument. When Jasper first went to Hazen's office, on March 20, 1885, he was accompanied by one Ames, a deputy sheriff, who had him in charge. There was also present one Clement, who was also an officer in the same corporation with Hazen. It is undisputed that at this first interview nothing was said about an absolute conveyance or a purchase. Jasper offered security, and was asked what security he could give.

After Jasper stated the security, Mr. Hazen declined to accept it or to sign the bond, whereupon Jasper and the officer started for the jail. When they had gone about one block, Hazen called them back. Here we meet the first really material conflict in the testimony. Jasper says that upon their return they went into the office, and Hazen stated that he had concluded to go on the bond provided he (Jasper) would give him a deed of his farm as security, and that he would cancel the deed if Jasper appeared for preliminary examination, and that after a short conversation this was agreed to, and the deed executed. He positively denies that there was any conversation had or contract made on the sidewalk before they entered the office. Hazen swears that when they returned, after starting for the jail, he told the officer that he wanted to see Mr. Jasper, and thereupon the officer withdrew to the distance of 25 or 30 feet, and that he then held a conversation with Jasper upon the sidewalk, and which no one else heard, wherein he offered to sign the bail bond provided Jasper would sell him the farm for \$500 over and above the incumbrance thereon; that Jasper agreed thereto, and thereupon they went into the office, and the deed was drawn. The officer, Mr. Ames, testified by deposition in this case for both parties. In the deposition taken on behalf of respondent, he says: "I am a messenger of the Northern Pacific Express Company. In the spring of 1885 I was deputy sheriff, and plaintiff was in my custody upon the charge of grand larceny. I accompanied him to the office of defendant, and was present, and heard the conversation between them. Mr. Jasper asked Mr. Hazen to go on his bond for his appearance at the preliminary examination to be had before the justice of the peace. Hazen asked him what security he could give, and Jasper replied he could give him his farm as security, and his personal property. Hazen at first said he could not do it; it was not security enough. I think we then started out for the jail, and had gone nearly a block, when Hazen called us back. He then told Jasper he had concluded to help him, if he would give him a deed of his farm, and a bill of sale of his personal property. We then went into Hazen's office, and Hazen drew up a deed. My understanding was that Jasper gave the deed to secure Hazen for going on his bail bond. To the best of my recollection, Hazen was to deed back the property to Jasper on his appearance for his examination. I could not state the conversation which took place at the time the deed was made out and signed by Jasper without reading it. I understood that the deed was given simply as security for Jasper's appearance." In the deposition taken in behalf of appellant, he says: "My impression was that Hazen was to hold the land as security for the bail but, of course, I cannot say positively. The conversation in the office was very short. I don't think it lasted over ten minutes. . . . I paid no particular attention. I was simply a disinterested listener." This evidence, taken together, shows the witness to be entirely disinter-

ested, and speaks about as positively as to the purpose for which the instrument was executed as any honest man testifying six years after the occurrence, to a matter resting entirely in parol, would care to speak. One Davidson, a witness for respondent, who had charge of respondent's personal property that was subsequently turned over to appellant, testified that, when appellant presented the order for said property, he stated that he had leased the Jasper farm. This appellant denies. Mr. Clement, for appellant, testified that he was present, in one room or the other, in the office, while Mr. Jasper was there, and that he did not hear any such contract made as that to which Jasper testified. He testified that, personally, he did not know what the deal between the parties was. This is all the direct testimony bearing upon the point, and it tends strongly to establish the fact that the instrument was given as security.

There are, however, certain circumstances that greatly strengthen respondent's case: First, we notice the great discrepancy between the value of the property and the alleged consideration. This circumstance, while not sufficient in itself to convert a deed absolute into a mortgage, is nevertheless entitled to much consideration. The trial court found this land to be worth \$1,880 above the incumbrances thereon, and the finding has fair support in the evidence. It is true there is a conflict upon this point, but it is perfectly clear that Jasper considered the land worth at least \$2,000 above the incumbrances. If we wish to properly understand Jasper's intention, we must view the transaction from his standpoint. This bond was for his appearance at the preliminary examination. It was given on March 20. The examination was set for the 21st, and was actually held on the 22d. Now, it is scarcely conceivable that a man in Jasper's financial condition, having little else on earth, should sell property of the value of \$2,000 for the sum of \$500 simply to avoid one day's confinement in the county jail. Again, Hazen testifies that, for a portion of this consideration, he subsequently gave Jasper his promissory note for \$225, maturing the 1st of November, 1885. Jasper denies any such transaction. Hazen admits that he has never paid the note, that it has never been presented for payment, and that he has never heard from it, in any form whatever. This circumstance has its significance. Very soon after Jasper reached the penitentiary, he caused a letter to be written to Mr. Hazen, asking about his business generally; how the crops were looking upon the farm, etc. In the fall following he caused another letter to be written to Mr. Hazen, in which he asked what kind of a crop had been raised, and whether it was sufficient to meet the incumbrance, and requesting that, if necessary, personal property be sold to save the farm, as he wanted a home when he came back, etc. Mr. Hazen admits that he received these letters, and says: "The letters showed, distinctly, that he treated the matter as if I was running the farm for him, in substance as he claims now." No answer whatever was ever made to either letter. It would be most

unusual, most unprecedented presumption, for a man in Jasper's condition, and of his business experience, to thus boldly, and without a word of explanation, excuse, or extenuation, assume the existence of certain conditions and circumstances which he knew did not exist, and which he knew that the party to whom he was writing also knew did not exist. It was also unusual for the man who received those letters to permit those statements, so important and vital, to stand unchallenged. It is not to be presumed that Mr. Hazen, during all those years, would have suffered Mr. Jasper to rest in the belief that he (Hazen) was running the farm for his (Jasper's) benefit, and that Jasper would have a home to which to return upon his release, if such were not the fact. Upon appellant's theory of the case his silence becomes as inexplicable as respondent's presumption. Another circumstance of weight is the fact that, soon after his preliminary examination, Jasper executed and delivered to his neighbor, Davidson, who had charge of his personal property, a lease of the farm for that year. The lease was drawn by Jasper's attorney, and its execution is undisputed. It is true that Jasper subsequently made an arrangement with Hazen, by which Hazen was to have charge of the farm during Jasper's incarceration, and Jasper gave Hazen a written order on Davidson for the personal property, which Davidson delivered on demand, and it does not appear that he insisted upon the lease. But there is nothing whatever to indicate that the lease was not executed in perfect good faith. This was an overt act, committed a few days after the transaction which Hazen claims was a sale, by which Jasper notified Hazen, in no uncertain terms, that he still claimed to be the owner of the land. Nothing could be more inconsistent with the idea of a sale. It must be noticed, too, that if this transaction was a sale, as appellant claims, the whole contract was consummated within five minutes from the time an absolute sale was first mentioned, and appellant purchased a farm at the beginning of seeding time, with the building thereon filled with the personal effects, grain, and feed belonging to respondent, and no arrangement whatever was made for removing respondent's property, and no time mentioned for delivering possession of the farm. This would be a very unusual course of business.

But there is one circumstance in the case that we were at first strongly inclined to think lent support to appellant's position. It is this: On the 23d day of March, 1885,—the day after the preliminary examination, and while in jail,—respondent signed an order on appellant, in favor of his attorneys, in the following form: "Fargo, D. T., March 23rd, 1885. A. H. Hazen: Pay to the order of Barnett & McEldowney one hundred dollars from the purchase price of the north-east quarter sec. 32, tp. 143, range 50." The trial court finds that, when respondent signed the order, he did not know that the words, "from the purchase price," etc., were contained in it. But we did not readily understand why respondent signed an order upon appellant on any account, unless he supposed he had funds in appellant's hands, and there is no

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suggestion of any source from which such funds could come, except as the purchase-price of the land. On consideration, we doubt there being any force in the point. The order was not drawn at the suggestion, request, or with the knowledge of respondent. It was drawn by appellant himself, and given to the attorneys, with the statement, in effect, that he would pay the money on it. The attorneys presented it to respondent, with a similar statement. Respondent was in jail, awaiting indictment for a felony. He could not procure bail, and was without money. To a certain extent, he was bound down. Naturally, he was very anxious to receive the best services of his attorneys, and, to that end, anxious to meet their requirements for fees. The opportunity was presented to him, and, if he stopped to think of the motives that influenced appellant (which is doubtful), he might not unreasonably conclude that since appellant had the deed in his possession, which he could refuse to return until his advances were repaid, therefore he had concluded to lend aid to that extent, appellant having already refused to go upon the enlarged bail bond. The trial court finds that this order was used by the appellant fraudulently, and with intent to cheat and defraud respondent out of his land. There is a basis for this finding. The form of the order is unique. It suggests a studied design to accomplish some object. If appellant's intention was, from the first, to defraud respondent, it can readily be seen that this order was a most adroit instrument, and, of all others, most likely to prove effective. As a probative document, the order is two-edged, and the least that can be said is that appellant is not in position to claim anything from it. It will thus be seen that there was much in the testimony and in the surrounding facts and circumstances to corroborate Mr. Jasper. There was little or nothing in the testimony or the surrounding facts and circumstances to corroborate Mr. Hazen. The principals to the transaction, with equal means of knowledge, testified in direct opposition, and with a fullness of detail that precludes all idea of mistake or defective memory. Ingenuity cannot reconcile their testimony, and the broad mantle of charity cannot conceal the fact that one or the other was willfully falsifying. It became the delicate but imperative duty of the chancellor to say which. His decision in favor of either party necessarily threw the opprobrium upon the other. By his finding he has said appellant's testimony was not entitled to credence. In view of his superior advantages in personal observation of the witnesses, and in view of the probability or improbability of their respective stories, can we say the chancellor erred in so holding? Clearly not. When appellant's testimony is disregarded, the defense is without support, and falls to the ground. Upon full consideration of all the testimony bearing upon this branch of the case, we are agreed that the evidence was sufficiently clear, convincing, and satisfactory to fully warrant the findings of the chancellor.

Judgment affirmed.

All concur.

NEBRASKA SUPREME COURT.

STATE of Nebraska, *ex rel.* FIRST NATIONAL BANK OF CRETE,

v.

Joseph S. BARTLEY, State Treasurer.

(.....Neb.....)

*1. In construing a statute, effect must be given, if possible, to every word, clause, and sentence therein. In other words, a statute should be so construed as to make all its parts harmonize with each other, and render them consistent with its general scope and object.

2. The term "several current funds," as employed in section 1 of the Act of the Legislature of 1891, entitled "An Act to Provide for the Depositing of State and County Funds in Banks," construed to mean all the moneys belonging to the state, in the possession or under the control of the state treasurer.

3. The subject-matter of said act, and the obvious scope and purpose of its many provisions, leave no room for doubt that the legislature intended the statute should apply alike to each of the different funds of the state treasury.

4. Where money is deposited in a bank on an open account, subject to check of depositor, and not received as a special deposit,—the bank agreeing to pay interest on the money,—the transaction, although called a "deposit," is in substance and legal effect a loan.

5. Under section 9, article 8, of the State Constitution, moneys belonging to the several permanent educational funds of the state cannot be "invested or loaned except on United States or state securities, or registered county bonds."

6. The depositing in banks of public funds under the provisions of the depository law constitutes a loan and investment of the moneys so deposited.

7. Held, that the said law, in so far as it requires the depositing of the moneys belonging to the permanent educational funds of the state in banks, contravenes section 9, article 8, of the Constitution, and said law is inoperative as to said funds.

(February 20, 1894.)

APPPLICATION for a writ of mandamus to compel the state treasurer to deposit with relator a portion of the moneys in the state treasury according to the requirements of the state law. *Writ allowed.*

The facts are stated in the opinion.

Mr. James W. Dawes, for relator:

The law is the best expositor of itself; every part of it is to be taken into view for the purpose of discovering the mind of the law-giver; the details of one part may contain regulations and subject-matter restricting the intent of general expressions or words in another part of the same law, and hence,

*Headnotes by NORVAL, CH. J.

NOTE.—The nature of an ordinary deposit in a bank as a loan of money is very sharply presented in respect to public funds under an absolute con-

every part of the law is to be considered, and the legislative intent is to be extracted from the whole of it.

People v. Weston, 8 Neb. 312; *Richards v. Kountze*, 4 Neb. 209; *People v. Buffalo County Comrs.*, 4 Neb. 159; *Nebraska R. Co. v. Van Dusen*, 6 Neb. 161; *State v. Garber*, 7 Neb. 17; *Swearingen v. Roberts*, 12 Neb. 337; *State v. Babcock*, 21 Neb. 602; *Stout v. Rapp*, 17 Neb. 465; *Burlington & M. R. Co. v. Webb*, 18 Neb. 220, 53 Am. Rep. 809; *Livesey v. Omaha Hotel Co.* 5 Neb. 72; *State v. Van Dymn*, 24 Neb. 591; *State v. Liedtke*, 9 Neb. 498; *Sedgw. Stat. Constr.* §§ 229, 242; *Sutherland, Stat. Constr.* § 328.

In interpreting clauses we must presume that words have been employed in their natural and ordinary meaning.

Story, Const. § 453; *Cooley, Const. Lim.* 6th ed. pp. 69, 71, 73, 74; *Chance v. Marion County*, 64 Ill. 66; *People v. New York Cent. R. Co.* 34 Barb. 123, 24 N. Y. 485.

When a constitution gives a general power, or enjoins a duty, it also gives by implication every particular power necessary for the exercise of the one or the performance of the other.

Story, Const. § 430; *Cooley, Const. Lim.* p. 78; *United States v. Fisher*, 6 U. S. 2 Cranch, 358, 2 L. ed. 304; *McCulloch v. Maryland*, 17 U. S. 4 Wheat. 316, 4 L. ed. 579; *Northwestern Fertilizing Co. v. Hyde Park*, 70 Ill. 634.

For the purpose of the business of a great state, all funds are current funds so long as they remain on hand, or not permanently invested.

Trust funds in their investment must be with a view to the good of the beneficiary, and for no other purpose.

Shuey v. Latta, 90 Ind. 136; 4 Lawson, Rights, Rem. & Pr. § 2030.

The trustee may change the investment of the trust property, where it is manifestly for the benefit of the *cestui que trust*; but if he does so without an order of court, he does so at his own peril.

Cornwise v. Bourguin, 2 Ga. Dec. 15; *Quick v. Fisher*, 9 N. J. Eq. 802; *Washington v. Emery*, 57 N. C. 82; 4 Lawson, Rights, Rem. & Pr. § 2029.

The trustee, in dealing with the trust property, must not use it in his private business, or make any incidental profit from his fiduciary relation.

Pom. Eq. Jur. §§ 1075, 1077; *Miller v. Davidson*, 8 Ill. 518, 44 Am. Dec. 715; *Jacobus v. Munn*, 37 N. J. Eq. 48, 38 N. J. Eq. 622; *Sherman v. Lanier*, 39 N. J. Eq. 249.

It is the duty of the trustee to invest the trust property so as to produce an income, and if he suffers the trust money to lie idle when by a proper investment an income might be obtained, he will be liable for interest, or for what would have been earned by the proper handling and investment of the estate.

Pom. Eq. Jur. §§ 1071, 1072; *Knowlton v.*

stitutional prohibition against loans therefrom. For special deposit in banks, see note to *Mutual Acc. Assn. v. Jacobs* (Ill.) 16 L. R. A. 516.

Bradley, 17 N. H. 458, 48 Am. Dec. 609; *Min-
voss v. Coz*, 5 Johns. Ch. 441, 1 L. ed. 1135, 9
Am. Dec. 818; *Sinking Fund Comrs. v.
Walker*, 6 How. (Miss.) 143, 38 Am. Dec. 438;
Barney v. Saunders, 57 U. S. 16 How. 585, 14
L. ed. 1047; *Andrew v. Schmitt*, 64 Wis. 684.

It will not, we think, be seriously argued that the framers of our constitution intended, by the use of the language comprising section 9 of article 8, entitled "Education," to present an instrument so inflexible and rigid in its terms that compliance with those terms would defeat the very purpose for which the trust funds said section is meant to protect and secure, were formed or created, viz., that of producing an income for the furtherance of the cause of education.

The object and purpose of this provision of the constitution is not alone to keep these funds secure from loss, but as well to provide income from their use for the purpose specified in the trust.

State v. McPetridge, 20 L. R. A. 223, 84 Wis. 478.

*Messrs. George H. Hastings, Atty. Gen.,
John H. Ames and W. S. Summers* for
defendant.

Norval, Ch. J., delivered the opinion of the court:

This is an application by the relator, the First National Bank of Crete, for a peremptory writ of mandamus to Joseph S. Bartley, state treasurer, to compel respondent to deposit with relator a portion of the money in the state treasury, according to the requirements of the Act passed by the State Legislature of 1891, entitled, "An Act to Provide for the Depositing of State and County Funds in Banks." The petition charges, in substance, that on the 9th day of January, 1894, the governor, attorney-general, and secretary of state, in pursuance of the provisions of said act, designated the First National Bank of Crete as a state depository, and on said day said bank executed and delivered a bond conditioned as required by said law, which bond, and the sureties thereon, were duly accepted and approved by the proper officers; that only three other banks have complied with the provisions of said act of the legislature, so as to entitle them to the deposit of state funds, and that the amount of the bonds furnished by each of said other banks was and is \$100,000, so that the aggregate amount which the respondent is authorized at any time to have on deposit in all of said banks, pursuant to said act, is \$150,000; that respondent has refused to deposit any of the moneys now in the state treasury with the relator, although requested so to do; that respondent, at the time of such demand and refusal, stated that all the moneys belonging to the state, which he is empowered by said act to deposit, were already deposited in the said several banks, except moneys belonging to the following funds: Sinking, relief, permanent school, temporary school, permanent university, library, agricultural college endowment, normal school endowment, temporary university, normal school interest, and saluue. The petition further charges that respondent refuses to deposit in relator's

bank any of the money belonging to either of the above-enumerated funds, although the amount in his possession, and belonging to any one of said funds, added to the amount on deposit by said treasurer with the said other banks, exceeds in the aggregate the sum of \$150,000, and that the sole reason given by the respondent for his refusal to deposit in the bank of the relator any of the moneys in the above-mentioned funds was and is that none of said moneys are "current funds," within the meaning of the said depository law. The cause was submitted on a general demurrer to the petition.

The first question in this case is one of construction to be given to the act above mentioned, relating to the deposit of public moneys in banks. Was it the intention of the legislature to require all moneys coming into the state treasury to be deposited, or only a certain portion thereof?

Sections 1 and 2 of said Act (Laws 1891, chap. 50), are in these words: "Section 1. The state treasurer shall deposit, and at all times keep in deposit for safe keeping, in the state or national banks, or some of them doing business in the state, and of approved standing and responsibility, the amounts of money in his hands belonging to the several current funds in the state treasury, and any such bank may apply for the privilege of keeping on deposit such funds or some part thereof; all such deposits shall be subject to payment when demanded by the state treasurer on his check and all banks receiving and holding such deposits as aforesaid, shall be required to pay, and shall pay to the state for the privilege of holding any such deposit not less than 8 per cent per annum upon the amounts so deposited, as hereinbefore provided, and subject also to such regulations as are imposed by law and the rule adopted by the state treasurer for receiving and holding such deposits. Sec. 2. The amount to be paid by any and all banks under the provisions of this act for the privilege of keeping public funds on deposit shall be computed on the average daily balances of the public moneys kept on deposit therewith, and shall be paid and credited to the state quarterly on the first days of January, April, July and October of each and every year, and the treasurer shall require every such depository to keep separate accounts of such several funds of the state as may be deposited, showing the name of each fund to which the same belongs and the amounts and sums paid to the state for the privilege of keeping the same on deposit as aforesaid, and to each of said funds respectively shall be credited directly to the account of the fund or funds so held on deposit, in proportion to the amount of such funds so held." By section 3, each bank designated as a depository under the act is required to give a bond for the safe-keeping and payment of all deposits, and the accretions thereof, conditioned that it will render each month to the state treasurer a statement, in duplicate, showing the several daily balances, and the amount of state moneys held by it during the month, the amount of the accretions thereof, how credited separately, and for the payment of

the deposit, and the accretions accruing thereon, upon the presentation of the check of the state treasurer, and also that such depository will faithfully discharge the trust and comply with the provisions of the act. The section further provides the form of the bond, names the officer with which the same shall be deposited, and forbids the treasurer having on deposit in any bank, at one time, moneys exceeding one half of the penalty of the bond. Section 4 provides that "the making of profit, directly or indirectly, by the state treasurer, out of any money in the state treasury belonging to the state, the custody of which the state treasurer is charged with by loaning, depositing, or otherwise using it, or depositing the same in any manner, or the removal by the state treasurer, or by his consent, of such moneys, or a part thereof, out of the vault of the treasurer's department, or any legal depository of the same, except for the payment of warrants legally drawn or for the purpose of depositing the same in the banks selected as depositories under the provisions of this act, shall be deemed guilty of felony, and on conviction thereof shall be subjected to punishment in the state penitentiary for the term of not more than two years, or a fine not exceeding five thousand (\$5,000) dollars, and shall also be liable under and upon his official bond for all profits realized from such unlawful using of such funds. And it is hereby made the duty of the state treasurer to use all reasonable and proper means to secure to the state the best terms for the depositing of the money belonging to the state, consistent with the safe keeping and prompt payment of the funds of the state when demanded." The next section prescribed the penalty for the willful failure or refusal of the state treasurer to comply with the provisions of the act.

Counsel for the relator insists that it is the duty of the state treasurer to keep on deposit in the several banks designated as depositories all money received by him belonging to the state, while the respondent contends that the moneys belonging to what is commonly known as the "general fund"—a fund created for the purpose of paying the salaries of the state officers, and defraying the general expenses of the state government—are the only moneys to which the depository act applies. The principal controversy in the case is as to the meaning of the term "several current funds," as used in the section first above quoted. The decisions of the courts of other states do not aid us in our investigation. In fact, we have been unable to find a law upon the statute book of any state, relating to the deposit of public moneys in banks, precisely like our own. In most of the states having a depository law, the treasurer is either required by express enactment to deposit all moneys that shall come into his hands, or else the statute specifically enumerates what funds shall be deposited in banks. Of course, the phrase "current funds," as employed in commercial transactions, has a fixed, known signification. Thus, these words, as used in notes or bank checks, have been frequently defined by vari-

ous courts as meaning current money, lawful money, par funds, or money circulating without any discount. See *Galena Ins. Co. v. Kupfer*, 28 Ill. 332, 81 Am. Dec. 284; *Wharton v. Morris*, 1 U. S. 1 Dall. 125, 1 L. ed. 65; *Hulbert v. Carver*, 40 Barb. 245; *Phoenix Ins. Co. v. Allen*, 11 Mich. 501, 83 Am. Dec. 756; *American Emigrant Co. v. Clark*, 47 Iowa, 671. All will agree, we think, that the phrase "current funds" was not employed by the legislature, in enacting the statute under consideration, in the same sense in which that term is used in commercial dealings. The term "current funds," like many other words in our language, is susceptible of more than one meaning. Where a word is employed in a contract or statute which has different meanings, the sense in which it is used is to be gathered from the context. It is an elementary rule of construction that effect must be given, if possible, to every word, clause, and sentence of a statute. In other words, a statute must receive such construction as will make all its parts harmonize with each other, and render them consistent with its general scope and object. *Follmer v. Nuckolls County Comrs.* 6 Neb. 204; *State v. Babcock*, 21 Neb. 599. If we apply the foregoing rule in the interpretation of the law under consideration, it is not a difficult task to ascertain the legislature's intent. It should be remembered that the moneys which come into the state treasury from time to time are, either by constitutional provision or by legislative enactments, applicable to a variety of objects, and are divided into several separate and distinct funds, according to the sources from which they are derived, and the uses to which the same may be devoted. We know at the time this law was enacted that there were several of these funds, each having a well-understood and appropriate name, as the general fund, sinking fund, permanent school fund, and others which it is unnecessary to stop now to enumerate. It is obvious, therefore, that the words "several current funds" were employed by the legislature with reference to the various designations or divisions of the public moneys of the state. Manifestly, the construction placed upon the provisions of the statute by respondent's counsel is entirely too narrow and strained, and should not obtain. To adopt it would violate the rule above stated for the construction of statutes, which requires that some meaning, if possible, must be given to every word in the act, since the construction insisted upon cannot prevail, unless we attach no meaning to the word "several," in the above phrase of the first section of the law. The statute declares that "the amounts of money in his hands belonging to the several current funds in the state treasury" shall be deposited. This language was, without doubt, intended to apply to more than one fund. This is manifest by the use of the plural of the word "fund," and the employment of the adjective "several." It certainly could not have been the intention of the lawmakers that the moneys belonging to one fund, alone, should be kept on deposit with some designated depository. If they did, they were very unfor-

tunate in the use of language. Had it been the intention of the legislature that the act should apply to a single fund, it is fair to assume that language which could not be misunderstood would have been employed to express such purpose. But it is said that the word "current," in the connection in which it is used with the word "funds," indicates that the moneys which the lawmakers intended are those raised by taxation, and which are devoted to defraying the current expenses of the state government by disbursements from what is known as the "general fund," and in the same connection reference is made to the definition of the word "current." In the Century Dictionary it is defined thus: "Running; moving; flowing; passing; present in its course; as the current month or year." Other standard authorities give the word about the same definition. Assuming that the word was employed by the legislature in the sense indicated, yet the interpretation contended for by respondent is not permissible. While the amount of money belonging to the general fund of the state is continually changing or fluctuating, caused by the paying of the revenues derived from taxation into the treasury, and by their being disbursed, it is likewise true that the amount in each of the other different funds in the treasury is constantly changing, as the records kept by the treasurer and auditor, respectively, will disclose, and of which public records this court is bound to take judicial notice.

We do not entertain a doubt as to the sinking fund, relief fund, which is also a sinking fund, and the permanent educational funds, the moneys in each of which, counsel strenuously insist, are not "current funds," within the meaning of the law. The sinking and relief funds, now aggregating about a quarter of a million of dollars, consist of moneys derived from taxes levied for the purpose of paying the interest on outstanding bonds issued by the state, and for the purpose of paying the principal of said bonds when they become due. The moneys constituting these two funds are collected and paid into the treasury from time to time, precisely the same as the taxes are collected and paid into the general fund. The interest on one set of the bonds is paid by the state treasurer annually, and the other semi-annually. The permanent school fund, permanent university, normal school endowment, and agricultural college endowment funds constitute the permanent educational funds of the state. The permanent school fund is composed of the proceeds of the sale of land by the state, and of the redemption of United States and state securities, and county bonds belonging to said fund, and of escheated estates, and a 5 per centum granted by congress on the sale of government lands in the state. Each of the other educational funds is composed of the proceeds of lands which have been set apart for that purpose and sold by the state, and the redemption of securities belonging to said funds, respectively. Each of these several funds is continually augmented by moneys received from the sources indicated, and the moneys therein are diminished from

time to time by the making of investments for the benefit of said funds. Hence, the several educational funds are "current funds," in the sense in which that term is used in the law, if the moneys composing the general fund fall within the definition, and all concede that the law applies to the fund last named. In the language of counsel for relator: "For the purpose of the business of a great state, all funds are current, so long as they remain on hand, or not invested. Shall we, by the use of jugglery of language, extend the provisions of this law to the pittance of the general fund, as we often find it, and deny them to the sacred trust funds of the state? . . . These trust funds are current in that they should have and in that they demand, constant attention hourly, daily, all the time, looking to their profitable, permanent investment. These trust funds are current, moving, and changing funds, increasing and diminishing." In respect to two of the other funds of the state treasury, the temporary school and temporary university, which aggregated at the close of the last year more than \$360,000, it may be observed that the first of them is derived from a tax levied and collected at the same time as other state taxes for the support of the common schools of the state, together with the interest and rentals accruing from the sale and lease of school lands, and the interest received from the investments made for the benefit of the permanent school fund. The temporary university fund is supplied from a tax levied for the support of the state university, which is likewise paid at the same time other taxes are collected, and by moneys received from the interest and rentals of lands belonging to the university endowment fund, sold and leased by the state, together with the interest on securities belonging to said fund, and tuition fees. The moneys composing the temporary school and temporary university funds are paid into the state treasury as often as the moneys constituting any other fund of the state are paid in, and more frequently than the moneys belonging to the general fund. The moneys composing the temporary school fund are apportioned among the counties every six months, and are paid upon warrants upon the state treasury drawn by the auditor. The moneys belonging to the temporary university fund are disbursed from time to time upon the auditor's warrant. Both of these are moving funds, so to speak, and the balances therein are constantly increasing and diminishing. There is no word or provision in the act we are discussing which directly, in terms or by fair implication, limits the operation thereof to the moneys of the state belonging to one fund, more than another. On the contrary, the subject-matter of the act, and the obvious scope and purpose of its provisions, conclusively show it was the intention of the legislature that the statute should apply to all funds of the state, alike. An examination of the provisions of the second and fourth sections of the law strengthens this conclusion. By the second section, it is made the duty of every bank designated as a depository "to keep separate accounts of such several funds of the

state as may be deposited, showing the name of the fund to which the same belongs and the amounts and sums paid to the state for the privilege of keeping the same on deposit as aforesaid, and to each of said funds respectively shall be credited directly to the account of the fund or funds so held on deposit, in proportion to the amount of such fund as held." There is no ambiguity in this provision: Plain language could not have been used. It shows that the moneys in the several funds were to be deposited, and that the depository should keep a separate account with each fund. The fourth section, which we have quoted above, makes it the duty of the state treasurer to make every reasonable effort to secure to the state the best terms for the depositing of "the money belonging to the state," and it is also made a felony for such officer to make any profit out of any money in the state treasury, belonging thereto, by loaning, depositing, or otherwise using or disposing of it; and the removal of such money, or a part thereof, by the treasurer, or with his consent, out of the vaults of the treasury, or any legal depository, except for the payment of warrants, or for the purpose of depositing in the banks legally selected as depositories, is also declared a felony. Whether or not this section is legal and valid as a criminal statute, is not now involved, and will not be decided. Its consideration, however, tends to show the purpose and object of the legislature in enacting the law, and that the power to deposit all the moneys in the state treasury for the benefit of the state was meant to be conferred, and we think it has been, in plain terms, so far as the legislature possessed the power to do so.

This brings us to the consideration of another question, and that is whether the act which we have been considering is unconstitutional, in so far as it requires the deposit in banks of the moneys in the treasury belonging to the several educational funds of the state. Section 9 of article 8 of the Constitution of Nebraska reads as follows: "All funds belonging to the state for educational purposes, the interest and income whereof only are to be used, shall be deemed trust funds held by the state, and the state shall supply all losses thereof that may in any manner accrue, so that the same shall remain forever inviolate and undiminished; and shall not be invested or loaned except on United States or state securities, or registered county bonds of this state; and such funds, with the interest and income thereof, are hereby solemnly pledged for the purposes for which they are granted and set apart, and shall not be transferred to any other fund for other uses." The foregoing provision prohibits the loaning or investing of any moneys belonging to any of the permanent educational funds of the state, "except on United States or state securities, or registered county bonds of this state." The moneys in these several funds the constitution has impressed with a trust character, and the legislature is powerless to authorize them to be devoted to any purpose not within the scope of the constitutional provision quoted. Does the statute attempt to authorize the loaning or investing of these

trust funds? Counsel for relator contend that it does not; that it merely requires their deposit temporarily for safe-keeping, pending need for use, or opportunity for permanent investment. This construction would be a reasonable and proper one, if the deposit contemplated by the statute was a special one, merely for safe-keeping, and that the same identical money should be returned. But this is not the kind of deposit the legislature meant. If it was, the purpose is not indicated in the title of the act, since it makes no reference to the safe keeping of the funds deposited in banks. It is manifest from an examination of the entire act that a general deposit of the funds was what the framers intended. True, the first section declares that "the state treasurer shall deposit and at all times keep in deposit for safe-keeping," in the banks that shall be designated as depositories, the moneys in his hands belonging to the several current funds, subject to payment on the treasurer's check. But, further along in the same section, the bank receiving and keeping such deposit is required to pay the state not less than 8 per cent per annum upon the amounts so deposited; and the next section provides, among other things, in substance, that the interest shall be computed on the average daily balances of the public moneys kept on deposit. While the statute mentions "safe keeping," when the several provisions are construed together it is quite clear that the transaction contemplated does not amount to a special deposit. Whoever heard of that kind of a deposit of money being paid out on checks, or of a banking institution paying for the privilege of holding a special deposit of funds? The identical moneys deposited are not required to be returned. Obviously, the bank receiving them had the right to use and control the money as its own. It could loan the funds for the purpose of earning the money, with which to pay the stipulated interest due the state. A deposit of state funds, under the provisions of the law, amounts to a loan or investment of the funds so deposited. As was said by *Mr. Justice Miller* in his opinion in *Marine Bank of Chicago v. Fulton County Bank*, 69 U. S. 2 Wall. 256, 17 L. ed. 787. "All deposits made with bankers may be divided into two classes, namely, those in which the bank becomes bailee of the depositor, the title to the thing deposited remaining with the latter; and the other kind of deposit of money peculiar to banking business, in which the depositor, for his own convenience, parts with the title to his money, and loans it to the banker, and the latter, in consideration of the loan of the money, and the right to use it for his own profit, agrees to refund the same amount or any part thereof, on demand." The decisions are quite uniform to the effect that, where money deposited in a bank is passed generally to the credit of the depositor, the relation of debtor and creditor is thereby created, and the transaction, although called a deposit, is nevertheless, in substance and legal effect, a loan, and this though it is payable on demand. *Commercial Bank of Albany v. Hughes*, 17 Wend. 100; *Perley v. Muskegon County*, 82 Mich. 183, 20

Am. Rep. 637; *State v. Butties*, 3 Ohio St. 309; *Atina Nat. Bank v. Fourth Nat. Bank of New York*, 46 N. Y. 82, 7 Am. Rep. 314; *Lowry v. Polk County*, 51 Iowa, 50, 83 Am. Rep. 114; *Long v. Emsley*, 57 Iowa, 11; *Re Franklin Bank*, 1 Paige, 249, 2 L. ed. 635, 19 Am. Dec. 413; *Wray v. Tuskegee Ins. Co.* 34 Ala. 58; *Bank of Northern Liberties v. Jones*, 42 Pa. 535; *Knecht v. United States Sav. Inst.* 2 Mo. App. 563. In *Foley v. Hill*, 2 H. L. Cas. 28, *Lord Chancellor Cottenham* said: "Money, when paid into a bank, ceases altogether to be the money of the principal. It is then the money of the banker, who is bound to return an equivalent by paying a similar sum to that deposited with him when he is asked for it. The money paid into the banker's is money known by the principal to be placed there for the purpose of being under the control of the banker. It is then the banker's money. He is known to deal with it as his own. He makes what profit of it he can, which profit he retains to himself, paying back only the principal, according to the custom of bankers in some places, or the principal and a small rate of interest, according to the custom of bankers in other places. The money placed in the custody of a banker is, to all intents and purposes, the money of the banker, to do with it as he pleases. He is guilty of no breach of trust in employing it. He is not answerable to the principal if he puts it into jeopardy, if he engages in a hazardous speculation. He is not bound to keep it or deal with it as the property of his principal, but he is, of course, answerable for the amount, because he has contracted, having received that money, to repay to the principal, when demanded, a sum equivalent to that paid into his hands. That has been the subject of discussion in various cases, and that has been established to be the relative situation of banker and customer. That being established to be the relative situation of banker and customer, the banker is not an agent or factor, but he is a debtor." The Ohio case was this: The Ohio canal fund commissioners deposited with the Columbus Insurance Company \$100,000 of the money and funds of the state, belonging to the canal fund, and in consideration of which the company gave a bond, signed by various persons, to repay the same in two years, with 7 per cent interest thereon per annum, payable annually. In an action by the state upon the bond, the court held that the advancement of the money to the insurance company was a loan, although the bond denominated the receipt of the money as a "deposit." In *State v. Keim*, 8 Neb. 63, this court held that the deposit of state moneys by a state treasurer in a bank was a loan, in its legal effect. This case was cited with approval in *First Nat. Bank of South Bend v. Gandy*, 11 Neb. 431.

It is urged that the Nebraska cases cited do not apply to the questions here at issue, since, at the time they arose, no law was in existence which required the deposit of public funds in bank, while now the treasurer is not only authorized to deposit them for safe-keeping, but he is expressly commanded to do so. We are unable to see the force of

the argument. The fact that the legislature has enacted that state moneys shall be deposited in banks does not make the placing of the funds therein any the less a loan than had they been deposited without sanction of law. On the contrary, it would seem that the two cases decided by our own court are the more valuable as precedents for our now holding that such a transaction amounts in law to a loan, since we have a statute which authorizes the deposit of public funds, and in every case of deposit this statute enters into, and forms a part of, the contract.

Connecticut has a statute which declares that where the real estate of a married woman has been sold, and the proceeds thereof "secured or invested in her name or in the name of a trustee for her benefit, the same shall . . . not be liable to be taken on execution for the debts or liabilities of her husband." The supreme court of that state, in *Jennings v. Davis*, 31 Conn. 184, held that, where the money received by the wife from the sale of her lands is deposited in her name in a bank, it is invested, within the meaning of the statute. Sanford, J., in delivering the opinion, observes: "It is not stated whether the money was deposited in the bank for safe-keeping merely, or in the character of a loan to the bank, for which a stipulated rate of interest was paid during its continuance there, nor is it material to inquire, because, in either case, the deposit (being a general, as contradistinguished from a special, one) creates a debt in favor of the depositor, and against the bank, and then the money became 'invested' in that debt, and, being thus invested in the name of Mrs. Morehouse, was protected by the statute against her husband's claims upon it. . . . It can make no difference whether the depositor took any written evidence of this investment, or did not. The statute does not require any particular species of evidence that the investment has been made. It only requires that it shall be made in her name, or in the name of a trustee for her benefit. Money loaned is 'invested' in a debt against the borrower. If a promissory note is taken for it in the lender's name, the note becomes the evidence of the investment, and secures it to the lender. If no note is taken, the money is nevertheless 'invested' in the debt against the borrower, and in the lender's name."

The conclusion is irresistible that the framers of the law under review contemplated that the moneys deposited in pursuance of the provisions thereof should be retained by the bank receiving the same for an indefinite period of time and be used and loaned by it as its own, the bank being under obligation to repay the amount so deposited on the presentation of the check of the state treasurer. There is no room for doubt that, where money is deposited under this act, the bank receiving the same is not a bailee, which would be the case if the title to the money remained in the state after the same was received by the bank. Prior to the adoption of the present statute, there existed in this state no law authorizing or requiring the deposit of public funds in banks. It was, however, generally understood that each of the former state treasurers

had loaned the state funds to various banking institutions of the state for his own pecuniary benefit. The state received no income from such use of its money, and it was to remedy this that the depository law was enacted, rather than to provide for the safe keeping of the moneys belonging to the state treasury. The clear and manifest object of the statute was to enable the state to receive interest on its funds deposited in banks. The transaction contemplated by the statute is as much a loan or investment of the moneys deposited under its provisions as where a bank loans its moneys on the note of its customer; and if this law can be upheld, so far as it relates to the depositing of the permanent educational funds in banks, then there is nothing to prevent the legislature from enacting a law authorizing the loaning of the educational or trust funds to its citizens, with or without security for the repayment thereof; and all will agree that such a law, if enacted, would contravene the section of the constitution above quoted. But it is said that the constitution does not say that these educational funds shall not be temporarily deposited in bank, until opportunity for their permanent investment is presented. That instrument, in express terms, forbids their being "loaned or invested," except in a certain manner; and, as we have already attempted to show, the depositing of these moneys in bank on open account, drawing interest, although deposited temporarily, constitutes a loan and investment of the money. The fact that a person borrows money for an indefinite period, payable on demand of the lender, does not make the transaction any the less a loan than if the money had been taken for a fixed, long period of time. The same is equally true as regards the depositing of money in bank. The length of time the money is left does not determine whether the transaction is a loan or not. We are satisfied, both from reason and upon authority, that the depositing of the moneys belonging to the permanent educational fund of the state in banks, under the provisions of the depository law, is, in effect, a loan and investment of the funds so deposited, and is therefore inhibited by the constitution. We do not wish to be understood as in the least intimat-

ing that the legislature is powerless to enact a law requiring the state treasurer to deposit the moneys belonging to these funds in a bank or banks for safe-keeping merely. Perhaps it has that power, but such is not the scope and effect of the law before us, since it requires a general deposit of the funds, and not a special deposit, where the identical moneys deposited are to be returned. The amount of uninvested moneys belonging to the several permanent educational funds of the state is large, and opportunities for the permanent investment of these moneys in the class of securities and bonds described in the constitution are daily becoming less frequent, so that the amount in the treasury belonging to these trust funds is constantly increasing. That they should be invested so that they will yield an income to the state, no one will deny. But the remedy, in part at least, must come through an amendment of the constitution. The courts cannot, under the guise of interpretation, extend the powers conferred by the constitution beyond the scope of its provisions.

We have not considered, nor do we now determine, whether the relator has such an interest as entitled it to maintain the action, since its right to do so has not been raised or argued by counsel. As the state at large is directly interested in the enforcement of the depository law, the attorney-general could, and doubtless it is his duty to, institute proceedings to compel the depositing of the funds in the banks designated as depositories; and perhaps a bank which has complied with the law might do so, at least in case the attorney-general should refuse to appear and file the application. As it is important to the public interests that the real questions involved in this controversy should be determined and set at rest, we have thought it necessary to pass upon the merits of the case, without going into the question of who should have instituted the proceedings. It follows from the views expressed in the above opinion that the demurrer to the application should be overruled, and a peremptory writ of mandamus allowed.

Writ allowed.

The other Judges concur.

IOWA SUPREME COURT.

C. F. FURLEY *et al.*

CHICAGO, MILWAUKEE & ST. PAUL
R. CO., *App't.*

(.....Iowa.....)

**Absolute liability for damages caused
by importation of cattle infected with
Texas fever without allowing it to be shown**

that defendant had no notice and could not have ascertained the condition of the cattle by the exercise of reasonable care, is not created under Iowa Acts 21st Gen. Assm. chap. 156, § 2, 8, substituted for §§ 4058 and 4059 of the Code prohibiting the importation of such cattle and making a violation of the law a misdemeanor with a right of action to persons injured for the damages sustained.

(*Robinson, J., dissents.*)

NOTE.—An exemption from liability for violation of the express terms of a statute when done unintentionally and without negligence, although allowed in the above case, is not made without dissent. But the harshness of the operation of a law which would inflict a penalty for dealing in cattle which communicate an unknown and undeveloped

contagion, where the dealer exercises ordinary care, and is free from any wrong intent, is so great that an implied exception seems to the majority of the court to have been intended. The statute, as an exercise of the police power, is not altogether unlike one who should make a person subject to a penalty for personally communicating a contagious

(January 31, 1894.)

APPEAL by defendant from a judgment of the District Court of Tama County in favor of plaintiff in an action brought to recover damages for the loss of certain cattle which died from Texas fever, which was alleged to have been communicated to them by a cow unlawfully transported into the state by defendant. *Reversed.*

The facts are stated in the opinions.

Messrs. Mills & Keeler, for appellant:

The statute in question, enacted in 1886 for the protection of domestic cattle from contagious diseases, was evidently taken from an earlier and substantially similar law of the state of Kansas.

See Kan. Laws 1881, chap. 161; Laws 1884, chap. 3. In 1887 the supreme court of that state construed their statute, in a case involving the precise question at issue here, and held:

"No recovery could be had against the defendant where he acted in good faith, unless he had knowledge, or such facts existed as made him chargeable with knowledge, that the cattle were diseased, or of a kind liable to communicate the disease to the domestic cattle of the state."

Patee v. Adams, 37 Kan. 133.

In 1888, a similar case against a common carrier, the supreme court of Kansas reaffirmed the construction placed upon the statute in the *Patee Case*.

Missouri Pac. R. Co. v. Finley, 38 Kan. 550.

In the Iowa statute, the civil action for damages allowed by section 5419, is based and conditioned upon a violation of the provisions of the preceding section. The legal wrong, if any, lies in doing the act prohibited by section 5418. This section is highly penal, and must therefore be construed strictly.

Bond v. Wabash, St. L. & P. R. Co. 67 Iowa, 716; *Sutherland*, Stat. Constr. §§ 849, 850.

As the language used does not require the interpretation of absolute liability, irrespective of negligence, the further presumption obtains that the legislature did not intend to abrogate the common-law rule in such cases, which makes negligence the basis of liability.

Sutherland, Stat. Constr. §§ 290, 291, 371; *Potter's Dwar.* Stat. 185.

The trial court so construed and applied this statute that defendant became liable in treble damages if it erred by refusing to transport the cow, and in actual damages with added fine or imprisonment, or both, if it erred by carrying the cow into the state. A construction of statute which necessarily leads to such absurd, unjust, and oppressive results cannot be correct in law, and should not be adopted by this court.

Small v. Chicago, R. I. & P. R. Co. 50 Iowa, 345; *Dilger v. Palmer*, 60 Iowa, 180; *Sutherland*, Stat. Constr. §§ 322, 324, 407.

Even in strictly penal laws, the general rule

excuses an innocent violation committed under an honest mistake of the facts, and this upon the plainest principles of reason and justice.

Margate Pier Co. v. Hannam, 3 Barn. & Ald. 266; *Sutherland*, Stat. Constr. § 354; *Bishop*, Statutory Crimes, § 132; 1 *Bishop*, Crim. L. 6th ed. §§ 291, 303, 304; *Dickenson v. Fletcher*, L. R. 9 C. P. 1; *Reg. v. Tolson*, L. R. 23 Q. B. Div. 163; *Reed v. Davis*, 8 Pick. 516; *Hassenfrats v. Kelly*, 18 Johns. 468; *Ethridge v. Cromwell*, 8 Wend. 635; *Lane v. Shears*, 1 Wend. 437; *Anderson v. State*, 7 Ohio, 250; *Duncan v. State*, 7 Humph. 148; *Cohn v. Neeses*, 40 Wis. 393; *Wallace v. Finch*, 24 Mich. 255; *Mhoon v. Greenfield*, 52 Miss. 434; *Price v. Thornton*, 10 Mo. 185; *Com. v. Stout*, 7 B. Mon. 247; *Henry v. Tilson*, 17 Vt. 473; *Wilberforce*, Statute Law, p. 254.

Under the Fire and Stock Statute the liability is just as absolute for failure to keep the fence in proper condition after construction, as for failure to erect it originally, yet this court has uniformly held that knowledge of the defective condition of the fence, and negligence in maintaining it, were necessary conditions of liability on the part of the railroad company.

Aylesworth v. Chicago, R. I. & P. R. Co. 30 Iowa, 461; *Perry v. Dubuque & S. W. R. Co.* 36 Iowa, 105; *McCormick v. Chicago, R. I. & P. R. Co.* 41 Iowa, 195.

There must be negligence somewhere to make the company liable.

Small v. Chicago, R. I. & P. R. Co. 50 Iowa, 341. See also *Orabell v. Wapello Coal Co.* 68 Iowa, 753; *Reynolds v. Hindman*, 32 Iowa, 146; *Messenger v. Pate*, 42 Iowa, 445; *Cooley*, Const. Lim. p. 580.

The construction placed upon this Texas Fever Statute by the court below brings it in direct conflict with section 8, article 1, of the Constitution of the United States, as amounting to a regulation and burdensome restriction of interstate commerce.

The statute, as construed below, cannot be justified as a mere quarantine regulation, or legitimate exercise of the police power of the state.

Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 24 L. ed. 527; *Minnesota v. Barber*, 136 U. S. 318, 34 L. ed. 455, 3 Inters. Com. Rep. 185; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823; *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 123, 3 Inters. Com. Rep. 86; *Henderson v. Wickham*, 92 U. S. 259, 23 L. ed. 543; *Norfolk & W. R. Co. v. Com.* 13 L. R. A. 107, 38 Va. 95, 47 Am. & Eng. R. R. Cas. 1.

Messrs. Struble & Stiger for appellees.

Rothrock, J., delivered the opinion of the court:

It appears from the record that on June 22, 1890, one Nathan L. Brown shipped from Long Beach, on the Gulf of Mexico, six

diseased. If such diseases were communicated by a person in whom it had not fully developed, and who was not aware of the fact that he had it or could communicate it, a statute making him liable therefor might be constitutional, but surely a very strict construction of it would be proper.

As to the liability of persons for communicating 33 L. R. A.

contagious diseases, see *State v. Butts* (S. Dak.) 19 L. R. A. 725, and note.

For liability of one who kills a horse which was not in fact diseased, in supposed obedience to a statute requiring the destruction of glandered horses, see *Miller v. Horton* (Mass.) 10 L. R. A. 116.

miles east of Pass Christian, in the state of Mississippi, a carload of emigrant movables, consisting of household goods, a horse, and a cow, to a station on defendant's road at Elberon, Tama county, in this state. Brown accompanied the car, and remained in charge of its contents, throughout the journey. The car was billed through from the starting point to its destination, and it was transported over connecting lines until it reached Port Byron Junction, in the state of Illinois, where it was delivered to the defendant, to be forwarded over defendant's road to its destination. When the car arrived at Elberon, which was about June 27, 1890, Brown unloaded and took away his property. He turned the cow into a pasture with plaintiffs' cattle, and it is claimed by the plaintiffs that their cattle contracted the disease known as "Texas Fever" from said cow, and that by reason thereof about thirty-two of plaintiffs' cattle died. The defendant filed an answer in two counts. The plaintiffs demurred to the second count of the answer. The court sustained the demurrer. The trial proceeded upon the petition and the first count in the answer. The main contention on the trial, after the demurrer was sustained, appears to have been on the question whether the plaintiffs' cattle died from Texas fever by contagion from the said cow owned by Brown, or from some other disease.

It is conceded by counsel for the respective parties that the principal question in this appeal is whether the demurrer to the second count of the answer was rightly sustained. We will therefore proceed to a consideration of that question. The defendant, in the second count of the answer, admits that it received the car at Port Byron Junction in the state of Illinois, with a waybill of said car and contents, and that said cow and other property were shipped from Long Beach, near Pass Christian, Miss. The defensive part of the answer is as follows: "And defendant further avers that at no time while said car and stock were so in its possession or under its control, whether in transit or otherwise, did it have any knowledge or information whatever, of any nature or degree, that said cow was in such condition as to infect with or to communicate Texas fever to other cattle, or to plaintiffs' cattle; that, if such cow was then in that condition, such fact was utterly unknown to this defendant, and could not have been discovered by it with the means then at its command, or in the exercise of such care on its part as was required by law, under the circumstances; that this defendant exercised all due care and caution on its part, and had neither knowledge nor means of knowledge that said cow, when so brought within the state of Iowa, or when delivered at Elberon, was diseased, or was in such condition as to infect with or to communicate to other cattle Texas fever, as alleged in plaintiffs' petition, and it was not negligent in that respect." There were several paragraphs in the demurrer, separately numbered; but there was really only one ground upon which it was claimed that the answer was vulnerable to the demurrer. It is clearly stated in the seventh paragraph,

which is as follows: "The statute of Iowa expressly prohibited any person from bringing into this state cattle in such a condition as to infect with or to communicate Texas fever to other cattle. Defendant, in the said second count of its answer, admits, by implication, the violation of this statute, but pleads, as a defense and excuse, that it acted in ignorance and without information as to the condition of the animal in question; and the admission of the defendant that it violated the law of this state is not excused by an allegation of want of knowledge or information, nor that it acted in violation of law in ignorance of its provisions, and exercised care in the premises." It will be observed that the demurrer is as broad as the answer and the question presented is, Is the defendant absolutely liable to the plaintiffs, notwithstanding the fact that its agents and employes had no knowledge or information of the condition of the cow, and that the said condition could not have been discovered by the exercise of proper care and caution, and that the defendant was not negligent in receiving the car, and transporting its contents to the destination? The ruling on the demurrer precluded the defendant from showing that it exercised all proper care and caution, and was not chargeable with negligence; and the charge to the jury was to the effect that if the cow was, at the time of shipment, in such condition as to infect with or communicate Texas fever to other cattle, and did communicate the disease to plaintiffs' cattle, from which disease they, or some of them, died, the defendant was absolutely liable for damages.

The question is to be determined by the construction placed on chapter 156 of the Acts of the 21st General Assembly, which is amendatory to, or rather substituted for, sections 4058 and 4059 of the Code. The second section of the Act, which is designated as section 4058, prohibits any person or corporation from importing any cattle into this state which, at the time of such importation, are in such condition as to infect with or communicate to other cattle pleuropneumonia, or splenic or Texas fever. It makes the violation of the law a misdemeanor, and visits the offender with a fine of not less than \$300, and not more than \$1,000, or by both fine and imprisonment in the county jail not exceeding six months, in the discretion of the court. The third section of the Act is as follows: "Any person who shall be injured or damaged by any of the acts of the persons named in section 4058, and which are prohibited by such section, in addition to the remedy therein provided, may bring an action at law against any such persons, agents, employes or corporation mentioned therein, and recover the actual damages sustained by the person or persons so injured, and neither said criminal proceeding nor said civil action shall in any stage of the same be a bar to a conviction or to a recovery in the other." This statutory provision does not appear to us to be essentially different, so far as the rule of liability thereunder is involved, from that part of section 1289 of the Code which was under consideration by this court in the

case of *Small v. Chicago, R. I. & P. R. Co.*, 50 Iowa, 388. That provision is as follows: "Any corporation operating a railway shall be liable for all damages by fire that is set out or caused by operating of any such railway, and such damage may be recovered by the party damaged in the same manner as set forth in this section in regard to stock, except as to double damages." It was held, in the case above cited, that this does not create an absolute liability, but makes the fact of an injury so occurring only prima facie evidence of negligence, which may be rebutted by a showing of freedom from negligence. It is true that the decision in that case was made by a divided court; but the rule of the majority has since been followed in very many cases. See *Slosson v. Burlington, C. R. & N. R. Co.* 51 Iowa, 294; *Lobby v. Chicago, R. I. & P. R. Co.* 52 Iowa, 92; *Babcock v. Chicago & N. W. R. Co.* 63 Iowa, 598, 598; *Rose v. Chicago & N. W. R. Co.* 62 Iowa, 625; *Seaska v. Chicago, M. & St. P. R. Co.* 77 Iowa, 137; *Engle v. Chicago, M. & St. P. R. Co.* 77 Iowa, 661, 666; *Greenfield v. Chicago & N. W. R. Co.* 83 Iowa, 270. And since the decision was made in *Small's Case* there have been six regular sessions of the general assembly, and we are not aware that at any time there has been any proposition introduced looking to an amendment of this statute, so as to make the liability for setting out fires absolute. Under the circumstances, it would be an amazing departure from a long line of decisions to hold that the construction adopted in *Small's Case* is not the settled law of this state, as expressed by this court, and as enacted by the lawmaking power. As we have said, the statute declaring liability for setting out fires, so far as the question of its absoluteness is involved, is not different from the statute applicable to this case. We need not here set them out side by side. They are essentially the same, as will appear by any fair examination of their provisions. It is provided by a statute of the state of Kansas as follows: "That no person or persons shall drive or cause to be driven into or through any county in this state, any cattle diseased with the disease known as Texas, splenic, or Spanish fever. Any person violating any provision of this Act shall on conviction be adjudged guilty of a misdemeanor, and shall be fined not less than one hundred and not more than one thousand dollars, and be imprisoned in the county jail not less than thirty days and not more than one year." Another section of the same Act is as follows: "Any person or persons who shall drive or cause to be driven into or through any county in this state any of the cattle mentioned in section one of this Act, in violation of this Act, shall be liable to the party injured for all damages that may arise from the communication of disease from the cattle so driven to be recovered in civil action, and the party so injured shall have a lien upon the cattle so driven."

In the case of *Pates v. Adams*, 37 Kan. 188, it was held that in an action to recover damages under this statute it was essential for the plaintiff to allege and prove that the defendant knew, or had reason to know, that

the cattle so driven were diseased with the fever, or were liable to communicate the disease to the domestic cattle of the state. It will be observed that the statute involved in that case is not essentially different from our own. They both declare a liability in general terms, without any language importing an absolute liability. The cited case goes much further than *Small's Case*, or than we do in the case at bar, and holds that the burden of proof of knowledge or negligence is on the plaintiff. *Pates v. Adams*, *supra*, was followed and approved in *Missouri Pac. R. Co. v. Finley*, 88 Kan. 550. Counsel for appellee admit that the cited cases involve the same question which we are considering. It is to be conceded that a contrary rule has been adopted in the state of Missouri. See *Wilson v. Kansas City, St. J. & C. B. R. Co.* 60 Mo. 184, and *Surface v. Hannibal & St. J. R. Co.* 63 Mo. 452. In our opinion, the rule of the Kansas cases is in line with the better principle.

But it is claimed by counsel for appellee that the question has, in effect, been determined by this court; and we are cited to the cases of *Jamison v. Burton*, 48 Iowa, 282; *Dudley v. Sautbaine*, 49 Iowa, 650, 31 Am. Rep. 165; *State v. Thompson*, 74 Iowa, 119, and *State v. Cloughly*, 78 Iowa, 626.

These and other cases which have been decided by this court are mainly prosecutions for violations of the prohibitory liquor law of this state by selling beer to minors and inebriates, and it is held that want of knowledge of the age or habits of the purchaser is no defense. The principle upon which the cases rest is that the avocation of the vendor of intoxicating liquors is unlawful, except under certain circumstances, and that, when he sells, he assumes the burden of knowing that these circumstances exist, and sells his liquor at his peril. It is a general rule that mere ignorance of fact will not excuse a person from a penalty provided by statute. 3 Greenl. Ev. § 21. But that principle can have no application to one who, in the pursuit of a lawful calling, and in the exercise of proper care and caution, does an act contrary to some statutory requirement. The theory of appellee is that defendant committed a criminal act, the violation of which is punishable by fine and imprisonment, and that, as it could make no successful defense to a criminal prosecution, it is absolutely liable for the damages occasioned by the criminal act. This is not an absolute rule. The law is well settled that, when a railroad train is operated through a city at a rate of speed prohibited by law or ordinance under a penalty, there is no absolute liability to a person injured by reason of the violation of the law or ordinance. It may, in such case, be shown that the person injured contributed to cause the injury by his own negligence. The application of the principle contended for to the facts of this case, it appears to us, shows conclusively that the defendant should have the right to prove, if it can, that it was free from negligence in receiving and transporting the car over its road. There is no hardship to plaintiffs in adopting this rule. The case is exceptional in its facts.

It was not an ordinary shipment of livestock, which would put the employers on inquiry as to whether the animals were such as come within the provisions of the statute. The cow was not bred in the south. The owner of the property was a resident of this state. In the fall of the year previous to the shipment complained of, Brown went to Long Beach to remain during the winter. He shipped his cow, with certain household goods, to that place, and the alleged cause of action arose when he reshipped the property to this state in the spring following. There was nothing in the appearance of the cow indicating that she had any disease. The fact appears to be that she was not diseased. She was milked during all the time she was in the south, and after she was returned to this state, and the milk was used by Brown's family. In the autumn of the following year she was fattened and slaughtered, and her flesh was used for food. There is evidence, however, to the effect that an animal acclimated in the south, and removed to this state, may communicate the Texas fever to cattle here without showing any evidence of the disease itself. In view of this claim, and in consideration of the fact that the defendant, as a common carrier, is bound to receive and transport freight offered for shipment, it would be unjust and unreasonable to require that it be absolutely liable to pay all damages arising by reason of the carrying of animals that may communicate contagious diseases, without allowing it to be shown that the carrier had no notice, and could not, by the use of reasonable care, have ascertained, that the animal belonged to the class, the transportation of which is forbidden by the statute. We think the statute under consideration does not impose any such absolute liability. The business of a common carrier is not only lawful, but it is absolutely essential as an agency in the transaction of the business interests and commercial affairs of the country. Under the facts of this case, the claim of appellee, in the face of the facts pleaded in the answer, is that the defendant was bound at its peril, before receiving the car, to ascertain that the animal was not in such condition as to communicate the disease to other cattle. Under the law of this state and the act of congress known as the "Interstate Commerce Law," the defendant was bound to receive freight in car lots, and haul it to its destination. McClain's Code, § 2039; 24 Stat. at L. 879. And the nature of the freight in this case was such that the defendant was bound to act promptly. It was liable to an action for damages if it failed to do so. The contention of plaintiff is that there is a liability for fine and imprisonment and damages for receiving and hauling the car. Suppose that the defendant was a natural person, and should be indicted, and he should offer to prove the facts set up in this answer; we think there ought to be no question that it would be a great error to reject the evidence, and hold the defendant guilty of a crime, and imprison him in a county jail for six months, and fine him \$1,000. There is nothing in either the letter or the spirit of the

statute which would sanction any such proceeding. The case is essentially different from those arising upon such police regulations as are enacted for the purpose of regulating dramshops, gambling houses, and the smuggling of goods, and the like. Counsel for appellee, in their argument in this court, say that, if the construction of the statute which we have adopted is to prevail, "it will at once become a dead letter, and may as well be repealed." We think the fears of counsel are groundless. As we have said, the case at bar is exceptional in its facts. We hold that the defendant should be allowed to show that it was blameless, if it can make such a showing. The rule in the *Small Case* left that statute in full force, and recovery has been had under that law in a large number of cases, as the reports of the decisions of this court will show.

The judgment of the district court is reversed.

Kinne, J., took no part in the decision of this case.

Robinson, J., dissenting:

I do not agree to what is said in the foregoing opinion in regard to the effect of chapter 166 of the Acts of the 21st General Assembly. Section 4058 of the Code, as amended by that act, provides as follows: "Any railway company . . . who shall carry, ship, or deliver any cattle into this state . . . which at the time they were . . . brought, shipped, or transported into this state were in such condition as to infect with or to communicate to other cattle, pleuropneumonia, or splenic or Texas fever, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than three hundred dollars and not more than one thousand dollars, or by both fine and imprisonment in the county jail not exceeding six months. . . ." In my opinion, the offense for which that section provides is one of the class referred to in 3 Greenleaf on Evidence, § 21, in the following language: "Where a statute commands that an act be done or omitted which, in the absence of such statute, might have been done without culpability, ignorance of the fact or state of things contemplated by the statute, it seems, will not excuse its violation. Thus, for example, when the law enacts the forfeiture of a ship having smuggled goods on board, and such goods are secreted on board by some of the crew, the owner and officers being alike innocently ignorant of the fact, yet the forfeiture is incurred notwithstanding their ignorance. Such is also the case in regard to many other fiscal, police, and other laws and regulations, for the mere violation of which, irrespective of the motives or knowledge of the party, certain penalties are enacted; for the law, in these cases, seems to bind the party to know the facts and to obey the law at his peril."

In *Com. v. Raymond*, 97 Mass. 568, it is said to be the general rule, where acts which are not evil in themselves are prohibited by law from motives of public policy, and not because of their moral turpitude or the crim-

inal intent with which they are committed, that persons are bound to know the facts and obey the law at their peril. That doctrine I understand to be fully sustained by the authorities. Thus, in 1 Wharton on Criminal Law, § 88, it is said: "When a statute makes an act indictable irrespective of guilty knowledge, then ignorance of fact, no matter how sincere, is no defense. . . . The function of imposing indictability on pernicious acts, irrespective of intent, is one which has been exercised by legislatures, not only frequently, but from necessity. . . . The question is one of policy; and this may be taken into consideration when the legislative meaning is sought. That a man should be convicted of a malicious act without proof of malice, or of a negligent act without proof of negligence, is of course an enormity which no legislature could be supposed to direct. But it is otherwise as to certain mischievous acts, which it may be a sound policy to prohibit arbitrarily, because they imperil public safety (as, for example, the selling of intoxicating drinks and defective storing of explosive compounds), and because to require scienter to be proved would be to defeat the object of the statutes, since in many cases, and those the most dangerous of the class, it would be out of the power of the prosecution to prove scienter beyond reasonable doubt."

The doctrine of the statements quoted is illustrated by the citation of numerous cases where persons were adjudged guilty of crimes by innocently doing acts which they believed, and had good reason to believe, were lawful; and the conclusion of the author is that honest ignorance of a fact may be no more of a defense than honest ignorance of a law, and that honest belief that an illegal act is legal is not necessarily a defense in a criminal prosecution. See also *State v. Hartfel*, 24 Wis. 60; 4 Am. & Eng. Encyclop. Law, 689. The doctrine of the authorities cited was approved in the recent case of *Com. v. Weiss*, 189 Pa. 247, 11 L. R. A. 530. A legislative enactment of that state, known as the "Oleomargarine Act," provided that "no person, firm, or corporate body shall manufacture out of any oleaginous substance or any compound of the same, other than that produced from unadulterated milk or of cream from the same, any article designed to take the place of butter or cheese produced from pure unadulterated milk, or cream from the same, or of any imitations or adulterated butter or cheese, nor shall sell or offer for sale, or have in his, her, or their possession with intent to sell the same as an article of food." The act also provided that every person who should manufacture, sell, or offer or expose for sale, or have in his possession with intent to sell, any substance, the manufacture and sale of which is prohibited by the provision quoted, should for every such offense forfeit and pay the sum of \$100. The action named was commenced against the keeper of a restaurant to recover the statutory penalty for a violation of the law. It appeared that he had served a customer with oleomargarine, contrary to the provisions of the act specified, but that he did not know-

ingly furnish, or authorize to be furnished, to any of his customers, any oleomargarine, but, so far as he knew, furnished genuine butter. In considering his guilt the court said: "Whether a criminal intent or a guilty knowledge is a necessary ingredient of a statutory offense is a matter of construction. It is for the legislature to determine whether the public injury threatened in any particular matter is such, and so great, as to justify an absolute and indiscriminate prohibition, even if, in the honest prosecution of any particular trade or business, conducted for the manufacture of articles of food, the product is healthful and nutritious; yet, if the opportunities for fraud and adulteration are such as to threaten the public health, it is undoubtedly in the power of the legislature either to punish those who knowingly traffic in the fraudulent article, or, by a sweeping provision to that effect, to prohibit the manufacture and sale altogether. The question for us to decide, therefore, is whether or not, from the language of the statute, and in view of the manifest purpose and design of the same, the legislature intended that the legality or illegality of the sale should depend upon the ignorance or knowledge of the party charged. The statute in question was the exercise of the police power, and the act was sustained upon this ground, not only in this court, but also in the Supreme Court of the United States. . . . The prohibition is absolute and general; it could not be expressed in terms more explicit and comprehensive. The statutory definition of the offense embraces no word implying that the forbidden act shall be done knowingly or willfully, and, if it did, the design and purpose of the act would be practically defeated. The intention of the legislature is plain,—that persons engaged in the traffic shall engage in it at their peril, and that they cannot set up their ignorance of the nature and qualities of the commodities they sell as a defense."

The rule of the authorities cited has been frequently recognized by this court. In *State v. Probasco*, 62 Iowa, 401, it was held that if a minor was permitted to remain in a billiard saloon, in violation of the statute, the offense prescribed by the statute was committed, even though the keeper of the saloon did not know of the presence of the minor. See also *State v. Thompson*, 74 Iowa, 122. The same rule has been applied in cases involving acts wrong in themselves. Thus, in *State v. Newton*, 44 Iowa, 45, it was held that a person who made an assault on a female under the age of ten years for a purpose forbidden by section 8861 of the Code was guilty of a violation of section 3873, even though he did not know that the child was under that age. It was said that the crime did not depend upon the knowledge of defendant of the fact that the child was under ten years of age but upon the fact itself. The case of *State v. Ruhl*, 8 Iowa, 449, announces a similar doctrine, and it is supported by numerous decisions in civil cases. In *Dudley v. Sautbaine*, 49 Iowa, 650, 31 Am. Rep. 165, it was held that, where the agent of the owner of a saloon sold intoxicating

liquor to a person who was in the habit of becoming intoxicated in violation of law, his principal was liable, although the liquor was sold without his knowledge, and in violation of instructions he had given. See also *Church v. Higham*, 44 Iowa, 482. Where a person had the right to sell intoxicating liquor to some persons, but was prohibited from selling to a minor, he was guilty of a violation of the law in selling to a minor, although he did not know that the purchaser had not attained his majority, and had good reason to suppose that he had. *Jamison v. Burton*, 43 Iowa, 282. If a person set fire to and burn, or cause to be burned, any prairie or timber land, and allow such fire to escape his control, between the 1st day of September in any year and the 1st day of May following, he is absolutely liable for damages which result, and his liability is not affected by the degree of diligence he used to prevent the escape of the fire. *Conn v. May*, 36 Iowa, 241; *Thoburn v. Campbell*, 80 Iowa, 340.

Section 4059 of the Code, as amended by chapter 156 of the Acts of the 21st General Assembly, provides that "any person who shall be injured or damaged by any of the acts of the persons named in section 4058 and which are prohibited by such section, in addition to the remedy therein provided, may bring an action at law against any such persons, agents, employes, or corporations mentioned therein, and recover the actual damages sustained by the person or persons so injured, and neither said criminal proceeding nor said civil action, in any stage of the same, shall be a bar to a conviction or to a recovery in the other." This section authorizes a recovery for damages which were caused by any of the acts prohibited by the preceding section. It follows that if they may be committed without knowledge of the condition of the cattle, although reasonable care has been exercised to ascertain it, and without an evil intent, persons injured by them may recover damages caused thereby, without regard to the knowledge or intent of the persons who committed them, and without regard to the diligence they used to avoid them. The right of recovery extends to all acts causing damage which are made criminal by the statute. Section 4058 is in the nature of a police regulation. In *Hannibal & St. J. R. Co. v. Busen*, 95 U. S. 465, 24 L. ed. 527, it was admitted that, in the exercise of its police powers, a state may enact laws for the protection of property within its borders, and to that end may exclude animals having contagious or infectious diseases; and the same doctrine has been announced in other cases and is well settled.

It is said, however, that the statute under consideration, so far as the rule of liability thereunder is involved, is not essentially different from that construed in *Small v. Chicago, R. I. & P. R. Co.*, 50 Iowa, 838, and that the doctrine of that case should be applied in this. It does not seem to me that there is anything to justify the presumption that the general assembly intended to incorporate the doctrine of the *Small Case* in its revision of sections 4058 and 4059 of the Code. The originals of those sections were enacted

by the 12th General Assembly in the year 1868, and were incorporated, in a modified form, in the Code of 1873, nearly six years before the opinion in the *Small Case* was filed. Both the Act of 1868 and the Code made it unlawful for any one to bring into the state Texas cattle, and provided for the recovery of damages by persons injured by violations of the law, and contained nothing to indicate that such violations would depend upon the knowledge or negligence of the person who should bring the cattle into the state. In that respect those statutes were in legal effect the same as the Act of the 21st General Assembly. An additional reason for concluding that the general assembly did not intend to adopt, in the Act of 1886, the construction placed upon section 1289 in the *Small Case*, is the fact that the opinion in that case was founded almost wholly upon considerations which have no application to the act under consideration. The portion of section 1289 construed in the *Small Case* is as follows: "Any corporation operating a railway shall be liable for all damages by fire that is set out or caused by operating of any such railway, and such damage may be recovered by the party damaged in the same manner as set forth in this section in regard to stock." The court said: "The first clause of the provision might seem to create an absolute liability. It makes the company liable for all fires caused by the operating of its road. If this provision stood alone, it would go far to support the plaintiff's construction (that the liability created is absolute, not depending on the negligence of defendant), although it would not necessarily sustain it, as we will hereafter endeavor to show." The court concluded that the liability was not absolute, for the reasons (1) that the first clause was coupled with a provision which provided for the manner of recovery; (2) that when a fire occurs in the legitimate use of railway property, without fault in the mode of use, and simply by the intervention of an uncontrollable element of nature, the cause of the fire is to be referred to the element, and not to the use; (3) that in paying the damages for its right of way the railway company compensates the property owner for the dangers to which his property is exposed by operating the railway; (4) that the statute was of doubtful construction, and it was therefore proper to give some weight to what might be considered as demanded or forbidden by the public interest; (5) that contributory negligence of the property owner would defeat recovery when the corporation was in fault, and should also defeat it when the corporation was not in fault. It seems to me apparent that the first, second, and third grounds of the opinion, as I have stated them, do not exist in this case. The language used in the Statute of 1886 is not doubtful, but direct and clear, and the policy of the statute is not a matter for judicial consideration. The conclusion of the opinion that the corporation is not liable when the property owner is guilty of contributory negligence is contrary to the rule adopted by this court in *West v. Chicago & N. W. R. Co.*, 77 Iowa, 654, 659, and other cases.

Whether the decision in the *Small Case* is correct is, it seems to me, a question which is not involved in this case, and which there is no occasion to determine.

The Kansas cases cited in the opinion of the majority rest in part upon a statute enacted after the one which was directly involved, but upon the same subject, which provided that, when the cattle which communicated the disease were brought into the state from a place south of the thirty-seventh parallel of north latitude, that fact should be taken as prima facie evidence that the cattle were capable of communicating, and liable to impart, the disease, and that the owner or person in charge of the cattle had full knowledge and notice thereof. Our statutes contain no provision of that kind. It is said the principle stated in 3 Greenleaf on Evidence, § 21, "can have no application to one who, in the pursuit of a lawful calling, and in the exercise of proper care and caution, does an act contrary to some statutory requirement." So far as that statement refers to acts which are prohibited by statutes, without regard to the knowledge or intent with which they are committed, and especially those in the nature of police regulations, it seems to me to be contrary to the authorities, including decisions of this court, and not to be well-founded in reason. It is well settled that honest ignorance of the law will not excuse its violation, and in many cases it is as reasonable and as consistent with a due regard to liberty and property to provide that honest ignorance of a fact shall not excuse a violation of a law which is demanded by public policy. The Oleomargarine Act of Pennsylvania does not prohibit the acts therein contemplated in terms any more direct and positive than does the statute under consideration, and the language used by the supreme court of that state which I have quoted is, in the main, applicable in this case. The statutory definition of the offense charged against defendant "embraces no word implying that the forbidden act shall be done knowingly or willfully, and, if it did, the design and purpose of the act would be practically defeated." The general assembly intended to protect the large and growing cattle interests of this state from the danger to which they would be exposed if cattle in the condition specified in the act should be brought into the state. It was for the general assembly to determine whether that danger, and the interests threatened, were "so great as to justify an absolute and indiscriminate prohibition." If a railway corporation may excuse its act in bringing into this state prohibited cattle on the ground that it did not know their condition, and could not, with ordinary and reasonable care, have ascertained it, then it seems to me evident that the statute must fail to accomplish its purpose to a great extent, if not wholly; and that is especially true if the corporation may be required to receive such cattle, and deliver them to the consignee within this state, without regard to their condition; and I understand the opinion of the majority to hold, in effect, that when a loaded car, although containing prohibited animals, is tendered to such cor-

poration, it is its duty to receive and forward it, and to act promptly in doing so, and that such duty may make unnecessary such a delay as would be required to ascertain their condition. That it is necessary to so hold to sustain the opinion appears from the fact that, if the mere conclusions set out in the portion of the answer demurred to are disregarded, no effort whatever on the part of the defendant to ascertain the condition of the cow is shown. The theory of the answer seems to be that as the defendant had no actual knowledge of the condition of the cow, and could not have ascertained it readily by inquiry, it would not have been justified in delaying to receive and forward the car until it could ascertain the fact. If that is the law (and under the rule of the majority opinion it seems to be), the cases in which railway corporations bringing prohibited cattle into this state cannot show lack of knowledge must be few; for such cattle will ordinarily be received from other railways, loaded in cars, and forming part, or all, of full car loads, and the obligation to receive and forward them without delay will be as pressing as it was in this case. It is said that the objection that, under the construction adopted by the majority, the statute will have little, if any, effect is groundless, and the result of the decision in the *Small Case* is cited in support of that statement. But the character of the cases contemplated by section 1289 of the Code is wholly unlike those for which the statute under consideration provides. When property is destroyed by fire from a locomotive engine, the circumstances attending its destruction are, or may become, fully known to the owner, and proof of them is readily obtainable. For that reason he may be able to overcome the prima facie showing of the railway company that its engines were in good order, and that it was free from negligence in setting the fires. But to rebut proof of care, and want of knowledge, on the part of the company in cases arising under the statute in controversy, the person injured would be compelled to seek evidence of a kind difficult, if not impossible, to ascertain, beyond the limits of the state and in unknown quarters, and practically he would be in the power of the company. I do not think that a railway company can be compelled to receive and bring into this state, without delay, freight in car lots which includes prohibited cattle. The act prohibiting them is valid, and, so long as it stands, its violation is not required by any act of congress or of the general assembly.

The hardship involved in holding the defendant liable if it could not, with reasonable diligence, have discovered the actual condition of the cow, is evident, and might well be considered by the general assembly in determining whether criminal liability should be incurred in such cases; but, so long as the statute creates the liability, the courts should not interfere to defeat the legislative purpose. That hardship and apparent injustice sometimes result from the enforcement of criminal statutes is inevitable; but that is not a sufficient reason for not enforcing

them, nor for adopting a rule of construction which may do justice in exceptional cases, but which will tend to defeat it in others. In this case it would not be a greater hardship to require defendant to pay the damages which its act in bringing the cow into the state caused than it is for the plaintiff to sustain it without compensation, and, if both parties are equally free from negligence or intentional wrong, there would be an element of justice frequently recognized by the courts in compelling the one whose act caused the loss to bear it. That the statute in question was intended to create an absolute liability for the bringing into the state of prohibited cattle, without regard to the knowledge or intent with which it was done, is further shown by the general course of procedure in regard to criminal statutes which was pursued by the general assembly which enacted it. That body passed seventeen acts which were of a criminal character, or contained penal provisions. Two of them—chapter 66 of the Acts of the 21st General Assembly, relating to the sale of intoxicating liquors, and chapter 83, relating to the practice of pharmacy—related to subjects upon which it is admitted the general assembly may properly legislate, creating liability for prohibited acts without regard to the knowledge with which they are committed, and need not be considered. Of the remaining 15, chapter 80, relating to embezzlement; chapter 63, relating to fish dams; chapter 76, relating to foreign corporations; chapter 78, relating to the funding of indebtedness of certain cities; chapter 79, prohibiting traffic in hogs which died of disease; chapter 104, regulating the practice of medicine; chapter 117, relating to mortgaged personal property; chapter 148, providing for a custodian of public buildings; chapter 161, in regard to elections; and chapter 177, relating to obscene literature,—contained provisions of a penal nature, without in terms making knowledge or intent an element of the act prohibited; but in each case the act is of such a nature as necessarily to involve knowledge, or negligence in not obtaining it. Chapter 52, relating to imitation of butter and cheese; chapter 65, relating to mutual benefit associations; chapter 166, relating to the sale and transfer of grain; and chapter 174, to prevent fraud in canned food,—create offenses which may, for convenience, be divided into two classes: (1) Those which involve the doing of an act prohibited, or the omission of an act commanded, where knowledge that the act or omission is unlawful exists from the nature of the case, unless there has been negligence to obtain it; and, in those cases, words requiring knowledge as an element of the offense are not used in the statute. (2) Those acts or omissions which are prohibited, but which are not criminal unless the act or omission is with knowledge that it is unlawful; and in the definition of those offenses—some eight or more in all—the word “know-

ingly” is used in each case. Thus, section 2 of chapter 52 makes it a misdemeanor for any person who manufactures imitation butter or cheese to omit to mark it in the manner prescribed in the act. It is not said that the manufacturer must know of the omission in order to commit the offense, but it is within his power to know and prevent it. The next four sections provide for various offenses, but make knowledge a necessary element of each of them, in terms which cannot be misunderstood. Thus, section 8 provides that “no carrier shall knowingly receive for the purpose of forwarding or transporting any imitation butter or imitation cheese,” unless it shall be marked and consigned in the manner prescribed. Section 8 makes the possession or control of imitation butter or cheese, not marked as required by the act, presumptive evidence of knowledge on the part of the person having such possession or control. Chapter 156 is the only one of the 17 Acts of the 21st General Assembly referred to, if chapter 66 be excepted, which prohibits an act which may be permitted in honest ignorance that it is forbidden, without in terms making knowledge that it was forbidden necessary to a conviction. The general assembly was careful to provide that a carrier should not be liable to a fine of not more than \$100, nor to imprisonment not exceeding thirty days, for receiving imitation butter or cheese not properly marked and consigned, unless it was done with knowledge of the fact. The omission to provide that the acts prohibited by the statute under consideration must be done with knowledge to create the heavier criminal liability and the civil liability, in view of the rule followed in other cases, is most significant. It seems to me the omission can have but one explanation, and that is that in enacting chapter 156 the General Assembly designed to make the prohibited act penal, and to create an absolute liability, without regard to the knowledge of the party committing it. The facts in this case tend strongly to justify the general assembly in adopting stringent measures to keep out of the state cattle in the condition described in the statute. The bringing into the state of one cow resulted in the death of thirty-two cattle owned by the plaintiff. If shipments into the state of cattle in condition to communicate to other cattle the disease contemplated by the statute were numerous, the loss which such shipments might cause to the cattle industries of the state is beyond computation. That fact was known to the general assembly when the statute was enacted, and no doubt was felt to be a sufficient justification of the severe provisions which it contains. It seems to me that the interpretation of the statute adopted in the opinion of the majority is contrary to the legislative intent, and that its practical effect will be to defeat the legislative will.

WEST VIRGINIA SUPREME COURT OF APPEALS.

William T. WIANT *et al.*, *Appts.*,

v.

S. A. HAYS *et al.*

(.....W. Va.....)

- *1. The title to land forfeited for non-entry on the assessor's land books, by section 7, p. 90, Acts 1869 (Code 1868, chap. 31, § 84), vested in the state upon the forfeiture, by the mere force of the statute, and without judicial or other proceeding declaring the forfeiture, and therefore a judgment against the former owner, rendered after such forfeiture, is no lien on such land.
- *2. The right of the former owner to the excess of the proceeds of the sale of such forfeited land, after payment of taxes, interest, and costs, accorded to him by section 8, article 13, of the Constitution, is property in the former owner,—personal property,—which he may sell, and which is liable to the lien of a *forti facias* against him; and such property as that, if a transfer be made of it in fraud of creditors, they may maintain a suit in equity to avoid the transfer.
- *3. Personal property, to be the subject of sale, must have an existence, but a potential existence is sufficient.
- *4. Under section 2, chap. 141, Code, a writ of *fieri facias* is a lien upon personal property, not of such nature as to be leviable, owned by the debtor before its return day, if docketed as required in said section, against a purchaser for value, without notice other than the constructive notice arising from such docketing; but, if not so docketed, the lien will not affect such purchaser, if he be a bona fide purchaser for value, and without notice of the writ. It makes no difference, so far as the protection of the purchaser is concerned, whether he purchased before or after the return day of the writ.
- *5. A proceeding under chapter 105 of the Code of 1887, by a commissioner of school lands, for the sale of forfeited lands, is a judicial proceeding,—a suit, not simply an administrative proceeding. The court may in it allow one claiming right to the surplus proceeds of its sale to file his petition asking such surplus to be paid to him.

(December 9, 1893.)

APPPEAL by plaintiffs from a decree of the Circuit Court for Gilmer County in favor of defendants in a proceeding instituted to reach the surplus of certain property which had been sold for taxes. *Reversed.*

The facts are stated in the opinion.

Meers. N. M. Bennett and Linn & Withers, for appellants:

A mere possibility or expectancy cannot

*Headnotes by Brannon, J.

be assigned, either at law, or in equity.—*Huling v. Cabell*, 9 W. Va. 522, 27 Am. Rep. 562; *First Nat. Bank of Wellsburg v. Kimberlands*, 16 W. Va. 555.

The interest of Peregrine Hays continued to be real estate up to the time of the sale, because up to that time he had the right to redeem.

Code, chap. 105, § 17, p. 788; *Waggoner v. Wolf*, 28 W. Va. 820.

After the sale the said Hays had a right to the surplus only, and to that the liens of the executions attached.

Code, chap. 141, § 2, p. 888; 1 Bouvier, L. Dict. 15th ed. p. 605; *Huling v. Cabell*, *supra*.

Mr. R. F. Fleming, for appellees:

Under the Constitution of this state article 13, section 5, P. Hays the former owner, or R. F. Kidd his assignee in his stead, is the only person entitled to receive the excess.

The title to the excess and the right of Kidd, by virtue of said assignment to him, attached and became effectual and absolute under the law as it then was, before the amendment of 1891 took effect. Neither W. T. Wiant nor R. G. Linn, administrator, was a creditor having a lien on said land at the time of said forfeiture, because this proceeding, in which said 200 acres of land was decreed to be sold and was sold, was neither a suit nor proceeding *in rem*, or *in personam*, and was administrative in its character.

McClure v. Mailand, 24 W. Va. 561.

The amendment of 1891, by adding after the words, "the former owner of any such lands" the following: "his heirs, personal representatives, or assigns; or any creditors having a lien on said land at the time of said forfeiture and still existing shall be entitled to recover," etc.,—cannot change and does not change the character of the proceedings.

Hissem v. Johnson, 27 W. Va. 644, 55 Am. Rep. 327; *Yokum v. Fickey*, 37 W. Va. 762.

The forfeiture of such lands is not dependent upon or brought about by judicial proceeding or sentence, inquest, judgment, or decree, but the same is effected by the statutes; and by the force and vigor of the statutes the forfeiture becomes absolute, and the title to such lands effectually vested in the state.

McClure v. Mailand, 24 W. Va. 576.

One tract of land cannot be treated as forfeited or said to have become forfeited at a certain designated time, and another tract, in identically the same situation, and omitted the same year at another time.

Brannon, J., delivered the opinion of the court:

A tract of land, the property of Peregrine

NOTE.—The West Virginia law forfeiting title to land for failure to enter it on the assessor's books for taxation is a very drastic remedy, which is moderated by the provision for returning to the former owner the surplus proceeds when the state sells the land. The nature of the interest of the former owner in the surplus before any sale has been made is held to be a property interest, subject 23 L. R. A.

to assignment, and the transfer of which may constitute a fraud on his creditors. See, as to the assignability of future contingent interests, *Read v. Mosby* (Tenn.) 5 L. R. A. 122, and *note*.

For a tax law creating a very different but quite vigorous remedy for the collection of taxes, which is held unconstitutional, see *Adams v. Tonella* (Miss.) 23 L. R. A. 346.

Hays, was forfeited for nonentry on the assessor's land books of Gilmer county for more than five years, from and including the year 1870; and under a decree in a proceeding instituted by the commissioner of school lands made February 5, 1891, the land was sold as forfeited, and purchased by Kidd, and its proceeds, after paying taxes and costs, left a surplus. The sale was on October 1, 1891, and it was confirmed by decree of October 8, 1891. By a writing dated June 1, 1891, Peregrine Hays assigned to Kidd any excess that might remain from its sale. Peregrine Hays and Kidd, before confirmation of sale, united in filing a petition in the circuit court of Gilmer, wherein said proceeding was going on, setting up said assignment, and asking that said surplus be paid to Kidd, pursuant to the assignment. William T. Wiant and R. G. Linn, administrator of Robert Linn, and others, filed in said proceeding a petition against Hays and others, setting up that Linn, administrator, had obtained a decree for money against Hays in February, 1886, and that Wiant had recovered a judgment for money against Hays, July 2, 1887, which were docketed in the judgment lien docket, and that various writs of *flori facias* had been issued on said decree and judgment, which were returned unsatisfied; and that certain ones of them had been entered in the execution lien docket.—Linn's first, docketed on February 18, 1891, and Wiant's earliest, docketed June 4, 1891; and they claimed in their petition that, under said judgments and executions, they were entitled to said surplus. The petition of said Wiant and Linn and others was, on demurrer, dismissed, and the said surplus fund was decreed to Kidd, and said Wiant, Linn, administrator, and other petitioners appeal.

To whom should such surplus fund go,—to Kidd under his assignment from Hays, or to Wiant and Linn, administrator, under their said claims as creditors of Hays? By the omission of the land from the tax books, its forfeiture became complete some time in 1875. By such forfeiture the whole title went from Hays, and vested in the state, by force of the statute (Acts 1869, p. 90, § 7; Code 1886, chap. 31, § 34), without any legal proceeding or sale. The act operates as a legislative grant, and vests title in the state. *Levasser v. Washburn*, 11 Gratt. 572. As was said in *McClure v. Matland*, 24 W. Va. 561, and *McClure v. Mauperture*, 29 W. Va. 633, after the forfeiture became complete, the former owner had no more right or title in the land than if he had never owned it. Therefore, as before Wiant's and Linn's judgments Hays had ceased to own the land, their judgments did not become liens on this land, as they were not rendered until in the years 1886 and 1887. What interest, then, had Hays as to the land after such forfeiture? This is a material question, because under the arguments in the case, we must answer whether Hays had such interest as could be assigned to Kidd, or such as could be subject to the writs of *flori facias* upon Wiant's and Linn's judgment and decree.

The Constitution (art. 13, § 5), as also the statute, provides that the former owner of

forfeited lands shall be entitled to receive the excess of the sum for which the land may be sold over taxes and costs, if his claim be filed within two years after the sale. This surely does not vest any estate that is real estate in the former owner, for the statute vests the whole estate in the state; and in *McClure v. Matland*, 24 W. Va. 561, it is held that this provision does not confer upon the former owner any interest in the land. But he has something that is property, dependent upon a sale and the existence of an excess for its fruition. In *McClure v. Matland* it is held that the grant to him of the excess is a gratuity,—an act of grace in the state. This language was used to support the position taken in that case that, under the then existing act relative to proceedings for the sale of forfeited lands, the owner had no right to demand to be a party, and was not a proper party, but it was surely not intended to mean that the right, under the constitution and act, to the excess, should it ever come to exist, was not a property right. It is a vested right, contingent, so far as its vesting in possession and enjoyment is concerned, upon the happening of the event of a sale and excess,—a right inchoate until sale, and then consummated, if it leave a surplus. It has potentiality, as contrasted with a mere naked possibility. There is the land out of which money may issue, and that land is required by law to be sold, and will be sold, and to that money the law gives the former owner a right. It is not a mere expectancy, like that of a child as to the estate of the living father, or the sale of the catch of fish on a future voyage. The fact that perchance the land may never be sold, and may never produce a surplus, does not render the former owner's right a mere possibility, legally speaking, but it is a probability. The facts that the land exists, and will be sold under fixed law commanding it, and that the right of the owner to the surplus is connected with it, and that the surplus issues out of it, give that right a potential present existence. That which is in every sense nonexistent—a non-entity—cannot be sold, is not property, but it need not have, in every sense, a perfect, tangible existence, to be regarded in law as capable of ownership. So it have a potential existence, it is enough. A man may not sell the fruit from trees, or wool or lambs from sheep, which he has not; but he may do so if he then owns the trees or sheep. Their ownership gives potential existence to the fruit and wool and lambs, though as yet the trees have not blossomed, or the wool grown, or the ewes become pregnant. "A mere contingent possibility, not coupled with an interest, is not the subject of sale, as all the wool one shall ever have, or the sheep which a lessee has covenanted to leave at the end of an existing term. If rights are vested, or possibilities are distinctly connected with interest or property, they may be sold." 1 Parsons, Cont. 538. What is a devise of land to an executor to be sold,—part of proceeds to one, part to another? The law ought to go as far as possible to deem that property necessary to pay creditors. We find it in old and late books, as laid down in Benjamin on

Sales, § 78, p. 80, that "things not yet existing, which may be sold, are said to have a potential existence; that is, things which are the natural product or expected increase of something already belonging to the vendor." Here the land did not belong to Hays, but that land existed, and he had a conceded right to certain money to issue from it. It would be unreasonable to say that a man whose land is worth many thousands of dollars forfeited for a few dollars of taxes, has no such interest in the excess as that, when it comes into real existence as money, it cannot be subjected to pay his debts. It might be said with some force that while the land is, as regards the legal title, vested in the state, yet the state holds in trust for the former owner as to the residue, and that his interest is land; but perhaps that view is untenable. I shall without further elaboration refer to the following authorities for the discussion of this somewhat abstruse subject: *Huling v. Cabell*, 9 W. Va. 522, 27 Am. Rep. 562, and many citations there; *First Nat. Bank of Wellsburg v. Kimberlands*, 16 W. Va. 555; Benjamin, Sales, p. 80, § 78; 1 Parsons, Cont. 523; Tiedeman, Sales, § 52; 2 Kent, Com. 468 (641), note a; 2 Bl. Com. 297; *Wheeler v. Wheeler*, 2 Met. (Ky.) 474, 74 Am. Dec. 421; *Ponville v. Casey*, 5 N. C. 389, 4 Am. Dec. 559, and note.

It is argued that it is no property,—merely a gratuity from the state. So it is as regards Hays and the state; but when once the gift has vested, like any other property given, it is the property of Hays, the donee. It is argued that it is, like pension to a soldier, exempt from creditors. There is no analogy. The pension is exempt by provision of the act granting it, but there is no exemption here made by the constitution. So we hold that this right of Hays touching the land is property; not real, but personal,—a chose in action. Therefore it could pass under the assignment of Hays to Kidd. But what of Wiant's and Linn's executions, docketed as execution liens? Code, chap. 141, § 2, says that every writ of *fiert facias* shall, in addition to the effect which it has under chapter 140 of this Code, be a lien from the time it is delivered to an officer to be executed upon all the personal estate of which the judgment debtor is possessed, or to which he is entitled, and upon all which he may acquire on or before the return day thereof, although not levied on, nor capable of being levied on, under that chapter. And then follows a provision that a purchaser shall not be affected by such lien unless the execution be docketed, as in said section provided; and the statute then provides that, if so docketed, it shall be an abiding and continuing lien against a purchaser, and have preference over him. The executions constituted liens on the said property right of Hays, the execution debtor, arising from said land, as it was in existence when the executions were delivered to officers for execution. *Huling v. Cabell*, 9 W. Va. 522, 27 Am. Rep. 562.

Linn's *fi. fa.*, which issued October 11, 1890, and was docketed February 13, 1891, has preference over Kidd's rights under his assignment. I find no execution of Wiant's

docketed before June 4, 1891, and, that being after Kidd's assignment, Kidd has preference over Wiant, provided he be a purchaser for valuable consideration, bona fide, and without notice of Wiant's execution. Though the assignment was, after Wiant's execution, in the officer's hands, and before its return day, yet, the property being a chose not leviable, Kidd has preference over Wiant, if Kidd be such a bona fide purchaser without notice. The lien of a *fi. fa.*, upon a chose is not under chapter 140, but under chapter 141, § 2; and, as this section excepts such purchaser, it is no difference that, when he purchased, the execution was in the officer's hands, and the return day had not passed. Opinion in *Boans v. Greenhow*, 15 Gratt. 162. Some change was made in 1882 in chapter 141. As our Code now is, chapter 140 gives the writ of *fiert facias* a lien on leviable property, but not at all on property not leviable. Chapter 141 does this. Under chapter 140 the lien on leviable property begins when the *fiert facias* goes into the officer's hands, and ends with its return day, unless levied, in which case it continues to bind the property levied upon after its return day. If not levied, it would not bind the property in the hands of one purchasing it after the return day, under chapter 140, whether he had notice of the execution or not. I say under chapter 140. But chapter 141 makes the *fiert facias* a lien on property not leviable, and continues, if it does not create, the lien, under chapter 140, on leviable property after its return day, if the *fiert facias* be docketed, as required by section 2. The lien given by section 2, chap. 141, as to property not leviable, like a chose in action, begins when it goes into the hands of the officer, but does not end with the return day. As to leviable property, one could not purchase it during the life of the execution, even without notice of it, but he could purchase unleviable property without notice, either before or after its return day, unless it be docketed, as section 2, chap. 141, saves him from the lien it creates on unleviable property; but chapter 140 does not save him from the lien by it created as to leviable property. In other words, if the subject be unleviable property, like a chose, whether purchased within or after the lifetime of the *fiert facias*, and it be docketed, as required in section 2, chap. 141, the lien is good against a purchaser, though he be a bona fide purchaser for value and without notice of the *fiert facias* otherwise than by the docketing; but, if not docketed, it is not good against such bona fide purchaser for value without notice. As to leviable property, if purchased before the return day of the writ, its lien, though not docketed, is good, even against a bona fide purchaser for value without notice of it, because of chapter 140; but, if purchased after the return day of the writ of *fiert facias*, the lien is not good against a bona fide purchaser for value, unless so docketed, or unless he have notice of the writ; but, if either so docketed, or the purchaser have such notice, it is good against him.

The petition charged that Kidd's assignment was made with intent to defraud pe-

tioners. This, I assume, was regarded by the court as immaterial, and as no ground to save the petition from demurrer, on the theory that the right assigned was not property in Hays, to which a creditor could set up a claim, and could not be the subject of a fraudulent alienation. Were this so, the position would be correct, as a creditor cannot say he has been defrauded by an assignment of anything that is not property of his debtor to which he can resort for satisfaction; but, as the thing assigned is to be regarded property liable to creditors, it follows that its fraudulent transfer could be assailed. Equity, under the statute avoiding fraudulent transfers, will reclaim and subject any species of the debtor's property, prospective or contingent,—all kinds of property, real, personal, legal, or equitable, vested, reversionary, or contingent estate,—subject to debts. It will subject property sometimes where the legal process cannot reach it. Equity is here not technical, but asks whether it is a thing of substantial value of the debtor, which in the facility and flexibility of its remedial procedure it can reach. Wait, *Fraud. Conv.* §§ 24, 25; *Bump, Fraud. Conv.* § 238. Certainly, equity would not allow the fraudulent transfer, if such it was, of hundreds of dollars, actual money in the hands of the court, coming from a sale of the land, having no longer a merely potential, but now an actual, existence, on any such theory that it was not property liable to creditors. If capable of assignment, it would, so far as its existence as property is concerned, be liable to creditors.

But it is contended that the proceeding in the name of the commissioner of school lands in the circuit court is not a suit with parties, but only an administrative proceeding by the state *ex parte*, to sell its own land,—only a method of converting its land into money,—and this contention is rested on *McClure v. Matland*, 24 W. Va. 561, and, not being a suit, Wiant could not file his petition in the proceeding. The question in that case was whether the former owner was a proper party to the proceeding to sell, and whether he could complain of error in the proceeding, and maintain an appeal. It was held that the proceeding was not judicial, in the sense that it involved litigation between parties. But this proposition, as applied to this case, can have no force, for two reasons: First, The act under which *McClure v. Matland* was had made no provision for parties. The legislature, desiring to make the proceeding as effectual as possible, and pass good title, and protect the purchaser's title, as under ordinary decrees, by chapter 95, Acts 1882 (Code 1887, chap. 105), greatly changed the law touching the sale of forfeited lands for the benefit of the school fund, directing that the commissioners file a petition which must contain certain matters of allegation, naming the owners of the land by it sought to be sold directing process to issue against the owners and all unknown persons having or claiming the land, and that it be served on them, or, in default of service, that a publication be made, and that the case be referred to a commissioner to report certain important mat-

ters, and that all the parties claimant appear before him, and that exceptions might be filed to it, and that a hearing take place on the report and exceptions, and a decree of sale be entered, if the land be found liable, and the sale reported to court for its action. There is an express provision that, if there be exceptions to the report, "the same proceedings shall be had in the case as if it were a suit in chancery." Now, why, with parties plaintiff and defendant, process, pleading, hearing between the parties, decree, etc., it is not, if not technically a chancery suit, yet a suit, I cannot see; a suit under a special statute, it is true, but none the less a suit. So, substantially, it was regarded in *Hays v. Camden*, (W. Va.) 18 S. E. Rep. 461 (decided this term). Proceedings at rules take place as in ordinary and common-law suits. In some places it is called a "suit." But I know that it is said by those holding the other view that the question is not to be tested by the circumstances, such as I have alluded to, the presence of pleading, process, hearing, etc., but it must be tested by the nature of the proceeding; that is, that it is only an administrative process by the state, through an officer and court, to realize money on its own property. But to this I reply that though the state might make the proceeding such, and did in its acts up to 1882, yet, by its Act in 1882, it changed the proceeding from one *ex parte* to one *inter partes*, and clothed the proceeding with all the habiliments of a suit; and still it did not proceed against the land, taking the fact of forfeiture as a concession, and simply at once sell the land, but it subjected its right and title under the supposed forfeiture to question and investigation, under the law, through a suit, called in all interested adversely to its claim, and gave them leave to contest its right, and made its claim the subject of litigation. Second. Suppose it is not a suit, as between the commissioner and the defendants. Still, claimants to the residue might file their petition in the proceeding to obtain that residue, because, the money being in the court, they could in no other way get it, save by asking the court for it by petition; and I understand that always where money is in the hands of a court in any proceeding, which is claimed by parties, and on grounds outside that proceeding by attachment, execution, assignment, or otherwise, a petition may and must be filed. How, otherwise, can the right to it be asserted? And, as incidental, there can be parties defendant to the petition. It would be a petition as to the proceeding, seeking the fund, but not litigating anything involved between the parties to the proceeding; while, as to the parties interested in the fund, it would be a bill,—a suit. It must be filed in the cause, because it seeks a fund in custody of the law, and asks an order in that cause for leave to withdraw the fund; but in no other respect does it concern or become part of it. This petition can be called a "bill," as between its plaintiffs and defendants. It is a bill in equity to render effective the lien of a *fi. fa.*, on a fund not leviable, which is a common function of equity, and also to annul a transfer of it, and settle right to it; and it is only

filed in the proceeding because there the fund is. It is no litigation within the other proceeding.

Said decree, so far as it sustains the demurrer of Kidd to Wiant's and Linn's petition, and

dismisses it, and gives the surplus to Kidd, is reversed, and said demurrer is overruled, and the cause remanded for further proper proceedings.

GEORGIA SUPREME COURT.

C. M. FORT, *Pf. in Err.*,

STATE of Georgia.

(.....Ga.....)

***By the Act of October 24, 1837, to regulate the business of insurance**, no unincorporated company is required to obtain, or can obtain, from the insurance commissioner a license to transact the business of insurance in this state; and the penalty prescribed in the ninth section of the Act for doing or performing any of the acts or things mentioned therein for any insurance company is not applicable unless the company is one incorporated by the laws of this state or some other state or of a foreign government. According to the facts appearing in the record, the Guarantee & Accident Lloyds is a voluntary association, unincorporated, consisting of one hundred natural persons. This being so, that company cannot be licensed to transact the business of insurance in this state; and, although there is no statutory authority for it to transact business without a license, a person who, as its agent, assists it in doing so, is not guilty of any offense.

(July 3, 1883.)

ERROR to the City Court of Atlanta to review a judgment convicting defendant of violating the state insurance law. *Reversed.*

The facts are stated in the opinion.

Messrs. Hall & Hammond, for plaintiff in error:

The act under consideration is a penal statute, and hence, it must be construed strictly.

Shaw v. Clark, 49 Mich. 384, 43 Am. Rep. 474; *Warner v. Com.* 1 Pa. 154, 44 Am. Dec. 114; *Sondheim v. Gilbert*, 5 L. R. A. 432, 117 Ind. 71; *Brooks v. Western U. Teleg. Co.* 56 Ark. 224; *State v. Coffing*, 3 Ind. App. 304; *Harrison v. State*, 22 Md. 463, 85 Am. Dec. 658.

It would take an extremely liberal construction to extend the meaning of the terms of this act, even to companies that were unincorporated, and certainly a strict construction would exclude the possibility of allowing a conviction

*Headnote by LUMPKIN, J.

NOTE.—In connection with the above case, holding that the Georgia statute, requiring a license for business by foreign insurance companies, does not apply to an unincorporated company, or make the agent of such company liable for doing business for it, see, as to the right of an individual to insure his own property in an unauthorized foreign company, *Com. v. Biddle* (Pa.) 11 L. R. A. 561.

Also as to the effect of insurance by foreign corporations which have not complied with the statute, 23 L. R. A.

of one who was acting neither for a corporation nor a partnership.

The legislature of a state has a power of control and even exclusion over corporations which it cannot exercise over individuals.

Bank of United States v. Deveaux, 9 U. S. 5 Cranch, 61, 8 L. ed. 88; *Bank of Augusta v. Earle*, 38 U. S. 13 Pet. 586, 10 L. ed. 806; *Paul v. Virginia*, 75 U. S. 8 Wall. 180, 19 L. ed. 357; *Liverpool & L. Life & F. Ins. Co. v. Oliver*, 77 U. S. 10 Wall. 566, 19 L. ed. 1029; *Commercial & R. Bank of Vicksburg v. Slocumb*, 38 U. S. 14 Pet. 60, 10 L. ed. 354; *Louisville & C. R. Co. v. Letson*, 43 U. S. 3 How. 556, 11 L. ed. 877; *Pensacola Teleg. Co. v. Western U. Teleg. Co.* 96 U. S. 1, 24 L. ed. 708, and numerous other cases.

Hence it is easy to see why the legislature confined this law to corporations, and did not extend it to individuals.

Individual underwriting is not a new form of insurance. It is one of the oldest forms, and corporations are more modern institutions. Such underwriting has always been held to be a separate contract on the part of each underwriter.

1 Lindley, Partn. ed. 1881, * 57; *Strong v. Harvey*, 3 Bing. 304.

The state of Georgia has no right to prohibit an individual, who is a citizen of the United States, from engaging in any occupation which he may choose, except in the exercise of its police power for the purpose of preventing harm to others.

Tiedeman, Pol. Powers, ed. 1886, p. 281; Cooley, Torts, ed. 1888, p. 326, *et. seq.*; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 686.

Such legislation could not be upheld on the ground that it would be a proper exercise of the police power of the state.

Slaughter House Cases, 83 U. S. 16 Wall. 36, 21 L. ed. 894; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253; *Butchers Union, S. H. & L. S. L. Co. v. Crescent City, L. S. L. & S. H. Co.* 111 U. S. 746, 28 L. ed. 585; *Hannibal & St. J. R. Co. v. Huen*, 95 U. S. 465, 24 L. ed. 527; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 686; Cooley, Torts, ed. 1888, p. 327, *277; *Ward v. Maryland*, 79 U. S. 12 Wall. 430, 20 L. ed. 452.

It is true that it has been held that where a

utes, see *Phenix Ins. Co. v. Pennsylvania Co. (Ind.)* 20 L. R. A. 405, and *note*.

As to the right of foreign assessment companies to do business without complying with the statutes as to insurance companies, see *State v. Root* (Wis.) 19 L. R. A. 271.

As to the regulation of foreign companies generally, see *State v. Western U. Mut. L. & Acc. Soc. (Ohio)* 8 L. R. A. 129, and *note*; *Boulware v. Davis*, (Ala.) 9 L. R. A. 601, and *note*.

business is "affected with a public interest" it is subject to regulation by statute.

See *Munn v. Illinois*, 94 U. S. 118, 24 L. ed. 77, and *Budd v. New York*, 143 U. S. 517, 36 L. ed. 247.

But it is not easy to perceive how a private contract between one individual and another, by which the one, for an agreed consideration, insures the other for the space of ninety days, is a contract so affected.

Lumpkin, J., delivered the opinion of the court:

A careful reading of the Act of October 24, 1887, "to regulate the business of insurance in this state, and for other purposes" (Acts 1886-87, p. 118), will satisfy the reader that the general assembly intended therein to deal with insurance companies chartered by this state or other states or by a foreign government. The second section of the Act requires incorporated insurance companies to procure licenses from the insurance commissioner as a necessary prerequisite to the transaction of the business of insurance in this state; but neither in this section nor in any other portion of the act is there any requirement that an unincorporated insurance company shall obtain a license, or any provision for the granting of a license to such a company. In view of this fact, it may well be doubted if the general assembly had in contemplation the possibility that any insurance company without a charter would be likely to undertake to do business in Georgia; otherwise it is more than probable that the act would either have expressly provided for licensing unincorporated companies, or else have declared in terms that no such company should transact business in that state at all. It is therefore safe to assume that in the general scheme of the act unincorporated companies were entirely overlooked. We are quite certain that the general assembly could not have intended in an indirect manner to make penal the transaction of insurance business by an agent of an insurance company which had not procured a license from the insurance commissioner, when it had made no provision by which the company in question could obtain such license. It would have been much easier and more natural to declare that licenses should not be issued at all to unincorporated companies; and then, in general terms, make it penal for an agent to transact business for any insurance company not entitled by law to receive a license, or to carry on business in this state. Our conclusion, therefore, is that the penalty prescribed in the second paragraph of the ninth section of the Act for rendering the services therein mentioned to "any insurance company" is not applicable unless the company is one which has been chartered under the laws of this or some other state or of a foreign government, and this conclusion seems to be sustained not only by the reasons above stated, but is also borne out by the context of the section last mentioned. The following is a copy of so much of that section as is material to the purpose in hand "That any person who solicits in behalf of any insurance company, or agent of the same, incorporated by

the laws of this or any other state or foreign government, or who takes, or transmits, other than for himself, any application for insurance, or any policy of insurance to or from such company, or agent of the same, or who advertises or otherwise gives notice that he will receive or transmit the same, or who shall receive or deliver a policy of insurance of any such company, or who shall examine, or inspect any risk at any time, or receive or collect or transmit any premiums of insurance, or make or forward any diagram of any building or buildings, or do and perform any other act or thing in the making or consummating of any contract of insurance for or with any such insurance company, other than for himself, or who shall examine into or adjust or aid in adjusting any loss for or in behalf of any such company, whether any of such acts shall be done at the instance or request, or by the employment of such insurance company, or of, or by, any broker or other person, shall be held to be the agent of the company for which the act is done or the risk is taken. Any person, who shall do or perform any of the acts or things mentioned for any insurance company, or agent of said company, without such company having first received a certificate of authority from the insurance commissioner of this state, as required by law, shall be guilty of a misdemeanor and on conviction in any court of competent jurisdiction shall be punished as provided by section 4810 of the Code of Georgia, and shall also pay a sum equal to the state, county, and municipal taxes and licenses required to be paid by insurance companies legally doing business in this state; and it is hereby made the duty of the insurance commissioner to see that all violators of the provisions of this section are prosecuted." It will be observed that the first paragraph undertakes to prescribe who shall be regarded as an agent of an insurance company chartered by the laws of this state or some other state or foreign government, and makes no allusion whatever to an agent of any insurance company of any other kind. The words "such company," "any such company," "any such insurance company," "any such company," and "such insurance company," used in the order stated in the paragraph designated, necessarily refer to an incorporated insurance company of some kind. This will be obvious from a reading of the paragraph. The next paragraph provides that "any person who shall do or perform any of the acts or things mentioned for any insurance company" shall be guilty of a misdemeanor, and, on conviction, shall be punished, etc. It will be observed that in the second line of this paragraph the use of the word "such" before the word "company" is omitted. While it is true that the words "any insurance company" are beyond doubt of themselves sufficiently general to cover all insurance companies, whether incorporated or not, they must be construed with reference to the context, and also with due regard to the general scope and purpose of the act. All of the section preceding the words last quoted was indubitably intended to be applicable to agents of incorporated companies

only; and the language following these words shows, we think, conclusively that the general assembly intended to make penal the acts of those persons alone who were agents of insurance companies which the law required should obtain certificates of authority from the insurance commissioner of this state, but which had failed to do so; and these companies, as we have seen, could, under the provisions of the act, be incorporated companies only. It therefore seems free from all doubt that the words "any insurance company" must be construed to mean any insurance company having a charter.

The tenth section of the Act provides that "any insurance company not incorporated or organized under the laws of this state, desiring to transact business in this state," shall appoint an agent upon whom service can be perfected; and we think that the words just quoted were intended to apply exclusively to incorporated insurance companies, and not to foreign companies having no charter. The proviso to this section declares that its provisions "shall not be construed to alter or amend the laws now of force in this state relative to bringing suits and serving process on foreign corporations doing business in this state." As no reference whatever is here made to foreign companies other than corporations, we are strengthened in the opinion above expressed that in passing the act in question the general assembly did not have in contemplation at all insurance companies which were not incorporated. The evidence in this case showed that the "Guarantee and

Accident Lloyds" is a voluntary, unincorporated association, consisting of one hundred natural persons. As has been seen, there is no provision of law for granting a license to such a company authorizing it to transact insurance business in this state, nor is there any statutory authority for it to transact business without a license. Nevertheless we are fully satisfied that a person who, as its agent, assists it in conducting its business, is guilty of no criminal offense. We think this conclusion follows legitimately from what has been said, and, in view of the rule that criminal statutes must be strictly construed, there is scarcely any room to doubt its correctness. In our judgment, the whole difficulty arises from the fact that the attention of the general assembly had not been called to the question of dealing with unincorporated insurance companies; otherwise the matter would doubtless have received the proper attention and direction, and we should find in the act now before us such provisions in regard to companies of this kind as the lawmaking power deemed it expedient to make. Whether such companies should be prohibited from transacting business altogether, or, if not, upon what terms and under what penalties they should be permitted to do so, are questions purely for the general assembly. As a court, we can do nothing but enforce the law as we find it. In the present case we are therefore constrained to hold that the conviction of the accused was contrary to law.

Judgment reversed.

MINNESOTA SUPREME COURT.

ST. PAUL & DULUTH R. CO., *Resp't.*,

v.

City of DULUTH, *Appt.*

(.....Minn.....)

- *1. **McClure v. Red Wing**, 28 Minn. 194, followed on the point that a municipal corporation is not liable to the owner of private premises within its boundaries for failing to provide a system of sewerage to carry away from such premises surface water and the water of perennial streams naturally coming thereon.
2. **The owner of a swamp which is the natural place of deposit of the surface waters and perennial streams from the higher adjoining territory cannot complain because such municipal corporation continues to deposit such waters on such swamp by means of mere storm sewers after such swamp has been improved.**
3. **This rule is not changed by the fact that the municipal corporation has diverted such waters from natural ravines, and, through such sewers, deposited them on such swamp at different points from**

*Headnotes by CANTY, J.

those at which the ravines terminate, the owner of the swamp having adopted the change made by such diversion in building the roadbed of a railroad across the swamp, by leaving no openings in the raised surface of such roadbed opposite the ends of the ravines, and by putting in box culverts across such roadbed opposite the ends of some of the sewers, to carry off such waters.

(February 10, 1894.)

A PPEAL by defendant from an order of the District Court for St. Louis County denying a motion for a new trial after verdict in favor of plaintiff in an action brought to recover damages for alleged wrongful disposition of surface water so as to injure plaintiff's property. *Reversed.*

The case sufficiently appears in the opinion. *Mr. H. F. Green, City Atty.*, for appellant:

No one of the numerous decisions in Minnesota upon this class of cases ever went in favor of the plaintiff or party complaining of the intrusion of water, unless two facts were shown, first that more water came upon property than before the trespass or intrusion complained of, and second that there was a consequent injury,

NOTE.—This case presents somewhat new particulars in respect to the application of the law as to flow of surface waters.

28 L. R. A.

For full review of the whole body of authorities on the subject, see *note* to *Gray v. McWilliams* (Cal.) 21 L. R. A. 593.

which before the trespass or intrusion was not suffered.

O'Brien v. St. Paul, 18 Minn. 176; *Kode v. Minneapolis*, 32 Minn. 159; *O'Brien v. St. Paul*, 25 Minn. 331, 38 Am. Rep. 470; *Hogenson v. St. Paul, M. & M. R. Co.* 81 Minn. 224; *Blakely Twp. v. Devine*, 36 Minn. 53; *Pye v. Mankato*, 36 Minn. 373; *Follman v. Mankato*, 45 Minn. 457.

This case is distinguished from every case decided in this state on the subject in that in every one of said cases it appears that the defendant cast the water on plaintiff's land, and that this act of defendant was manifestly the proximate cause of plaintiff's injury. In the case at bar,

1. It does not appear that any greater volume or even as great a volume of water comes upon plaintiff's tracks as before.

2. It does not appear that such changes as defendant has made in the discharge of the various channels on respondent's tracks has or will have any effect upon plaintiff's damages either past or prospective.

The injury complained of is entirely the result of acts of the complaining party.

The city had a right to turn this surface water into the ravines before constructing the sewers, and drain the same either by natural or artificial drains into these ravines, and having this right before the sewers were constructed, the city certainly retains it after that construction and can conduct this surface water into the streams now contained within the sewers just as before it could conduct it into the same streams then contained in the ravines.

Angell, Watercourses, 7th ed. 514; *Martin v. Biddle*, 26 Pa. 415; *Kauffman v. Griesemer*, 26 Pa. 407, 67 Am. Dec. 437; *Miller v. Laubach*, 47 Pa. 154, 86 Am. Dec. 521; *Meizell v. Morgan*, 149 Pa. 415; *Dayton v. Drainage Comrs.* 128 Ill. 271; *Lambert v. Alcorn*, 21 L. R. A. 611, 144 Ill. 814.

Viewing these channels as watercourses we have done respondent no injury, not by changing their course, for the injury from that cause is merely nominal, and none from draining surface water into them, for that we had a right to do.

If the entire drainage from this hill is to be looked on as surface water, this case comes clearly within the doctrine of—

Brown v. Winona & S. W. R. Co. (Minn.) May 11, 1893. See also *Johnson v. Chicago, St. P. M. & O. R. Co.* 14 L. R. A. 495, 80 Wis. 641; *Jenkins v. Wilmington & W. R. Co.* 110 N. C. 438; *Meizell v. Morgan*, *Follman v. Mankato*, *Pye v. Mankato*, and *Blakely Twp. v. Devine*, *supra*; *Jordan v. St. Paul, M. & M. R. Co.* 42 Minn. 172; *Angell, Watercourses*, p. 135; *Flagg v. Worcester*, 18 Gray, 601; *Collins v. Waltham*, 151 Mass. 196; *Turner v. Dartmouth*, 18 Allen, 291; *Enery v. Lovell*, 194 Mass. 13; *Kennison v. Beverly*, 146 Mass. 467; *Purks v. Newburyport*, 10 Gray, 28.

Messrs. Lusk, Bunn & Hadley and Moore, Towne & Harris for respondent.

Canty, J., delivered the opinion of the court:

The part of the city of Duluth here in question is a steep hillside, sloping towards St. 23 L. R. A.

Louis bay. This slope rises 600 feet above the bay, and extends back from it more than a mile. In 1870, between the foot of the hill and the bay, there was a wide margin of marsh or swamp, covered more or less, with the water of the bay. Between what is now Fourth avenue east and Twelfth avenue west, there were on this slope seventeen large ravines, which were well-defined water channels, in which water ran down the hill into the swamp below, and there spread out over the swamp, and flowed off into the bay. In seven of these ran perennial streams of water, and in the other ten large volumes of water ran during times of storms, freshets, and melting snows. There were many other smaller depressions and ravines, which carried more or less surface water at such times into the swamp. In 1870 the predecessor in interest of the plaintiff constructed its track along on this swamp, parallel to the foot of the hill and the side of the bay, upon piling driven into the swamp. This piling offered no resistance to the free egress of the water. From time to time since, the plaintiff has added other tracks built on piles, and has filled up the right of way under the tracks with embankments of earth, leaving no place or passage for the egress of the water, except one near Tenth avenue west, which is sixteen to eighteen feet wide, and is still crossed by the track, supported on piling. At seven or eight other points, plaintiff has put in temporary box culverts of wood across the right of way, not opposite the ravines and natural water channels, but opposite the ends of the storm sewers hereinafter mentioned. The part of the city built on this slope was platted before the railroad was built, with streets running along the side of the slope, parallel with the railroad right of way, and other cross streets running up and down the side of the hill, terminating at the right of way. These streets have since been improved, and now exist as so platted. The city has also constructed under these cross streets fourteen sewers, which run down the hill, and all of them terminate at plaintiff's right of way, except two, one at Lake avenue, and one at Fifth avenue west, which have been extended under the right of way to the bay. Some of the others connect with the box culverts above mentioned, some have no connection, and one or two empty into said bridged open space left across the right of way. These sewers carry off the surface water deposited by rains and snows and the water of the seven perennial streams, all the water having been diverted from the said seventeen ravines into these storm sewers. They are connected only with the catch basins in the streets, not with the houses. There is another system of sanitary sewers running at right angles to these storm sewers, and having no connection with them.

The plaintiff brings this action against the city to enjoin the use by it of these sewers, and the depositing of the water from them on plaintiff's right of way. It is not claimed that these sewers bring any more water onto plaintiff's premises than was brought by ravines and creeks in a state of nature; but it is claimed that the water has been diverted from the creeks and ravines, and deposited at other

points on the premises; that it runs down these sewers with great velocity, and strikes the roadbed with great force, tearing it up. The plaintiff further claims that "it is well settled that the construction of ditches and pipes for the sole purpose of drainage, gathering water in streams or bodies solely to discharge it, and thus dumping it onto another's land, is actionable. Such works are not a reasonable and proper improvement of one's own premises." The cases cited by counsel are cases where surface water was collected and discharged onto premises where it would not naturally go. The city of Duluth would have no right to discharge surface water on the land of any private owner, unless his land is the natural channel or dumping ground for it. But the land of plaintiff is such natural dumping ground. Plaintiff complains that the city is making such of it, but it seems to forget that nature, and not the city, has made this place such dumping ground, and that the city has never relieved the land of such servitude. It complains that the city diverted the water from its natural channel into these sewers, which deposit the water at different points on its premises from those at which the ravines deposited it; but it forgets that these premises are, so to speak, all channel, and that, while the city diverted the water from its natural channels upon the slope of the hill, it returned the water to that channel,—the common dumping ground,—at plaintiff's premises. If plaintiff had improved its right of way with special reference to the ends of

the ravines, and left openings opposite such ends for the water coming down the ravines, then the plaintiff might be in a position to object to a diversion afterwards of the water to the points where the sewers terminate. But it has not done so. It has permitted the city to make these changes, and has to a considerable extent adopted the plan of the city, by closing up all openings for egress of water at the ends of the ravines, and putting in the box culverts opposite the ends of the sewers. Estoppel by conduct, if any exists is against the plaintiff, not against the city. The defendant is not liable for failing to relieve plaintiff of the burdens put on plaintiff's premises by nature, or for failing to provide a sewer system for plaintiff's premises. "The duty of providing drainage or sewerage is in its nature judicial or legislative, and consequently a municipal corporation is not liable for mere nonaction in failing to perform it." *McClure v. Red Wing*, 28 Minn. 194.

It is true that the water comes down against plaintiff's right of way with considerable velocity, but that is a velocity given it by the hill-side, which was made by nature, and not by the city. It seems to us that the case is simply this: Can the owner of a swamp improve it, and then compel the owner of the high land around it to keep the surface water naturally tributary to the swamp from coming from the higher lands upon the swamp? We think not.

For these reasons the order denying the motion for a new trial should be reversed.

So ordered.

NEW YORK COURT OF APPEALS.

Henry H. ISHAM, Trustee, etc., *Resp't.*,
v.

Mary E. POST, Admr., etc., of Augustus T. Post, Deceased, *Appt.*

Mary E. POST, Admr., etc., of Augustus T. Post, Deceased, *Appt.*,
v.

Henry H. ISHAM *et al.*, *Respts.*

(141 N. Y. 100.)

1. A banker who loaned money for a customer without any compensation for the service is liable for failure to exercise the skill and knowledge of a banker engaged in that business, especially where he had promised to give careful attention thereto.
2. A banker making a loan for a customer on collateral securities is not, for the purpose of avoiding loss on the collaterals, bound to make inquiry as to the solvency of the borrower, if he was reputed to be responsible when the loan was made and nothing indicated the slightest reason for refusing the loan.
3. Taking stock as collateral without verification of its validity at the company's office, especially if there is nothing in

the appearance of the certificate to excite suspicion, is not negligence on the part of a banker in making a loan for a customer.

4. A banker is not chargeable with negligence in loaning a customer's money on raised collateral, if the forgery was such as to deceive any reasonable scrutiny of a fairly prudent banker, knowing the signatures but not suspecting fraud in the body of the instrument.

5. Evidence that a banker charged with negligence in loaning money of a customer on raised certificates of stock loaned large sums of his own money on similar certificates to the same borrower is admissible on the question as to his negligence.

6. Evidence that the identical raised certificates of stock have been used as collateral for years and accepted by skillful bankers and brokers without suspicion is admissible on the question of negligence in loaning a customer's money upon such certificate.

(January 28, 1894.)

A PPEAL by Mary E. Post from a judgment of the General Term of the Supreme Court, Second Department, affirming judg-

NOTE.—The general principles governing gratuitous bailments are well illustrated in the present case which constitutes an important precedent in 23 L. R. A.

respect to a class of transactions by bankers on which there does not seem to have been much, if any, direct authority.

ments of a special term for Kings County in favor of Henry H. Isham; individually, and as trustee, and also in favor of the *cestuis que trustent* in proceedings brought to hold the estate in her hands liable for losses which occurred through the insufficiency of collateral security taken by Augustus T. Post when loaning money belonging to the trust estate. *Reversed.*

The facts sufficiently appear in the opinion. **Mr. Alfred Ely**, for appellant:

In making this loan to Mills, Robeson & Smith, Mr. Post acted in all that he did within the scope of his authority as agent, as contemplated and intended by Isham, and Mr. Isham, as principal, is alone responsible for the results.

Lambert v. Heath, 15 Mees. & W. 487; *Peckham v. Ketchum*, 5 Bosw. 506.

The \$25,000 delivered by Isham to Post was not chargeable with any trust in Mr. Post's hands.

Post had no notice that the money was trust funds.

There was nothing in the character of the transaction to put Mr. Post on his guard or require him to inquire further.

Where a transaction is prima facie for the benefit of the trust and not prima facie a repudiation of it, the party dealing with the trustee has not been held to have had, merely by the use of the word "trustee," any such notice, as would put him on his inquiry.

Gerard v. McCormick, 14 L. R. A. 284, 180 N. Y. 267; *Duncan v. Jaudon*, 82 U. S. 15 Wall. 165, 21 L. ed. 142; *Shaw v. Spencer*, 100 Mass. 394, 1 Am. Rep. 115, 97 Am. Dec. 107; *Walker v. Manhattan Bank*, 25 Fed. Rep. 254.

The transaction undertaken by Mr. Post for Mr. Isham in this case was a gratuitous bailment and one of those rare transactions known to the law as a "mandatum."

Story, Bailm. chap. 8.

A mandatary is responsible to his principal only for the exercise of ordinary care, and is liable only for gross negligence. The gratuitous bailee or mandatary is not a guarantor—there is no consideration upon which to found any agreement of warranty—and in acting bona fide to the best of his judgment without gross negligence he is not liable for loss.

Story, Bailm. §§ 179-188; *Shiells v. Blackburne*, 1 H. Bl. 158; *Beardale v. Richardson*, 11 Wend. 25, 25 Am. Dec. 596; *Tompkins v. Saltmarsh*, 14 Serg. & R. 275; *Finucane v. Small*, 1 Esp. 815; *Foster v. Essex Bank*, 17 Mass. 478, 9 Am. Dec. 168; *Loeb v. Hellman*, 83 N. Y. 601; *Hun v. Cary*, 82 N. Y. 66, 37 Am. Rep. 546.

The exercise of ordinary care did not require Mr. Post to verify these certificates at the office of the company.

The burden of proof is upon the plaintiff.

Lamb v. Camden & A. R. & Transp. Co. 46 N. Y. 279, 7 Am. Rep. 327.

All the certificates delivered to Mr. Post possessed all the indicia of genuineness required by law and universal custom. They had been duly signed by the proper officers and duly issued by the company, "and the transfer indorsed thereon was duly signed in blank by the shareholder," and this indorsement and the whole certificate guaranteed by a reputable

stock exchange firm. According to the established usage in the commercial world, they were acceptable to lenders or purchasers without inquiry or other formality than that of delivery.

Knox v. Eden Musee American Co. (Limited) 74 Hun, 488; *McNeil v. Tenth Nat. Bank of New York City*, 46 N. Y. 325, 7 Am. Rep. 841; *Leitch v. Wells*, 48 N. Y. 585; *Fifth Avenue Bank of New York v. Forty Second Street & G. Street Ferry R. Co.* 19 L. R. A. 381, 187 N. Y. 231; *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 80; *First Nat. Bank of South Bend v. Lanier*, 78 U. S. 11 Wall. 369, 20 L. ed. 172.

Under the universal custom and established usage of the commercial world Mr. Post was entitled to rely on the possession of the certificates without verification or further inquiry.

Ibid.

Mr. Post was not required to know the handwriting in the body of the certificates.

Bank of Commerce v. Union Bank, 8 N. Y. 280; *White v. Continental Nat. Bank*, 64 N. Y. 316, 21 Am. Rep. 612.

Any and all presumption of negligence on Mr. Post's part, if there was any, would be and is rebutted by the fact that he treated Isham's money in the same way as he did his, Post's own.

Jones, Bailm. p. 63; *Story*, Bailm. § 183; *Shiells v. Blackburne*, 1 H. Bl. 159; *Finucane v. Small*, 1 Esp. 815; *Foster v. Essex Bank*, 17 Mass. 479, 9 Am. Dec. 168.

Mr. Post is not liable because he expressly exempted himself from liability by specific agreement to that effect with Mr. Isham at the time he undertook the loan.

First Nat. Bank of Lyons v. Ocean Nat. Bank, 60 N. Y. 279, 19 Am. Rep. 181; *Foster v. Essex Bank*, *supra*; *Wilkinson v. Corderdale*, 1 Esp. 75; *Story*, Bailm. 9th ed. p. 166; *Loeb v. Hellman*, 83 N. Y. 601; *Bell v. Dagg*, 60 N. Y. 530.

Mr. Frederick A. Ward, for respondent:

The fair interpretation of the contract is that Post engaged to loan the money for Isham, as trustee and in his name, to a solvent borrower upon genuine, sufficient, and proper collateral.

The liability of Mr. Post to furnish genuine and not counterfeit security in this case did not arise out of any collateral contract of guaranty nor because of negligence, but by reason of the principal contract, the condition precedent of which was that the loan should be made upon securities which were genuine, not on those which were false or counterfeit.

In all dealings in negotiable securities there is an implied warranty on the part of the one proffering them, whoever he may be, as a part of the agreement, that such securities are genuine and not forged.

Delaware Bank v. Jarvis, 20 N. Y. 228; *Litauer v. Goldman*, 72 N. Y. 506, 28 Am. Rep. 171; *Story*, Promissory Notes, par. 118; *Herrick v. Whitney*, 15 Johns. 240; *Webb v. Odell*, 49 N. Y. 588; *Mersden Nat. Bank v. Gallaudet*, 120 N. Y. 308; *Ross v. Terry*, 68 N. Y. 618; *White v. Continental Nat. Bank*, 64 N. Y. 316, 21 Am. Rep. 612; *Goddard v. Merchants Bank*, 4 N. Y. 147; *Welsh v. German American Bank*, 78 N. Y. 424, 29 Am. Rep. 175;

Weisser v. Denton, 10 N. Y. 75, 61 Am. Dec. 781; *National Park Bank of N. Y. v. Ninth Nat. Bank of N. Y.* 46 N. Y. 77, 7 Am. Rep. 810; *Turnbull v. Bowyer*, 40 N. Y. 456, 100 Am. Dec. 523; *First Nat. Bank of Washington v. Whitman*, 94 U. S. 348, 24 L. ed. 229; *Peckham v. Ketchum*, 5 Bosw. 506; *Lambert v. Heath*, 15 Mees. & W. 487.

One who sells as genuine a forged note is liable for the purchase price.

Frank v. Lanier, 91 N. Y. 112.

In case of forgery, whether of securities or of checks, "the tree must lie where it falls," and the person first deceived by the forgery must, as between him and other innocent parties, bear the loss.

Allen v. Fourth Nat. Bank of N. Y. 59 N. Y. 12; *Thomson v. Bank of British North America*, 82 N. Y. 1; *Otis v. McCullum*, 92 U. S. 447, 23 L. ed. 496; *Osborn v. Nicholson*, 80 U. S. 18 Wall. 654, 20 L. ed. 689; *Stoman v. Bank of England*, 14 Sim. 475; *John-on v. First Nat. Bank of Hoboken*, 6 Hun, 124.

So long as Mr. Post conducted the transaction in his own name without giving up or disclosing his principal, or securing his adoption of the loan, he made himself debtor to the trust estate and took the risks of the transaction.

Morrison v. Currie, 4 Duer, 79; *Holt v. Ross*, 54 N. Y. 478; *Bank of Commerce v. Union Bank*, 8 N. Y. 280; *Kingston Bank v. Eltinge*, 40 N. Y. 391; *Frank v. Lanier*, *supra*; *Gloucester Bank v. Salem Bank*, 17 Mass. 83; *Bank of United States v. Bank of Georgia*, 23 U. S. 10 Wheat. 351, 6 L. ed. 339; *Price v. Neal*, 2 Burr. 1855.

One who takes forged or improper securities is presumptively negligent and should bear the loss.

Whitney v. Martine, 88 N. Y. 535; *Gloucester Bank v. Salem Bank*, and *Bank of Commerce v. Union Bank*, *supra*.

Whenever a transaction is (as this was) unusual and abnormal and not such as ordinarily occurs in the proper conduct of business, the presumption of negligence arises.

Seybolt v. New York, L. E. & W. R. Co. 95 N. Y. 562, 47 Am. Rep. 75; *Kearney v. London, E. & South Coast R. Co.* L. R. 5 Q. B. 411.

The duty of defendant's intestate was enhanced by his knowledge that these were trust funds.

Gerard v. McCormick, 14 L. R. A. 234, 130 N. Y. 267; *Shaw v. Spencer*, 100 Mass. 382, 1 Am. Rep. 115, 97 Am. Dec. 107; *Gibson v. National Park Bank of N. Y.* 98 N. Y. 94; *Fellows v. Longyor*, 91 N. Y. 324; *Deobold v. Oppermann*, 2 L. R. A. 644, 111 N. Y. 538.

The measure of care that must be taken of trust moneys is such care and prudence "as men of common prudence ordinarily exercise in their own affairs, and it is immaterial that the services are rendered gratuitously."

Hun v. Cary, 82 N. Y. 66, 37 Am. Rep. 546.

Upon the notice imparted by the check and the two accounts kept by defendant, one with plaintiff individually and one with him as trustee, as found by the court, defendant's intestate was chargeable with knowledge that he had absolutely no right to loan these trust moneys upon such securities as he accepted
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without the written consent of the *cestuis que trust*, and that he did so at his peril.

Gerard v. McCormick, *supra*; *Sturtevant v. Jaques*, 96 Mass. 623; *Shaw v. Spencer*, *supra*; *Budd v. Munroe*, 18 Hun, 816; *Brewster v. Sime*, 42 Cal. 139; *Thompson v. Poland*, 48 Cal. 99.

Even had this been a contract of gratuitous bailment, still the gratuitous bailee is bound to use a due diligence and attention adequate to the trust imposed in him; to perform his engagement in good faith, and neither do nor omit anything which the nature of the trust requires.

Rutgers v. Lucet, 2 Johns. Cas. 92; *Wilkinson v. Coverdale*, 1 Esp. 74; *Doorman v. Jenkins*, 2 Ad. & El. 256.

Whatever the relation between the parties, whether that of principal and agent, bailor and bailee, or *cestuis que trust*, the fact that it was agreed that the services should be gratuitously rendered had it been proven would have been immaterial.

Hun v. Cary, and *Doorman v. Jenkins*, *supra*; *Litchfield v. White*, 3 Sandf. 545; *Deobold v. Oppermann*, *supra*.

The *cestuis que trust* cannot be estopped by any illegal act of their trustee.

Sherman v. Wright, 49 N. Y. 227; *Fellows v. Longyor*, 91 N. Y. 324; 2 Perry, Tr. § 843.

Messrs. Williams & Ashley, for the respondents, *cestuis que trustent*:

Post had notice that Isham was a trustee using trust funds, and was bound to ascertain what the trust was at his peril.

The check of Isham, with the word "Trustee" added, was full notice to him of the trust, and put him upon inquiry.

Fellows v. Longyor, 91 N. Y. 324; *Shaw v. Spencer*, 100 Mass. 382, 1 Am. Rep. 115, 97 Am. Dec. 107; *Third Nat. Bank of Baltimore v. Lange*, 51 Md. 138, 34 Am. Rep. 304.

Finch, J., delivered the opinion of the court:

The relation between the parties to this controversy must be regarded as that of principal and agent. Post was a banker; not a member of the stock exchange, and so bound by its rules, but familiar with its customs and usages, and controlled by them, to some extent, whenever dealing with stocks in the Wall street market. He held himself out to the business world in that character. By his circulars he advertised himself as dealing in "choice stocks," and promised his customers "careful attention" in all their financial transactions. Those who dealt with him contracted for, and had a right to expect, a degree of care commensurate with the importance and the risks of the business to be done, and a skill and capacity adequate to its performance. That care and skill is such as should characterize a banker operating for others in a financial center, and different in kind from the ordinary diligence and capacity of the ordinary citizen. The banker is employed exactly for that reason. Without it, there might cease to be motives for employing him at all. Isham was the trustee of an express trust, but in this dispute must be regarded simply as an individual, and without reference to his trust character; for

the trial court has found as a fact that, in employing the banker to loan for him \$25,000, he gave no notice of the trust character attaching to the money, contracted apparently for himself, and left Post to believe, and be justified in believing, that the money was his own. The evidence on the subject admits of some difference of opinion, but on this appeal the finding must control.

In the same way, the question whether Post's services in making the loan were or were not to be gratuitous must be deemed settled. The finding is that those services were to be without compensation; and on that ground the appellant claims that Post was a gratuitous mandatary, and liable only for gross negligence. But while no compensation, as such, was to be paid, it does not follow that the banker was freed from the obligation of such diligence as he had promised to those who dealt with him, or was at liberty to withhold from his agency the exercise of the skill and knowledge which he held himself out to possess. Nothing in general is more unsatisfactory than attempts to define and formulate the different degrees of negligence; but, even where the neglect which charges the mandatary is described as "gross," it is still true that, if his situation or employment implies ordinary skill or knowledge adequate to the undertaking, he will be responsible for any losses or injuries resulting from the want of the exercise of such skill or knowledge. *Story, Bailm. § 182a; Shiells v. Blackburne*, 1 H. Bl. 158; *Post v. Essex Bank*, 17 Mass. 479, 9 Am. Dec. 168; *First Nat. Bank of Lyons v. Ocean Nat. Bank*, 60 N. Y. 295, 19 Am. Rep. 181. In the latter case, it was said that ordinary care, as well as gross negligence,—the one being in contrast with the other,—must be graded by the nature and value of the property, and the risks to which it is exposed. Post, therefore, was required to exercise the skill and knowledge of a banker engaged in loaning money for himself and for his customers, because of the peculiar character and scope of his agency, because of his promise of careful attention, and because the contract was made in reliance upon his business character and skill.

We should next consider upon whom rested the burden of proof. The plaintiff alleged and proved that he put into Post's hands, as his banker and agent, to be loaned upon demand at the high rates of interest prevailing, and in the mode approved by custom and usage, the sum of \$25,000, which sum Post had not returned, but refused to return, upon proper demand, and so had converted the same to his own use. That made out plaintiff's case. Judgment for him must necessarily follow, unless Post, in answer, has established an affirmative defense. That which he pleaded and sought to prove was that the money was lost without his fault, and through an event for which he was altogether blameless. In other words, he was bound to show that he did his duty fully and faithfully, and without negligence or misconduct, so that the resultant loss was not his, but must justly fall upon the plaintiff. *Martin v. Brooks*, 94 N. Y. 75; *Ouderkirk v.*

Central Nat. Bank, 119 N. Y. 267. With that burden resting upon him, we must examine his defense, and the evidence given in its support, and determine whether or not it is our duty to sustain the adverse conclusion, to reverse which he brings this appeal.

The trial court has found that Post was negligent in making the loan upon the security of the certificates of stock taken as collateral, which had been raised by a forgery to indicate a larger number of shares than was the actual truth. Negligence is usually a mixed question of law and fact, and is never purely one of law, unless the facts are wholly undisputed, and admit of no conflicting inferences. *Filer v. New York Cent. R. Co.* 49 N. Y. 47, 10 Am. Rep. 327. In the face of the finding referred to we cannot reverse this judgment, unless it clearly appears that upon no possible view of the facts, and upon no inferences deducible from them, can proof of negligence be found, or unless, in reaching the result, some material error in the admission or exclusion of evidence has affected the judgment rendered. The finding of negligence, by its terms, rests upon three omissions. The admitted cause of the loss was a forgery of the number of shares of the stock given as collateral on the loan, by raising that number in one certificate from 7 shares to 70; in another, from 8 to 80; and in a third, from 3 to 93. The certificates were the genuine and lawful certificates of the company, when issued, signed, and attested by the proper officers, and defective only in the forgery which raised the number of the shares. The loan was made to Mills, Robeson & Smith, who were in good repute and standing at the time, but failed two days later for a very large amount. The trial court asserted Post's liability upon the ground that he took the certificates without examination, without presenting them for verification at the office of issue or of registry, and without inquiry as to the solvency of the borrowing firm. Assuming, as the court held, and as the facts of the agency appear to justify, that Post was bound to exercise, in making the loan, ordinary care, such as belonged to his business as a banker, and to the duty he attempted to perform, we must consider the alleged omissions upon the facts disclosed in the record. In so doing, we may dismiss the claim of negligence, as inferred from the omission to inquire as to the solvency of the borrowers. There is no proof that inquiry would or could have developed any different information from that which Post already had. There is no hint of any unfavorable rumors preceding the failure, or of any doubt in any quarter of the solvency of the borrowing firm; but, on the contrary, the undisputed evidence is that they were reputed to be solvent and responsible when the loan was made. There is no indication that inquiry would have yielded to Post any different information from that which he already possessed, or would have furnished the slightest reason for refusing the loan. There was certainly no negligence in omitting a new and further inquiry. Nor do I think that ordinary care required Post, before accepting the certificates, to have pre-

sented them for verification, if there was nothing on their face calculated to arouse suspicion. They had been issued, as appears by their dates, more than six years before the loan was made, but had been issued directly to Smith, who was one of the borrowing firm, and of course knew that they were genuine when the stock was transferred to him on the company's books. He had executed the usual blank assignment, which enabled them to pass from hand to hand, and which had been attested by his firm; and no suspicion could attach to them, except upon a doubt of Smith's integrity, which no known fact warranted. There is no proof that it was ever a habit or custom for bankers or brokers to present such certificates for verification, and it is quite obvious that the business methods of Wall street do not admit of such a custom, suggest no necessity for its existence, and would be badly hindered and hampered by such a regulation; so that I am of opinion that in ordinary cases, and at least where the official signatures are genuine, and nothing in the body of the certificates reasonably awakens suspicion, it is not evidence of negligence that the stock was taken as collateral, without verification, at the company's office. Where there is nothing in the surrounding facts or on the face of the paper to create a doubt, it would be an instance of great and extraordinary care to present them for verification, and much beyond the degree of diligence required of Post, in the present case.

There remains only the alleged omission to give the certificates a reasonable examination. I am inclined to regard that question as sufficiently debatable to prevent our treating it wholly as a question of law. And that is true partly because of some serious conflict in the testimony, but mainly because of the inherent character of the inquiry, which is much more one of fact than of law. The evidence fairly indicates that Post personally never saw the certificates when the loan was made. In all his correspondence with Isham, and when standing on his defense, he made no such claim, but himself said he trusted too much to his clerks. Isham, in one of his letters, reminds Post of his having made that remark, and the latter does not dispute it. And as matter of fact the loan was negotiated and consummated by his managing clerk, Shephard, who was fully examined as a witness, and did not claim or pretend that he showed the certificates to Post at all. But Shephard was not incompetent. Enough appears in the evidence to indicate that he possessed the necessary skill and knowledge to properly perform the duty assigned to him. He held a responsible position in Post's office, had an extensive and valuable experience, succeeded to Post's business on his death, and testifies that he was familiar with, and had handled, very many of the certificates of the company whose stock was taken as collateral. We are not justified in saying that he did not examine the forged certificates at all, and the finding of the trial court cannot mean that. What it must mean, in view of the facts, is that he gave them no close and careful scrutiny. He does not pretend that he did. He says only that they

were brought to him by the messenger of the borrower, and that he took them, and gave Post's check in exchange. Undoubtedly, he recognized the familiar signatures, and noted the number of shares represented; but there was nothing like careful scrutiny or examination, but unhesitating trust in the honesty of the borrowers. I cannot say, as matter of law, that such was the full measure of his duty, and that he did not hastily withhold more or less of the very skill and knowledge upon which Isham relied in selecting Post to loan for him the money. The answer made would be sufficient, if it had been proved. That answer is that the forgery was so skillfully and deftly executed that no ordinary skill, exercised upon a reasonable examination, would have disclosed the fraud, or even aroused suspicion. But we do not know that. The certificates themselves were before the trial judge, and what inference he drew from their inspection we cannot say. What we do know is that one of them, raised from 8 to 98, was so skillfully changed that when Shephard and Isham examined it critically, after knowledge of the forgery, the latter thought it genuine. What Shephard thought, he did not tell us, and omitted to say that what would have deceived the inexperience of Isham would also have deceived him. But at this stage of the case the defendant realized the necessity of proof that the forgery was deft enough to deceive the skill and knowledge of any ordinary banker dealing in such securities. As I look at it, the point had become vital to the defense. If a fair and reasonable examination of the papers, in the room of a hurried and momentary glance, would have disclosed the fraud to the skilled eye of an experienced banker, or awakened a suspicion which would have led to a verification, then I think a finding of negligence would be justified. But if, on the contrary, the forgery was such as to deceive any reasonable scrutiny of a fairly prudent banker, knowing the signatures, but not suspecting fraud in the body of the instruments, then scrutiny would have done no good, and the deception suffered would be excusable. Just that the defendant sought to prove in two ways. He offered to show—First, that he himself had loaned \$50,000 of his own money to the same borrowers, accepting in part similar raised collateral; and, second, that for several years the same identical raised certificates had been given and received on the street as collateral for loans, and deceived the skill and care of a great number of bankers and brokers, who took and held them without suspicion. Both offers of proof were refused, and the evidence excluded. I think that was error. The proof would have shown, at least, the character of the forgery, and that Shephard was not in fault for not disclosing it. It would have established Post's absolute good faith in the transaction, and that he took the same care of Isham's money as of his own. Of course, it was not admissible to show merely that some others were no more prudent than Post, or that his own fault was less because they did the same; but it was admissible to prove that Shephard was deceived by a forgery so perfect and skill-

ful that it escaped, for years, the vigilance of the street. With that fact in the case added to what already appears, I should deem the defense sufficiently established. It was objected to this offered evidence that it might involve an examination of each separate transaction with others. That was not proposed or necessary. The witness testifying was Watson. He had been the clerk of Mills, Robeson & Smith for eleven years, and had charge of all their loan business. The offer was to prove by him that for years these raised certificates had been used on the street as collateral for loans without a suspicion on his part, and baffling the skill and knowledge of banks, brokers, and business firms of experience and reputation. It seems to me, if that is the truth, that no fact could more conclusively establish the perfection of the forgery, and more completely excuse and justify the failure of Shephard to discover it. What was permitted to be proved makes the existence of such a fact quite probable. The certificate raised from 3 to 98 was well enough done to have deceived Isham; and, as to the others, it was much easier to change 7 to 70 and 8 to 80 without attracting notice. If this occurrence has disclosed a new danger in the business methods of the stock market, it may serve at least as a warning, and tend to make more deliberate inspection and closer scrutiny an ordinary duty. The judgment should be reversed, and a new trial granted; costs to abide the event.

Judgment reversed.

All concur, except Bartlett, J., not sitting.

PEOPLE of the State of New York, *ex rel.*
THURBER-WHYLAND CO., *Appl.*,

v.

Edward P. BARKER *et al.*, *Respondts.*

(441 N. Y. 584.)

1. Foreign corporations are included within the Laws of 1855 requiring assessment on all moneys invested in business by nonresidents.
2. Debts cannot be deducted from funds invested by nonresidents under Laws 1855, chap. 37, providing for the taxation of funds invested in business by nonresidents although it says they shall be assessed on funds invested "the same as if they were residents."

(January 23, 1894.)

APPEAL by relator from an order of the General Term of the Supreme Court, First Department, affirming an order of the Special Term dismissing a writ of certiorari sued out to review the refusal of the tax commissioners to deduct indebtedness from the personal property assessed to relator for the purpose of taxation. *Affirmed.*

The facts are stated in the opinion.

NOTE.—The right of a nonresident to deduction of debts from the amount of property in the state in order to obtain the amount of taxable property is, although here decided with reference to the laws of New York, a question which is important 23 L. R. A.

Mr. L. C. Wachner, for appellant:

The relator is organized under the laws of the state of New Jersey, and that state is therefore its domicile, and it is a nonresident.

Foreign corporations are comprehended within the words "persons and associations" in the Act of 1855.

People v. McLean, 80 N. Y. 259; *British Commercial L. Ins. Co. v. Tax Commissioners*, 1 Keyes, 308.

This is the only statute regulating the taxation of foreign corporations for local purposes, and therein alone must be found the power and method of assessing and taxing them.

People v. McLean, *supra*; *People v. Tax Commissioners*, 28 N. Y. 242.

The basis—and the only basis—for assessment and taxations under the act is "on all sums invested in any manner in said business."

People v. Wemple, 183 N. Y. 323.

In the enumeration of the kind of property which is taxable the court speaks of tangible property ("things"); and so it was also held in *People v. Equitable Trust Co. of New London*, 96 N. Y. 393, that "nonresidents, property having no legal *situs* here and business not carried on here are not the subject of taxation here."

People v. Campbell, 20 L. R. A. 453, 189 N. Y. 543; *Re Swift's Estate*, 18 L. R. A. 709, 187 N. Y. 84.

Debts and choses in action follow the domicile of the owner.

People v. Tax Commissioners, 28 N. Y. 224; *People v. Tax Commissioners*, 58 N. Y. 246; *Re Swift's Estate*, *supra*.

The tax commissioners, therefore, have no concern with and no power to inquire as to the debts, choses in actions, or any property belonging to the relator, not having a legal *situs* here for the purpose of estimating its taxable property. The assessors have to do with the sums invested here, nothing else.

People v. McLean, *supra*.

The statute prescribes that the assessment shall be "the same as if they were residents of this state." And the rule of assessing residents upon their personal property is "the full value of all the taxable personal property owned by them after deducting the just debts owing by them."

1 Rev. Stat. 391; *People v. Ferguson*, 38 N. Y. 89.

Full effect must be given to the language of the legislature and a meaning must be sought for each word.

Potter's Dwarrr. Stat. 197, 200-219; *McOluskey v. Cromwell*, 11 N. Y. 593; *People v. Matsell*, 94 N. Y. 179.

The basis of taxation in the case of foreign corporations can only be the tangible property here that alone is afforded governmental protection; whereas the resident enjoys such protection over all his personal property (except only such as has a definite *situs* and is taxable out of the state).

Re Swift's Estate, *supra*.

in other states under statutes more or less similar, and under which the above decision will most likely be followed unless the right to exemption is unmistakably expressed.

The statute does not provide that in case a foreigner invests all his personal estate here, he shall be entitled to deduct all his debts, and when he invests a part he shall be entitled to a deduction of only a proportionate amount of his debts.

People v. Wemple, 138 N. Y. 325.

Messrs. David J. Dean and George S. Coleman, with *Mr. William H. Clark*, for respondents:

Under the scheme of the statute for the taxation of nonresident persons and corporations, no deduction for debts, from the amount of capital invested in business of the state of New York, is authorized.

In the absence of proof to the contrary the court will assume that the laws of New Jersey with respect to the assessment and taxation of property are the same as the laws of New York.

People v. Tax Commissioners, 4 Hun, 596.

The Statute of 1855 comprehends only a scheme by which the capital in this state shall be reached for the purposes of taxation, and to accomplish that purpose it is not necessary that the assessors should ascertain the general indebtedness of the relator.

People v. Tax Commissioners, 23 N. Y. 224;

Williams v. Wayne County Suprs. 78 N. Y. 561.

Peckham, J., delivered the opinion of the court:

The relator complains of the amount of its assessment for purposes of taxation, because, as is alleged, its indebtedness was not deducted therefrom by defendants. It is a foreign corporation, having, according to the affidavit made by its president, a principal office at 76 Montgomery street, Jersey City, N. J., in which state it was organized under the laws thereof. Its office in New York city is stated to be at 116 Reade street. It also appeared by the affidavit that the company was organized with a nominal capital of \$3,000,000, of which \$2,500,000 had been issued, \$100,000 for cash, and the rest for property consisting of merchandise, trademarks, good will, etc. On January 11, 1892, it owned merchandise within the state, exclusive of imported goods in original packages, of \$500,000 in amount. It also had accounts and bills receivable owing to it within the state of New York of about \$200,000, cash in bank about \$20,000, and other personal property in the state of about \$50,000, or a total of \$750,000. It owed on the day above named, in New York city, open accounts of about \$150,000, and bills payable \$1,088,904.42, or a total indebtedness of \$1,218,904.42. It was further stated in the affidavit that the balance of the capital was employed outside the city of New York, principally in the form of accounts receivable, amounting to about \$1,400,000. The tax commissioners assessed the personal property of the relator at the sum of 500,000, after hearing the relator and considering its demands; and they decided that sum to be just, and the amount for which the personal estate of the relator was lawfully assessable for the year. The relator claimed that the indebtedness above set out should be deducted from the sum of \$750,000, which it stated

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was the utmost amount of its property that could under any circumstances be regarded as invested in any manner in business in this state, and that, if such deduction were allowed, there was no sum remaining upon which to make any assessment. Objection was made by it to the addition of any part of the above-named sum of \$1,400,000 to the sum of \$750,000, because, as it alleged, the former sum was employed outside the city of New York, and was principally in the form of accounts receivable. The claim was that, as to such accounts, they had no *situs* in and of themselves, and were mere choses in action, and took in law the *situs* of their owner, and that *situs* was its domicile in New Jersey. It was, therefore, urged that no part of such sum could be regarded as invested in any manner in the business of the relator in the city of New York.

Prior to 1855, great numbers of persons doing business in this state, and having large amounts of moneys invested within its borders, nevertheless chose to reside just outside its confines. Although these persons were nonresidents of the state, yet they came daily within its boundaries for the purpose of doing business here, and had here large amounts of capital invested in their business; and yet, under our laws, they could not be reached for taxation. Their names could not be put upon an assessment roll, because they did not reside in any town or ward where an assessment could be made; and they had no agents or trustees who resided in the state, against whom any assessment on account of such property could be made. To reach the nonresident for the purpose of subjecting such property to taxation was the object of the Act, chapter 87 of the Laws of 1855. *People v. Tax Commissioners*, 23 N. Y. 224. Section 1 of the Act reads as follows: "All persons and associations doing business in the state of New York as merchants, bankers, or otherwise, either as principals or partners, whether special or otherwise, and not residents of this state, shall be assessed and taxed on all sums invested in any manner in said business, the same as if they were residents of this state, and said taxes shall be collected from the property of the firms, persons, or associations to which they severally belong." We are of the opinion that this act does not contemplate the deduction of debts from the sums invested in this state by nonresidents. As the person is a nonresident, it is to be assumed that he will, at the place of his domicile, have all of what might be termed his "equities" adjusted, and that, if entitled to it anywhere, it will be at such domicile that he will claim and be allowed the right to have such deduction. In his case the Statute of 1855 seizes upon the certain, specific sum which he has here invested in the business carried on by him, and that sum is to be assessed and taxed the same as if the person were a resident of the state. In using the expression, "the same as if they were residents of this state," we do not think it was intended that exceptions were to be allowed here the same as if the party were a resident, or that deductions from the sum thus invested should be made as if that were

the case. It meant, as it seems to us, that the sum invested in any manner in business in this state should be assessed in the same manner and form as a resident would be assessed. Foreign corporations are included within the terms of the Act of 1865. *British Commercial L. Ins. Co. v. Tax Commissioners*, 1 Keyes, 303, cited in *People v. McLean*, 80 N. Y. 254, 259. Hence it was said that a foreign corporation doing business in New York was properly taxable in the city of New York, where its principal place of business or office of the agency existed. And in this last-cited case, in 80 N. Y., it is said that the Act of 1865 points out the mode of taxation, viz., "the same as if they were residents of this state;" and, in referring to the mode of taxing a resident corporation, it is found that it is to be taxed in the town or ward where it has a principal office or place for the transaction of its financial concerns. The foreign corporation is not to be taxed in all things the same as if it were a resident, because the statute expressly provides that it is only to be taxed for the sum invested in business in this state, and, in order to tax it upon that sum no indebtedness should be allowed. The percentage, the form, the mode of the assessment and taxation upon the specific sum invested in business in this state are to be the same as if the person were a resident; but inasmuch as all the subjects of assessment against a nonresident are not within the jurisdiction of the state, but only the sum here invested, it is plain that it was never contemplated by the legislature that such nonresident should have the right to make deductions from the sum by reason of debts, while the taxing authorities would have no right to balance such deductions by an assessment of other property of the nonresident not situated within the state. The resident has no right to deduct his indebtedness from any specific piece of personal property, or from any special chose in action. In a general way, it may be said that he is to be charged with all his personal property, and from that total he may deduct his debts. This cannot be done in the case of a nonresident, although it may (as we may assume) be done at his domicile. All we are to do is to assess and tax the sum here invested; and the equities must, as we have said, be adjusted at the domicile of the person. The assessment of a domestic corporation is made after a deduction for debts, because its capital and surplus are to be assessed at their actual value, which cannot be arrived at without considering and deducting debts. A foreign corporation is not to be thus taxed, and no inquiry is made as to the actual value of such capital or surplus, and, as such value is not to be assessed or taxed, the debts should not be deducted from specific property here invested. The relator having no right to deduct its debts from the sum it had invested in its business here, it is unnecessary to discuss the question whether the amount of the debts due it should be regarded as any part of the sum invested in its business in this state, because the sum assessed by the defendants is less than the amount which the affidavit of the president

of the relator shows was invested in its business in this state at the time of such assessment, exclusive of those accounts. The order of the general term should therefore be affirmed, with costs.

Order affirmed.

All concur.

In the Matter of the Judicial Settlement of the Accounts of Sara N. WORTHINGTON et al., Exrs., etc., of Henry R. Worthington, Deceased.

(41 N. Y. 2.)

1. **An assignment by an executor before his accounting of his commissions is void** as contrary to public policy, since when the hope of compensation is gone, a strong incentive to diligence and zeal is wanting and the temptation to be content with a lax or perfunctory administration of the trust becomes more persuasive.

2. **An assignee of the commissions of an executor has no such vested title, legal or equitable, to any share or interest in the assets of the estate to be distributed upon the account as confers upon him the right to be made a party to the proceedings or to be heard upon a settlement and entry of the decree.**

(January 18, 1894.)

APPPEAL by petitioner from an order of the General Term of the Supreme Court, Second Department, affirming an order of the surrogate of Westchester County denying his petition to open the decree settling the accounts of the executors of Henry R. Worthington, deceased, in order to permit him to make claim to commissions alleged to have been earned by one of the executors and assigned to the petitioner. *Affirmed.*

The facts sufficiently appear in the opinion.

Mr. Alexander V. Campbell, for appellant:

The surrogate's holding that if an executor for any reason fails to complete his duties, "whether he resigns, dies, or is removed for cause, no commissions can be allowed" was error.

Re Jones, 4 Sandf. Ch. 615, 7 L. ed. 1229; *Wheelright v. Rhoades*, 28 Hun, 60; *Re Allen*, 29 Hun, 9; *Re Baker*, 85 Hun, 272; *Re Hayden*, 54 Hun, 197; *Welling v. Welling*, 3 Dem. 511.

The executors' commissions were assignable.

The surrogate erred in holding that the petitioner was not a "person interested," under § 2514, subsec. 11, and so not entitled to be cited, nor to make himself a party under Code, § 2731.

Code Civ. Proc. § 2514, subsec. 11.

Mr. William A. Jenner, for respondents:

The petitioner has no standing in court in this proceeding or right to interfere with the executors' accounts or decree settling them.

NOTE.—The rule that an assignment of unearned salary of a public officer cannot be lawfully made, which is strongly illustrated in *State v. Williamson* (Mo.) 21 L. R. A. 827, and shown also in *Schwenk v. Wyckoff* (N. J. Eq.) 9 L. R. A. 221, and *Bowery Nat. Bank v. Wilson* (N. Y.) 9 L. R. A. 708, and *note*, is here extended to the case of an executor as to which the decision seems to be a new one.

His status, at most, was that of an alleged creditor of a removed and deceased executor, holding an assignment of the latter's claim to commissions.

By Code, § 2780, only a "party may contest the account with respect to a matter affecting his interest in the settlement and distribution of the estate."

This assignment was, and could be, to the petitioner as security merely for Harry's alleged debt to him.

The petitioner's claim, if he has any, is against the estate of Harry F. Worthington, by whom he was employed. That claim the petitioner has never attempted to establish. If he had no valid claim against Harry F. he has no interest in any commissions to which Harry F. might have been entitled.

Harry F. Worthington was not entitled to any commissions upon the *corpus* of the estate, he having been removed before the final execution of the duties imposed upon the executors by the will.

Re Jones, 4 Sandf. Ch. 615, 7 L. ed. 1229; *Re Allen*, 29 Hun, 7; *Re Hayden*, 54 Hun, 197.

The commissions of an executor are not assignable, and an instrument purporting to assign the same is void.

Wheelright v. Rhoades, 28 Hun, 57; *Redfield's Surrogate Practice*, p. 781; *Re Hayden*, *supra*; *Re Manice*, 31 Hun, 119.

It is against public policy that an executor should assign his commissions in advance of their being ascertained, fixed, and allowed to him.

It has been frequently held that the assignment of the salary or fees of a public officer is void as against public policy.

Code of Civil Procedure, § 1910; *Bowery Nat. Bank v. Wilson*, 9 L. R. A. 706, 122 N. Y. 478; *Bliss v. Lawrence*, 58 N. Y. 442, 17 Am. Rep. 278; *Toft v. Maraly*, 120 N. Y. 474; *Lawrence v. Townsend*, 88 N. Y. 24; *Platt v. Platt*, 105 N. Y. 488; *Decker v. Saltzman*, 59 N. Y. 275; *Daly v. Stetson*, 23 Jones & S. 202; *Zubriakie v. Smith*, 18 N. Y. 822, 64 Am. Dec. 551; *Lamphere v. Hall*, 26 How. Pr. 509; *Brooks v. Hanford*, 15 Abb. Pr. 342.

Every reason forbidding the assignment by a sheriff of his fees is equally cogent against allowing an executor to assign his expected commissions, especially when the latter's commissions are payable only upon and for the faithful rendition of the services.

Abbot v. American Hard Rubber Co. 33 Barb. 578; *Ten Eyck v. Craig*, 62 N. Y. 406; *Moore v. Moore*, 5 N. Y. 256; *Ackermann v. Emmott*, 4 Barb. 626.

Per Curiam:

This appeal has been taken from an order of the general term affirming an order of the surrogate refusing to open and modify a decree entered upon the final judicial settlement of the accounts of the surviving executors of the will of Henry R. Worthington, deceased. The appellant claims no other interest in the estate of the decedent than that derived from an assignment by one of the executors of his commissions. This executor was subsequently declared a lunatic, and removed for mental incapacity, and died before the remaining executors had rendered an ac-

count. The executrix of the removed and deceased executor was made a party to the accounting, and the surrogate rendered a decree in which it was, among other things, adjudged that the removed executor was not entitled to commissions because he took no part in the management of the estate, or in the making and keeping of the accounts of the executors. The appellant was not cited nor heard in this proceeding, and we think it is clear that he had no such vested title, either legal or equitable, to any share or interest in the assets or property of the estate to be distributed upon the accounting or affected by it, as conferred upon him the right to be made a party to the proceeding, or to be heard upon the settlement and entry of the decree. It may be conceded that the assignment of the commissions was made for a good consideration, and that the removed executor had actively participated for many years in the management and administration of the estate, and that his representatives were therefore entitled to some consideration upon the final allowance of commissions by the surrogate. The difficulty in the way of the appellant is of another kind. Until ascertained and liquidated at the times and in the manner authorized by law, the commissions are not subject to the executor's disposal, but the right to them is inchoate, and upon grounds of public policy, unassignable. There is no fundamental distinction in this respect between public and private trusts, where the statute fixes the compensation, and prescribes that it shall not become due and payable until the services have been rendered, or at stated periods during the term of service. It is well settled that a public officer cannot, during his official term, and before his salary or fees become due and payable, make a valid assignment of such salary or fees. *Bliss v. Lawrence*, 58 N. Y. 442, 17 Am. Rep. 273; *Bowery Nat. Bank v. Wilson*, 122 N. Y. 478, 9 L. R. A. 706.

It is believed that the efficiency of the service to be rendered depends upon the enforcement of such a rule. If the emoluments of the office might be separated from it and transferred to another, it would leave the duties of the office as a barren charge to be borne by the incumbent. It is evident that transfers of this kind would not tend to promote activity and care in the discharge of official obligations. The same considerations forbid the recognition of an assignment by an executor of his commissions in advance of the time prescribed by law for their adjustment and payment. When the hope of compensation is gone, a strong incentive to diligence and zeal is wanting, and the temptation to be content with a lax or perfunctory administration of the trust becomes more persuasive. As the appellant failed to establish a valid title to any interest in the estate of the decedent, we are not required to consider the other questions discussed upon the argument of the appeal.

The order of the General Term must be affirmed, with costs.

All concur, except Bartlett, J., not sitting.

IOWA SUPREME COURT.

LIMBURG
v.
GERMAN FIRE INSURANCE CO. OF
PEORIA.

(.....Iowa.....)

1. Both conditions need not be shown in order to avoid a policy of insurance under a clause making it void when "vacant or unoccupied."
2. The words "vacant or unoccupied" in an insurance policy must be construed with respect to the use and adaptability of the building insured.
3. An old counter not intended to be moved but left for sale in the insured building on removal of the tenant who had used it for a cigar store and factory and a few bottles and jugs of liquor stored there under an arrangement with him without the knowledge of the owner of the building do not constitute an occupancy of the building where the owner is seeking another tenant.
4. Altering or repairing a building does not constitute an occupancy within the meaning of an insurance policy which provides that mechanics may be employed for a certain number of days in such work.
5. A verdict ignoring the instructions of the court to limit the recovery to the amount required to repair the building and giving the whole amount of insurance thereof will be set aside.

(January 26, 1894.)

A PPEAL by defendant from a judgment of the Superior Court of Keokuk in favor of plaintiff in an action brought to recover the amount alleged to be due on a policy of fire insurance. *Reversed.*

The facts sufficiently appear in the opinion.
Mr. James C. Davis for appellant.
Mr. J. F. Smith for appellee.

Kinne, J., delivered the opinion of the court:

1. Defendant company issued to plaintiff its policy of insurance for the sum of \$500 on a frame store building in the city of Keokuk, Iowa. The policy insured the property against loss by fire from September 4, 1890, to the 4th day of September, 1891. On March 29, 1891, the property was partially destroyed by fire. Plaintiff brings this action to recover, claiming that the loss is total. Defendant pleads a provision in the policy that if the premises "be or become vacant or unoccupied, and remain so for ten days," the policy shall be void. It alleges that for more than ten days immediately prior to the fire said premises had become and remained vacant and unoccupied. It also claims that the insured property was only damaged to the amount of \$200. Other issues were pre-

sented, as to which no question is now made, and they need not be stated.

2. The provision of the policy on which the defense is chiefly based is: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied, and remain so for ten days." It becomes necessary, therefore, to determine when, in legal contemplation, a building may be said to be "vacant or unoccupied," within the meaning of these words as used in the policy. At the outset it will be well to bear in mind that, in order to avoid liability under this clause of the policy, it is not incumbent on the defendant to show that both conditions existed for the ten days immediately preceding the fire. It is sufficient, under this provision of the policy, to defeat liability, if the building was either vacant or unoccupied for the required time, in the absence of other provisions indorsed upon or added to the policy. A learned writer has said that the words "vacant" and "unoccupied" are not synonymous; that "vacant" means empty of everything but air, and that "unoccupied" means that no one has the actual use or possession of the premises; and it is further said that the words must be construed with reference to the kind of structure or building insured. 1 May, Ins. § 249a. It occurs to us that these words must also be construed in view of the uses and purposes for which the building is adapted; that is, as to whether it is so built and arranged as to be used as a dwelling house, or a store building, or a school-house, or a structure fitted and adapted for use for some other purpose. Webster defines "vacant" as being "deprived of its contents; not filled; empty." The same authority defines "occupy" thus: "To take or hold possession of; or hold or keep for use; to possess." Another definition is: "To hold possession; to be an occupant." It is said that occupancy implies an actual use of a dwelling house as a dwelling place; that the insurer has a right, by the terms of such a policy, to the care and supervision which would be involved in such an occupancy. *Bonenfant v. American F. Ins. Co.* 76 Mich. 658; *Shackleton v. Sun Fire Office of London, England*, 55 Mich. 288, 54 Am. Rep. 379; *Ashworth v. Builders Mut. F. Ins. Co.* 112 Mass. 423, 17 Am. Rep. 117.

Weidert v. State Ins. Co., 19 Or. 261, was a case of insurance of a dwelling house, where the policy contained a "vacant" or "unoccupied" clause. It appeared that plaintiff moved out of the house about March 20; that on the next day one McNett moved in, and remained until the 20th of June; and after that time, and up to the time of the fire, plaintiff or his hired man visited the house

NOTE.—In connection with the very full review of cases as to vacancy and nonoccupancy of insured premises presented in the opinion of the court in the above case, see also *Halpin v. Insur-* 23 L. R. A.

ance Co. of North America (N. Y.) 8 L. R. A. 79, and *note*, and *Continental Ins. Co. v. Kyle (Ind.)* 9 L. R. A. 51, and *note*.

daily, and that some of the members of his family were at the house every day. It was held that the house was vacant and unoccupied. In *Keith v. Quincy Mut. F. Ins. Co.*, 10 Allen, 228, the court held that the fact that tools remained in a shop, and that it was visited daily by the son of the insured, did not constitute occupancy; that the policy contemplated some practical use of the building. In *Corrigan v. Connecticut F. Ins. Co.*, 123 Mass. 298, the occupant of the house had moved out, leaving in it some of his furniture, and retaining the key; and the premises were held to be unoccupied. In *Herrman v. Merchants Ins. Co.*, 81 N. Y. 184, 37 Am. Rep. 438, it was held that a dwelling house was unoccupied when no one lived in it; and in *Herrman v. Adriatic F. Ins. Co.*, 85 N. Y. 168, 39 Am. Rep. 644, the holding was that occupancy contemplated the use of a house by human beings as their customary place of abode. In *Cook v. Continental Ins. Co.*, 70 Mo. 610, 35 Am. Rep. 438, the insured had moved out of the house, leaving some furniture, and leaving a man in possession of the house, and to sleep therein. He abandoned it, and afterwards the house was burned, no one being then there. It was held that it was unoccupied. In *Watertown F. Ins. Co. v. Cherry*, 84 Va. 72, the premises insured consisted in part of a dwelling house. The evidence showed that the insured had moved out of the house; that it was not in use, except that a party had put some fodder in the outbuildings; and the buildings were occasionally visited by a resident of the neighborhood, who had the key. The building was held to be vacant and unoccupied.

In *Halpin v. Insurance Co. of North America*, 120 N. Y. 73, 8 L. R. A. 79, it was held that a building used as a morocco factory, and which was unused for about six months prior to the fire, was unoccupied within the meaning and contemplation of the parties, even though all the machinery remained in the building, and it was closed and locked, and in the hands of the plaintiff's agent for rent, and he visited it frequently. The court said "that to constitute occupancy of a building used for manufacturing purposes there must be some use or employment of the property. Its use as a place of storage merely is not sufficient. . . . The insurer has a right, by the terms of the policy, to the care and supervision which is involved in the use of the property contemplated by the parties at the time of entering into the contract." In *Continental Ins. Co. v. Kyle*, 124 Ind. 132, 9 L. R. A. 81, a tenant moved out of an insured dwelling house March 26, after which one who had previously engaged the house made some repairs thereon, and kept in the house some planes, and on March 30, put some hay in the stable, and buried some potatoes on the premises, intending to move in on April 1. March 31, the house was destroyed by fire, and it was held that a policy conditioned against the premises becoming "vacant or unoccupied" was avoided.

In *American Ins. Co. v. Padfield*, 78 Ill. 169, it is said: "A fair construction of the 23 L. R. A.

language 'vacant and unoccupied' is that it should be without an occupant,—without any person living in it." In *Ashworth v. Builders Mut. Ins. Co.*, 112 Mass. 423, 17 Am. Rep. 117, it is said: "Occupancy, as applied to such buildings [dwelling house and barn], implies an actual use of the house as a dwelling place, and such use of the barn as is ordinarily incident to a barn, belonging to an occupied house, or at least something more than a use of it for storage." In *Farmers Ins. Co. v. Wells*, 42 Ohio St. 519, the tenant moved out with no intention of returning, leaving in the premises a barrel of corn and a coal-oil can. On the following night the building burned. It was held that it was vacant or unoccupied. In *Sleeper v. New Hampshire F. Ins. Co.*, 56 N. H. 401, the occupant of the house removed to another town, taking his family, their wearing apparel, and part of their furniture. It was held that the building was vacant and unoccupied, even though he may have intended to return in eight or ten months, and left in the house a few articles not necessary for his present use. In *Moore v. Phoenix Ins. Co.*, 64 N. H. 140, it is held that the premises were vacant and unoccupied where the occupant had removed therefrom, though a little furniture was left in the house; and it is also held that the terms "vacancy" and "nonoccupancy" are used interchangeably, and as equivalent in meaning. In *Dennison v. Phoenix Ins. Co.*, 52 Iowa, 457, a building used as a boarding house and hotel, which had been vacated by a tenant, and stood awaiting another occupant, was held vacant and unoccupied. In *Feshe v. Council Bluffs Ins. Co.*, 74 Iowa, 876, the tenant moved out of a dwelling house on September 26, and it was burned October 1, following. The owner lived a mile and a half away, and spent a part of each intervening day in examining and cleaning the house, but did not sleep there nights. Her father, who lived near the insured premises, left an axe and grub hoe in the house at night; otherwise it was not occupied. It was held that to all intents and purposes the house was vacant and unoccupied. It was said: "There was nothing left or placed in the house which indicated an intent to occupy it as a dwelling at any time. It is true it had been rented, and a tenant expected to take possession in about two weeks subsequent to the fire; but this is immaterial." In *Snyder v. Firemans Fund Ins. Co.*, 78 Iowa, 146, the tenant had moved everything out of the insured dwelling house except some trumpery,—a box or barrel, a cross-cut saw, a pair of skates,—and did not expect to return, and there was no evidence touching its future occupancy. The house was destroyed by fire the next morning. Carpenters had been at work repairing it. It was held vacant or unoccupied. In *Sexton v. Hawkeye Ins. Co.*, 69 Iowa, 99, the dwelling house had been vacated by the tenant about three months prior to the fire. He had left therein two or three jars, and two large four or five gallon jars, and a molasses keg, and a table. It appears also that plaintiff had in the house some tools and other things. It was held that the articles in the house did not

constitute an occupancy, and that a verdict was properly directed for defendant.

Appellee relies upon and cites many cases, among which we specially refer to the following: *McMurray v. Capital Ins. Co.* (Iowa) 54 N. W. Rep. 354, was a case where a dwelling house was insured and it was claimed that the premises had become vacant and unoccupied. The facts were that the insured had been away for several months, working at his trade. His wife and children were away temporarily on a visit to her parents. The house remained the home. None of the furniture had been removed. There was no intention to abandon it as a place of residence. The absence was for a temporary purpose only. In *Eddy v. Hawkeye Ins. Co.*, 70 Iowa, 473, 59 Am. Rep. 444, the tenant had removed from the house on Tuesday. The fire occurred the following Friday. Plaintiff was residing in another house on another part of the farm; and on the morning after the tenant moved out plaintiff took possession of the house, cleaned it, and prepared to move in. Before the fire plaintiff had in part moved in, had placed therein carpets, bedding and bedsteads, cans of fruit, chairs, pictures, mirrors, stoves, clothing, dishes, and a table, and expected to be there to remain on Saturday; and it was held that the house was not vacant or unoccupied. In *Doud v. Citizens Ins. Co.*, 141 Pa. 47, the provision in the policy was, "if the premises insured be vacated." The tenant moved out, and on the following day the owner was at the house all day, and then left, and began packing up preparatory to moving into the house herself, and in fact had placed some things in the house. She was held to be in possession, and that the house had not been vacated. *Roe v. Dwelling House Ins. Co.*, 149 Pa. 94, was like the *Doud Case* in its facts. In *Home Ins. Co. v. Wood*, 47 Kan. 521, it was claimed that the house was unoccupied within the meaning of the policy. The jury found that the plaintiff's family was residing in the house at the time it was burned, but were temporarily absent. The evidence showed that the household goods were all in the house; that some of them had been packed; that plaintiff stayed in the house every night until five days before the fire, and thereafter slept at another place, because he was ill; that he was at the house every day up to the day of the fire. The court, while expressing doubts as to whether the building was occupied, held that, as the jury had so found, and there was evidence to sustain their finding, it would not disturb the verdict. In *Burlington Ins. Co. v. Brockway*, 188 Ill. 644, the property was a building occupied by the assured as a dwelling and store-room. The policy contained a provision like that in the case at bar. The insured ceased to occupy the dwelling part of the building, but did occupy the store up to the time of the fire. The company contended that a failure to occupy the whole building avoided the policy. The court held that the occupancy of the store portion of the building was an occupancy under the terms of the policy. In *Traders Ins. Co. v. Race*, 142 Ill. 338, the court held that by reason of special

provisions in the policy the trustees therein mentioned, or the mortgagee, was not affected by a violation of the conditions of the policy by the assured as to nonoccupancy; and, further, as the proceeding was in equity, which will not enforce a penalty or forfeiture, that the company must show that the vacancy or nonoccupancy in some degree contributed towards causing the fire. In *Traders Ins. Co. v. Race* (Ill.) 29 N. E. Rep. 846, the insured had moved furniture in the house, and from that and other circumstances the court held it was not vacant and unoccupied.

It will be observed that few if any of the cases relied upon by appellee sustain his contention that the premises in controversy were occupied within the meaning of that word as used in policies of insurance. Facts touching vacancy or occupancy differ in each case presented; hence each case must be determined upon its own peculiar facts. It must be conceded also that the decisions of courts are not always in harmony where the facts are substantially the same. It will serve no useful purpose to further review the authorities. From them may be deduced certain rules or principles applicable to cases like that at bar. We must, in construing the meaning of the words, "be or become vacant or unoccupied," have in view not only the technical meaning of the words, but the uses for which the property is adapted, which must have been in contemplation of the parties when they entered into the contract. Again, mere use of a store building as a place in which a few articles may be left no business being carried on therein, and the premises not being so used as to in any wise insure for them the care, watchfulness, and protection from danger to exposure to fire which must have been in contemplation of the parties to the contract, in view of the adaptability of the building for certain uses only, cannot be deemed an occupancy. To prevent a policy from being avoided for vacancy or unoccupancy in such a case, the use and occupancy must be of such a character as ordinarily pertains to a building adapted for such purposes. A mere storage of property therein, which does not involve the care and watchfulness which the policy holder owes to the insurer, will not suffice to constitute occupancy. The undisputed facts in the case at bar are that the insured property was a two-story building, the lower story being adapted and used for a store-room, with access therefrom to the story above. There was no means of access to the upper story except by going through the store-room. When the policy issued, the building was occupied by one Reimbold as a tenant of the plaintiff. He had a cigar store in the front part of the building downstairs, and a cigar manufactory in the rear part. There were two rooms upstairs which seem to have been but little used by the tenant. His lease expired on March 11, 1891. He moved his stock out of the building on March 7, and on the same day he had his government license transferred to permit his carrying on business in the building to which he had moved. He had a policy of insurance upon his stock and tools used in his business. This he had properly trans-

ferred on March 6. When he moved out on March 7, he left in the building one counter, which he did not intend to move, but wanted to sell, some shelving, and some leaf tobacco in an upper room. All these articles he had taken from the building prior to March 20, except the counter, and he thinks he had them all out, except the counter, before the 18th of March. The counter remained in the building, and was burned. The fire occurred on March 29. The tenant, when he went out, or at least by March 11, gave one key to the building to the agent of the insured, and retained the other. He retained the key so that he might show intending purchasers the counter which he had left there. He exercised no control over the property after his lease expired. During the continuance of his tenancy he had given one Masterson, a saloon keeper, the right to store some liquors in one of the upper rooms, for which Masterson was to pay him \$3 per month. He had given Masterson no authority to thus use the upper room after his own lease expired. Masterson's place of business was two or three doors from this building. He never used any part of this building as a store-room to do business in. He simply kept a few bottles of liquor upstairs there, and, as he needed a fresh supply in his saloon, he would come there and get it. He did not come there frequently, only occasionally. He had in the building, within ten days before the fire, one or two bottles of brandy, one or two jugs of whiskey, some bottles of whiskey, and a couple of boxes of wine, and some bottles. It does not appear that Masterson had any key to the building after March 11, or that he was allowed any means of access to his goods. He had no lease from the plaintiff. He was not thus occupying or using this upper room, after the tenant moved out, by reason of any arrangement with plaintiff, so far as the record shows. Nor does it appear that his use of this room was known to plaintiff. Plaintiff's agent had rented the building to a new tenant, who was to move in on March 18, but failed to do so. At the time of the fire there was no certainty as to when, if at all, the building would be occupied. Certain repairs had been made in anticipation of the occupancy of the tenant who was to move in, and failed to do so. Plaintiff's agent testified that at the time of the fire plaintiff was not in any way occupying the building, and had no tenant in there. Plaintiff's agent was frequently in the store-room, painting and papering and scrubbing it out, prior to the fire. Do these facts show occupancy? We think not. The tenant who was to occupy more than ten days prior to the fire had failed to come. No other tenant had been found. The premises were not used for the purpose of carrying on business therein for more than fifteen days preceding the fire. They stood awaiting a tenant. There is nothing to show that plaintiff would ever be able to rent the premises. There was absolutely no use made of the building whatever for the ten days preceding the fire, except that the counter of the late tenant was in there, and

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the Masterson liquors, before mentioned. The parties, when they entered into the contract of insurance, did not contemplate that the property would be treated as occupied if an outgoing tenant left an old counter in the building, nor if some one unknown to plaintiff stored a few bottles of liquor there. Such use, if it can be dignified into a use, of the building, insured to it practically no care and protection whatever. Such a use, to our minds, falls far short of a compliance with the terms of the contract. That contemplated the use incident to a store, and such a use would carry with it a large degree of protection to the property, which was not essential or possible under the facts as they appear here. The building was vacant or unoccupied for more than ten days prior to the fire. Counsel for appellee seem to think that to hold the parties to the contract which they have voluntarily entered into, and in the absence of fraud, is technical. We cannot change or ignore the agreement of the parties. We cannot make a new one for them, but we must construe their agreement as we find it.

8. Appellee contends that, as the policy provides that mechanics may be employed in the building, altering or repairing it, for not more than fifteen days at any one time, and it was being repaired, that should be considered as an occupancy within the terms of the policy. We do not think so. The repairs might be made while the building was occupied. Again, it is not shown that these repairs continued up to within ten days before the fire. The provision of the policy does not indicate that it was in the contemplation of the parties that there should be no occupancy of the premises while repairs were being made. As the point is not pressed with any apparent confidence, we need give it no further consideration.

4. Under the instructions of the court the jury should have found for the defendant. Indeed, under the undisputed facts, there was no such occupancy as the policy contemplated, and hence the court would have been justified in directing a verdict for the defendant.

5. The jury were told by the court in an instruction that if they found that the building was not totally destroyed, and it could be repaired at an expense of \$200 to \$250, then plaintiff's damages would be limited to the amount it would have cost to repair said building, and put the same in as good condition as before the fire occurred, with 6 per cent interest per annum thereon. Under the provisions of the policy this instruction was proper, and, whether it was so or not, the jury were bound to follow it. The undisputed evidence was that for \$250 the building could have been made as good as it was before the fire. The jury disregarded the court's instruction, and found for plaintiff for the full amount of the policy, with interest. The court should have set the verdict aside for the reasons given.

Reversed.

WASHINGTON SUPREME COURT.

P. S. WILKES, *Appt.*,
v.
Griffith DAVIES, *Resp.*

(..... Wash.)

1. The owner of improvements on school lands in Washington, who is entitled to compensation therefor on sale of the land, need not yield up possession before bringing an action to recover their value from the purchaser of the lands.
2. A decision that the owner of improvements on school lands which have not been appraised as required by law, cannot have an injunction against the consummation of the sale of the lands to the highest bidder until he has been paid for his improvements because he has two other remedies, one of which is to sue the purchaser of the lands for the value of the improvements, must be held conclusive in a subsequent suit between the parties in interest of the right of the owner of the improvements to bring an action for their value against such purchaser, the parties in the two suits being identical except for the omission in the latter suit of the officers against whom the injunction was sought but who were not parties in interest.

(*Hoyt, J., dissents.*)

(January 22, 1894.)

APPEAL by plaintiff from a judgment of the Superior Court for King County in favor of defendant in an action brought to recover the value of improvements placed by the plaintiff upon school land, which was afterward bid in by defendant. *Reversed.*

The facts are stated in the opinion.

Mr. W. S. Relfe for appellant.

Messrs. Fishback, Elder & Hardin for respondent.

Dunbar, Ch. J., delivered the opinion of the court:

This was an action at law to recover the alleged value of improvements on school land. The plaintiff alleged his possession of said lands by virtue of a lease from the county commissioners of King county, the appraisal of the land by the county commissioners under the act to provide for the sale and leasing of school lands, approved March 28, 1890, and all the subsequent steps taken by the commissioners under said law. He alleged that the defendant, Davies, was the highest and best bidder for the land upon which the plaintiff's improvements rested, and alleges that in appraising said lands the county commissioners of King county, although, at the time, having full knowledge and notice of the fact that plaintiff had im-

provements thereon, and of their value, and that the plaintiff was the owner of said improvements and living thereon, arbitrarily, and without just cause, failed and refused to appraise or value the improvements made by the plaintiff, as aforesaid, upon the land, and failed and refused to set down the value of said improvements upon the land so appraised, and to report the same, as required by law. The complaint also alleged the value of the improvements, and asked for judgment for that amount. The complaint is a long one, but we think we have stated sufficient of it for the purposes of this decision. Upon the trial of the cause the defendant objected to the introduction of any testimony by the plaintiff, for the reason that the complaint did not state a cause of action. The court sustained the motion, and plaintiff, standing on his complaint, appeals; so that the only question before the court is the sufficiency of the complaint.

The first and main contention for the respondent is that the plaintiff, being in possession of the improvements, not having delivered them to defendant, he could not recover their value from defendant. We cannot agree with this contention of respondent. We think the law accords to him, without any question or peradventure, the value of his improvements upon the sale of the land, and that he should not be compelled to yield up possession and depend upon a personal judgment, which might prove inadequate or entirely worthless. Neither do we think the law will compel him to remain upon the land awaiting the pleasure of the purchaser to take possession of the premises and the improvements.

There is another proposition in the case, however, that is vastly more troublesome, namely, whether or not the appellant is precluded by the action of the county commissioners in reporting no improvements upon the land, and what appellant's remedies and rights are under such circumstances, if he have any. Although the court entertains grave doubts upon these propositions, yet we think it is unnecessary to determine them in this case. Substantially, this same case was before the court, and this statute was construed, in *Wilkes v. Hunt*, 4 Wash. 100. In discussing the statute now under consideration, the court, in its opinion rendered in that case, said: "To maintain injunction against any one, the plaintiff must make sure that he has not some other adequate remedy; and this is none the less the rule when an officer of the state is the person sought to be enjoined, and the object of the injunction is to prevent his performing a statutory duty. In this case the appellant shows that there

NOTE.—For the general doctrine as to what matters are concluded by a judgment, see *Wiese v. San Francisco Musical Fund Soc.* (Cal.) 7 L. R. A. 577, and *note*.

The present case presents a peculiar application of the doctrine, in which the declaration in a suit for injunction of the existence of other remedies

made as the reason for denying the injunction is held conclusive of the right to one of such specified remedies, on an attempt to enforce it in a subsequent action. This dissenting opinion regards as a commingling of the doctrine of *stare decisis* with that of *res judicata*. The exact point seems to be a novel one.

was no appraisement of his improvements, and that, therefore, the purchasers from the state will take title to the land without paying him for their value, as the statute says he shall do within thirty days. Were we clear that such results would follow, we should feel inclined to reverse the judgment since it is plain that the intention of the statute is to reimburse persons situated as the appellant avers himself to be. But he seems to have not only one, but even two other remedies, either of which would save him harmless. In the first place, if there has been no compliance with the statute by the appraisement of his improvements, certainly no court would permit a purchaser, under those circumstances, to interfere with his possession of the land until he is compensated as the law required. Secondly, the purchaser is required to pay the appraised value to the owner of the improvements,—that is, he is the debtor to the owner to that amount, and must pay it within thirty days. He can be sued for the debt, and, if there has been no appraisement, the court and a jury can fix the reasonable value as well as the commissioners. With such a wealth of remedies at his hand we think the state should be permitted to proceed with its business without the hindrance of an injunction, and the judgment is therefore affirmed." By reference to the record in the case of *Wilkes v. Hunt, supra*, it will be seen that the parties in interest in that case were the identical parties in interest in this action; it being alleged in that action that Hunt was the agent for Davies, the defendant in the action at bar, in bidding in the land. That action was against both Hunt and Davies. It is true that the land commissioners were necessarily made parties defendant to the action; but it was equally true that they were not the parties in interest, and, under the theory of the plaintiff in that action, it was necessary that the commissioners should be made a vehicle to convey him into court to obtain an adjudication of his right with Hunt and Davies. That adjudication could only affect the parties in interest, namely, Wilkes on the one side, and Hunt and Davies on the other. Afterwards, Davies was substituted for Hunt as the purchaser, so that it will be seen that the parties to this suit were the parties to that.

The next question is, Was the subject-matter of the litigation the same? The object of the first action was to obtain the value of the improvements on the land by enjoining the sale until such improvements were paid for. The avowed object of this action is to obtain the value of the same improvements. The complaints in both actions are the same; the same state of facts is alleged; and, by referring to appellant's brief in the former action (the respondent not appearing), it will be seen that the injunctive relief there sought was sought on the theory that no legal relief was available. We quote from appellant's argument, on page 23 of the brief: "Since the title to the land would pass to the purchaser from the state by this contract and patent, if delivered, the plaintiff having only the right to be paid the ap-

praised value of his improvements, he could interpose no defense to an action by the purchaser to recover possession of the lands and improvements. He could not recover the value of his improvements from the state, nor could he compel the purchaser to pay for them, for the reason that no valuation had been placed upon them by the commissioners. How, then, can he be protected, except by injunction?" So that it will be seen that the very question raised by the respondent in this case, namely, that the complaint did not state facts sufficient to constitute a cause of action, was before the court in that case, and one of the grounds alleged by the court for refusing the equitable relief asked for was the ground that the plaintiff was entitled to the relief asked for in this action. So that the question involved here was directly before the court, and passed upon by the court, in *Wilkes v. Hunt*, and the court, in its opinion, plainly states that the judgment in that case was based upon its construction of the statute on the questions raised in the case now before the court; and, while it may be that the case might have been decided on some other ground, these questions were involved in the case, were considered and decided by this court and such consideration and decision on these points decided the former case. So says this court in its opinion. This was in no sense *obiter dictum*, but was the decision on one of the points involved in the case.

The plaintiff in this action, relying upon the rule laid down by the court, has brought himself squarely within it, and the decision of this court, whether right or wrong, must bind the parties to the action in which it was rendered, and becomes the law of the case. Whether or not the judgment in the former case was *res adjudicata*, so far as the public is concerned, in the way of a precedent, it is not necessary to determine, for there is a well-defined distinction between the doctrine of *res adjudicata* in that sense and the doctrine of *res adjudicata* in its application exclusively to the parties to the action. The general rule is that the judgment of a competent court is binding and conclusive upon the parties, and will not be reversed or reviewed by any court possessing concurrent jurisdiction. It is not only binding and conclusive as to all questions of law and fact that were made upon the first trial, but as to all questions of law and fact which, from the organization and powers of the court, might have been submitted. *Wells, Res Adjudicata*, § 424. In *Davidson v. Dallas*, 15 Cal. 75, the court, in referring to a case which had been before it, and had been decided, at a previous trial, says: "This view of the case is conclusive of this appeal. The same facts are brought before the court now as when the case was heard and decided here. The agreement was before the court between Dallas and Gilson, and the effect of it was passed upon." In *Thomason v. Dril*, 34 Ala. 175, it was decided that a decision of the supreme court is the law of the case in which it was announced, and is conclusive both in the primary court and on a second appeal; and by the supreme court of Indiana in *Haw-*

ley v. Smith, 45 Ind. 183: "When the supreme court has laid down a rule of law, it will adhere to it in a subsequent action between the same parties, where a different decision would leave one party without a remedy, even though doubtful of the correctness of the rule when applied to other cases." In *Stacy v. Vermont Cent. R. Co.*, 32 Vt. 551, the rule was announced that the supreme court would not revise a former decision made by the same court in the same cause, and on substantially the same state of facts. Said the court: "Upon carefully examining the original bill of exceptions that was then before the court, and comparing it with the one now before us, we are wholly unable to discover in this case any fact material to its determination that was not contained in that. The facts are stated with more particularity now than then, but substantially they are the same. We find no such alteration or addition to the facts as calls for the application of any different rule of law than what the case then required." And so with the cases under consideration. The complaints are substantially identical, and consequently call for the application of no different rules of law or modes of construction. This rule is so obviously based upon the plainest principles of justice and fair dealing that it has been decided by the Supreme Court of the United States in *Washington Bridge Co. v. Stewart*, 44 U. S. 8 How. 413, 11 L. ed. 658, that after a case has been decided on its merits, and remanded to the court below, and is again brought upon a second appeal, it is then too late to allege even that the court had no jurisdiction to try the first appeal; virtually holding as the law of the case a decision of a court without jurisdiction. This case has been followed by the appellate courts in many of the states. In *Clary v. Hoagland*, 6 Cal. 635, it was decided that when a case has been once taken to an appellate court, and its judgment obtained on the points of law involved, such judgment, however erroneous, becomes the law of the case, and that this rule applies, not only to questions of law arising out of the case, but to questions of jurisdiction. And while the case at bar was not brought here on appeal directly as a matter of record the second time, yet in fact and in effect it is here, for all the purposes of the case, exactly as though it were brought here on a second appeal. *Dugan v. Hollins*, 18 Md. 149, is a case where the parties to the second action were not nominally the parties to the first action; but the same questions were adjudicated in both cases, and the same law points involved, just as in the action at bar, and it is a case in point, so far as parties to the action are concerned. There the court said: "The present defendants . . . were the plaintiffs in the suit against Coonan, reported in 9 Gill, 62. That case, in form, was an action of assumpsit to recover rent for the house now in dispute, but in reality was designed to obtain a decision upon the title to the property, under the will of Cumberland Dugan, Sr. This is evident from the admission stated on page 66." Analogous to this, the case of *Wilkes v. Hunt* was in form an equitable proceed-

ing, but it was in reality designed to obtain a construction of the statute in relation to the rights of owners of improvements on school land. Quoting again from *Dugan v. Hollins*, the court said: "As regards the effect or influence of the former decision upon the present case, it will be seen to be quite immaterial whether it shall be considered as an estoppel or as a decision by the court of last resort, giving an interpretation to the clauses of the will of Cumberland Dugan, Sr., in relation to the same property now in dispute, and where the same question arises which was before decided."

And so we say again that the decision in the case of *Wilkes v. Hunt* was an interpretation of the clauses in the statute with reference to improvements on school land, and in relation to the particular improvements now in dispute, and that the same questions arise in the case at bar which were before decided; and we again adopt the language of the court in that case, and apply it to the case at bar, when we say: "The same property, the same statute, and the same questions arising upon similar facts which were presented in the former case are also before us in this." We therefore think the following quotation from *Hammond v. Inloes*, 4 Md. 188, would constitute a very appropriate closing for us: "We have not been able to discover a sufficient reason for making this an exception to the almost uninterrupted practice of all courts, of receiving their own decisions as of binding force."

In the appeal of Thomson and others in the case of *Winn v. Albert*, 15 Md. 268, the court decided that, where the court of appeal has declared a deed of trust for the benefit of creditors to be void, that decision is the law of the case, and must govern in all further proceedings in the same case, notwithstanding a different decision upon a similar deed may have been subsequently made by the court in another case. And this, also, was a case where the parties to the last action were not, in form, parties to the action in the former case. Such, also, was the condition in the case of *Tuttle v. Garrett*, 74 Ill. 444. The parties to the action, the decision of which was held to be *stare decisis*, were John G. Tuttle *et al.*, plaintiffs in error, against Augustus O. Garrett, defendant in error; but the court held in the latter case that it was substantially the same case, and that the court was concluded by its decision in the former case. The Supreme Court of the United States, in *Aurora v. West*, 74 U. S. 7 Wall. 82, 19 L. ed. 42, lays down the rule as follows: "Courts of justice, in stating the rule, do not always employ the same language; but, where every objection urged in the second suit was open to the party within the legitimate scope of the pleadings in the first suit, and might have been presented in that trial, the matter must be considered as having passed *in rem judicatam*, and the former judgment in such a case is conclusive between the parties. Except in special cases, the plea of *res judicata*, says Taylor, applies, not only to points upon which the court was actually required to form an opinion and pronounce judgment,

but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time." And, referring to *Washington, A. & G. S. Packet Co. v. Sickles*, 65 U. S. 24 How. 341, 16 L. ed. 538, the court said: "Attempt was made in that case, as in this, to maintain that the judgment in the first suit could not be held to be an estoppel, unless it was shown by the record that the very point in controversy was distinctly presented by an issue, and that it was explicitly found by the jury; but the court held otherwise."

It seems to us that this high authority is decisive of the case at bar, for, if the contention of the respondent in this cause in regard to the construction of the statute is correct, it would have been a complete answer to the complaint in the former action. It is true that the plea of *res adjudicata* was not presented by the pleadings, nor was it offered in proof under the general issue, which are the two ordinary ways of bringing this question to the notice of the court. But this case falls within the rule laid down by many courts where no opportunity to plead the former adjudication is presented. The plaintiff brought his action in accordance with his legal rights, as pronounced by this court. He could not very well plead an estoppel in his complaint. The defendant answered, but his answer was a denial of the facts alleged in the complaint. No question of law was raised by the answer to render the plea of an estoppel necessary by reply. It denied that the plaintiff had the improvements which he alleged he had; denied that he lived on the land, or that he was in possession of the land, as averred in the complaint; denied that the lands were advertised for sale, as alleged; denied that either the defendant or his assigns were claiming the right to take plaintiff's improvements without compensation, but averred that all the plaintiff's improvements had been duly and regularly appraised and compensation made therefor in the sum of \$600, and that plaintiff had accepted and received said sum. There was much more to the same effect in the answer, but it only put in issue questions of fact, and informed the plaintiff that these facts must be substantiated by proof. This court had not passed upon any question of fact in the case. If it had, such decision could have been pleaded as *res adjudicata* to the answer. But there was certainly no opportunity to plead *res adjudicata* of any decision of the court on the law involved. Neither was there any opportunity to offer such a plea in evidence, even if it had been admissible to have done more than to have cited the court to the decision; for the case was really disposed of on demurrer, or a motion which was equivalent to a demurrer to the complaint; for, after the jury was impaneled, the defendant objected to the introduction of any evidence, on the ground that the complaint did not state facts sufficient to constitute a cause of action, and the plaintiff was deprived of the right to introduce evidence of any kind by the action of the court in sustaining the motion. But, in any event,

this objection was not raised here, and we will not raise it for the parties. Both cases are matters of record in this court, and the court can take judicial notice of its own records. But, further, it was made a direct issue by the brief of appellant in this court, and is the only matter which is discussed in the brief. No objection was made in the respondent's answering brief to the consideration of this question, or in oral argument to its discussion. In fact, it was claimed by respondent in his brief that the case of *Wilkes v. Hunt* was *res adjudicata*, to the effect that the plaintiff could not hold possession of the land, and at the same time recover its value in a suit at law. Both parties therefore conceded it to be *res adjudicata*, and treated it as such, but placed different constructions upon the decision. In consideration of the importance of this statute in its effect upon the public, and of the doubt that is at present in the minds of the court as to whether the construction placed upon it in *Wilkes v. Hunt* was the proper construction, we will not pass upon that question now, nor consider ourselves bound by it in any independent cases; but, having so construed the statute in a case in which the identical parties to this action were the parties in interest, and the identical property here involved was involved, so far as this case is concerned we feel ourselves bound by the decision therein rendered, and by the opinion therein expressed; and on this ground *the judgment will be reversed*, and the case remanded to the lower court, with instructions to proceed in accordance with this opinion.

Stiles, Scott, and Anders, JJ., concur.

Hoyt, J., dissenting:

I am unable to agree with the conclusions of the majority as stated in the foregoing opinion, and, as I deem the questions discussed therein of great importance, shall at some length state the reasons which induce me to dissent therefrom. Such conclusions are founded entirely upon the alleged fact that what was said by this court in the case of *Wilkes v. Hunt*, 4 Wash. 100, was conclusive of the rights of the parties in the case at bar. If these conclusions had been put upon the ground that what was thus said had become a rule of decision for all cases presenting a similar state of facts, I should find little fault with the reasoning of the court in regard thereto. But it clearly appears from the opinion that they were not at all founded upon such rule. It appears from inferences to be drawn from the course of the discussion in the opinion, and also by express announcement therein, that what was said in that case will not be considered as the settled law of the state; that, owing to the importance of the questions involved, the court will not now decide anything in regard thereto, but will hold them open for further investigation. What was said in that case is not applied to this, for the reason that it is now thought to be the law in this state, settled or unsettled, but is so applied solely on account of the alleged substantial identity of the parties and of the subject-matter in the

two cases. By reason of such identity it is argued that what was said in the former had become the law of this case, or a matter *res adjudicata* as between the parties thereto. This makes it necessary that the principles underlying those questions which are technically termed "the law of the case," "*res adjudicata*," and "*stare decisis*" should be considered, and their application pointed out. As I understand these matters, "the law of the case" is a rule of law announced by a court in the particular case under consideration. The question as to its application most frequently arises in a case which has been before an appellate court, and certain rules of law applicable thereto announced by that court, and the cause remanded for a new trial. In such a case the law, as laid down upon the first appeal, will be held to be the law of the case on the second appeal, and will be adhered to by the court, without any investigation as to whether or not the court is then satisfied with the law as so laid down. After a somewhat extended investigation I have been unable to find that the rule of "the law of the case" has ever been applied, except as to questions thus decided. It may be possible that some courts have, in some particular case, applied the law established in one case in another not technically the same, but it will be found that it was substantially identical with the one in which the rule was laid down. That is said to be "*res adjudicata*" as between the parties to an action when it appears that a court of competent jurisdiction has passed upon it in a case where the parties and the facts were substantially the same. A question thus decided is conclusive upon the parties; and, whether or not it was correctly ruled, they must abide by the decision. A legal principle is said to be "*stare decisis*" when it is so established by the rulings of a court that it feels bound thereby, and will not further investigate the question as to its correctness. The line of distinction between these several principles is clear and distinct, and founded on reason and authority. That such is the fact will sufficiently appear from the cases cited in the foregoing opinion. They are so cited for the apparent purpose of showing that there is no such well-defined distinction, and that what would come within the rule of "*stare decisis*," as above defined, may be applied as "the law of the case," or as "*res adjudicata*" between the parties to the action. I am unable to gather any such doctrine from such cases. All excepting four may be grouped together, and the most careful reading of the entire group will fail to show that in any of them is any other question decided than that a rule of law laid down by a court in a particular case will be adhered to as the law of that identical case when it again comes before the court.

The four cases cited, not included in the above group, will now be considered. *Hammond v. Inloes*, 4 Md. 188, refers entirely to the rule of *stare decisis*, and simply holds that when an appellate court has, upon careful consideration, announced a certain rule of law as applicable to a certain state of facts, it should adhere to that rule in another case presenting the same state of facts, unless it

is satisfied that the decision is wrong. As I understand the facts of this case, there was much better reason for the application of the rule of "the law of the case" or *res adjudicata* than in the case at bar; but the court refused to found its decision upon either of these principles. In the case of *Dugan v. Hollins*, 18 Md. 149, the court held that where it had once decided as to the force of a law with reference to the title to certain property, and the same law, in reference to the same property, was brought up for consideration upon the same question in another suit, the former decision would be adhered to, whether the judgment be technically an estoppel or not, unless there is manifest error therein. It will be seen that in this case the court announced the doctrine that it would adhere to its former decision even where the parties were not identical, unless it was satisfied that such decision was erroneous; but there is no intimation in the opinion that the court would hold the parties to that action bound by the decision should it be overruled in its application to other cases. It clearly appears from the opinion that the court refused to decide as to whether or not the former decision was rendered under such circumstances as to bind the parties in the case under consideration. In *Hawley v. Smith*, 45 Ind. 183, the court held a rule of law which had been announced in a former case to be binding upon the court in that one, whether or not said rule of law would, upon a further consideration be found to be correct; but the facts of the case show clearly that in so holding it applied the rule of "*res adjudicata*" as above set out. The language of the court is as follows: "It having been held in the former action between the same parties, on the same cause of action, that the relation of principal and agent existed, we should regard the question as *res adjudicata* between the parties. This should be the rule, even if we doubted the correctness of the ruling when applied to other cases." The case of *Aurora v. West*, 74 U. S. 7 Wall. 82, 19 L. ed. 42, only applies the rule of "*res adjudicata*" as between the parties to the action in relation to the same subject-matter, but extends the doctrine to questions which might have been adjudicated in the former suit, as well as to those which were actually so adjudicated. This extension can have no influence in deciding the case at bar, and was only the announcement of what had been held by many of the courts, though *Justice Miller*, in his dissenting opinion, gives reasons, which to me are satisfactory, why the rule should not be so extended. "These are all of the cases cited, and I can gather nothing therefrom that in any manner tends to extend the rule of "the law of the case," *res adjudicata*, or *stare decisis* so as to warrant their being in any manner intermingled, or applied to cases except as above stated.

I will now proceed to examine the decision in the case of *Wilkes v. Hunt*, as related to this case, and state my reasons for holding that, if the case at bar is to be at all affected by that decision, it must be because it is *stare decisis* in this court, and not for the reason that it is "the law of the case" or *res*

adjudicata in any sense. That it is not the law of the case is too well established by the principles hereinbefore announced, and by the cases bearing thereon, cited by the majority, to need further discussion. The case in which that decision was announced was in no sense this case. It was between different parties, and related to an entirely different subject-matter; for while, except for the reason to be hereinafter stated, there may be something in the facts which would justify the statement of the majority that the ultimate object sought by the plaintiff in that case was the same as the ultimate object sought in this, yet the immediate objects of the suits were entirely different. In the former case the only object was to prevent a sale of the land being consummated as between the state and the purchaser at the sale. Under the complaint therein the court had no jurisdiction whatever to in any manner render a judgment in favor of the plaintiff for the value of his improvements as appraised, or to be appraised. The only thing which he sought was to have the hands of the officers of the land department stayed. There is no intimation in his complaint, or in any part of the proceedings, that he seeks any express relief as against the defendant in this action. It is nowhere suggested that in the proceeding there should be an appraisal ordered, and, upon such appraisal being had, the purchaser at the sale adjudged to pay the amount thereof to the plaintiff. Nor does it in any manner appear therefrom that the injunctive relief is auxiliary to any other relief to which he may be entitled; while in the case at bar the only thing sought is to recover, in an action at law, the value of his improvements. If, in the former case, he had brought his action to recover for such improvements, and had, as auxiliary thereto, sought to stay the hands of the land department from completing the contract of sale, there would be some ground for the contention that the two suits were as to the same subject-matter; but such was not the fact, and the assertion of the majority of the court that the only object of the former suit was to secure the payment to the plaintiff for his improvements is in no manner founded upon the records in that case, but entirely upon a loose statement in the brief of the plaintiff. It in no manner appears from said record that the plaintiff would have been satisfied to submit the question of the value of his improvements to a jury. The gravamen of his complaint is that he was entitled to have them appraised under the statute, and that, until they had been so appraised, the sale should not be consummated. In my opinion the subject-matter of the two cases was in no legal sense the same, and for that reason the decision in the first case could not be *res adjudicata* in the latter one. But, if it were, the parties were not so identical as to warrant the application of that rule. It is true that, so far as any pecuniary interest was concerned, the defendant in this action was the substantial party in the former one; but when we take into consideration the object of that suit, and the parties at the hands of whom the relief was asked, and also consider

the fact that the purchaser at the sale may have cared very little as to whether or not the officers were allowed to consummate it by the execution of the contract, it should not be held that he was the principal person against whom the plaintiff was waging that suit. For aught that appears in that case, this defendant may have been entirely content to have had the court restrain the execution of said contract. It was nowhere intimated therein that he, or his agent who made the bill for him, had acted in the premises in any manner wrongfully. All the wrongful action alleged was on the part of the officers of the land department, and they were the substantial parties to that action, and the defendant in this action was but incidentally interested therein. Under these circumstances, the responsibility of defending the action should have been, and probably was, cast upon the officers of the land department, and for that reason, if for no other, this defendant should not be bound by the decision rendered therein.

There is another, and to my mind conclusive, reason why the former decision could not be relied upon here as having been an adjudication which established the rights of the parties to this action. Before that rule can be invoked, the former decision must in some manner be brought into the case under consideration; and as the correctness of the ruling of the lower court must be determined upon the record as presented to it, and not by anything occurring in the case subsequent thereto, I am unable to see how its decision can in any manner be affected by the former one. The transcript of the record from the lower court will be searched in vain for anything that in the most remote manner calls the attention of that court to the fact that there had ever been such a decision made by any court as that now relied upon. As I understand the rule, a court will never, for the purpose of applying a principle of law as "*res adjudicata*" in a particular case, go outside of that case to ascertain what that principle is. If a rule of law has been so established by the courts of a state as to be "*stare decisis*" therein, it must be given effect without being specially brought into the particular case; and this must be done as well when the parties and subject-matter are entirely different as when they are identical with those of the case in which the rule was announced. But I cannot understand how it can be held that in the trial of this case in the lower court it was bound to take notice that this principle of law had been adjudicated between the parties under such circumstances as to be binding upon them in this case, without the fact of such decision, or the circumstances under which it was rendered, having been in some manner brought to the attention of that court. The rule announced would require of a trial court not only that it should bear in mind every principle of law theretofore announced by it, and every other court of competent jurisdiction, but also to take judicial notice of all the facts in every case, and at its peril, without its attention being in any manner called thereto, deciding rightfully as to the identical par-

ties in all of the cases, and the entire subject-matter which was, or might have been, adjudicated therein. That such could not be the rule seems clear to my mind. The utmost extent to which any of the cases go is to hold that, where there has been no opportunity to plead the former adjudication, it may be given in evidence under the general issue. There is no intimation in any of such cases that, where the plaintiff relies upon such adjudication as the foundation for his action, he should not set it up in his complaint. If he does not have to thus set it up, then the court, when it rules as to the sufficiency of such complaint, must bring to its aid an adjudication in another case, of which it has no notice whatever, or else have its decision reversed by having such adjudication suggested in the appellate court. But, even if it was held that it was not necessary for such prior adjudication to be set up in the pleadings, under the circumstances of this case the plaintiff was not in a situation to take any advantage of such adjudication. After the intimation of the court that it thought the complaint on its face insufficient, he made no suggestion that its allegations were in any manner aided by matters not appearing therein. Not only was there no attempt in this manner to aid the complaint, but the plaintiff substantially told the lower court that he had no proof to offer upon that subject, as, after the court had intimated that the complaint was insufficient, he stated to the court what he proposed to prove to establish the issues on his part, and in so doing made no reference whatever to any matter as "*res adjudicata*" between the parties.

The majority of the court have evidently seen the force of some of these suggestions, and have attempted to show that the parties here conceded that the question of *res adjudicata* was involved in the case. But, even if the briefs of the parties do make such concession, that fact would not be sufficient to warrant this court in finding therefrom that the question was presented in the court below; and, unless it was so presented, this court should not allow it to influence the decision here. The transcript of the record shows clearly that nothing of the kind was relied upon in the lower court. Such being the fact, this court, if justified in acting upon any concession of counsel to the contrary, could only do so when the concession was made in such express and unmistakable terms that there could be no doubt of the intention. No suggestion, by way of argument, or anything of that kind, should have the force of such express concession. As I understand the briefs, however, there is no claim, even on the part of appellant, that the question of *res adjudicata* was presented to the court below, or even that he relied upon it here. That there may be no misunderstanding as to the facts, I here set out the entire brief and argument of the appellant. It was in words and figures following: "The sole question before this court is the sufficiency of the complaint. It was contended by counsel for defendant at the trial that, the plaintiff being in possession of the improvements,

not having delivered them to defendant, he could not recover their value from defendant; also, that plaintiff should have appealed to the state school land commission on the refusal of the county commissioner to appraise the improvements. The court, on its own motion, held that there having been no appraisal by the county commissioners, the sale was void, and the defendant acquired no title, hence was not liable. This same controversy came before this court in the case of *Wilkes v. Hunt*, 4 Wash. 100, in which the plaintiff sought to enjoin the execution and delivery of the contract of purchase of the lands in question on the same theory which was adopted by the court below in this case, namely, that the failure of the county commissioners to appraise the improvements vitiated the sale. As a matter of fact, Hunt attended the sale, and was the purchaser, as shown by the memoranda of the sale; but he and defendant, Davies, being members of the same syndicate, Davies was, under the peculiar and loose methods of the King county commissioners, substituted for Hunt in the contract of purchase; hence the suit against Davies as purchaser. In the case cited, this court says, *inter alia*: 'If there has been no compliance with the statute by the appraisalment of his improvements, certainly no court would permit a purchaser, under those circumstances, to interfere with his possession of the land until he is compensated as the law requires. The same doctrine is announced in *Pearson v. Ashley*, 5 Wash. 169. Secondly, the purchaser is required to pay the appraised value to the owner of the improvements,—that is, he is the debtor to the owner to that amount, and must pay it within thirty days. He can be sued for the debt, and, if there has been no appraisalment, the court and a jury can fix the reasonable value as well as the commissioners.' Relying on this as an announcement from the highest authority, the plaintiff brought his suit. The superior court for King county reversed the decision of the supreme court, and dismissed his case. Having lost his right to an injunction by reason of the fact that he had a legal remedy, and having been denied a legal remedy because of his right to an injunction, he, although somewhat bewildered, confidently appeals to this court for an adjustment of his rights in the premises, and for a reversal of the decision of the court below." It will be seen from an examination of such brief that, while it cites our former decision as an authority, it nowhere suggests that it was made under such circumstances as to make it conclusive of the rights of the parties in this action. The only expression in the most remote degree justifying the contention on the part of the majority is in the statement that "the same controversy came before this court;" but, if counsel had intended to place any special reliance upon the decision by reason of the identity of the subject-matter and of the parties it would have been incumbent upon him to have at least shown by the title of the case that the present defendant was a party to that suit. It can only be gathered, from all that is said by appellant, that he relied upon said decision

ion for the reason that it had been announced by this court. But such reliance can only avail him in the event that the court still adheres to the decision as having been properly ruled. This the majority of the court expressly refuse to do. They, in effect, say that, if this question was presented in a case where the parties were different from those in which it was decided, we would not adhere to it, but would proceed to investigate further.

From the brief of respondent it clearly appears that the idea that the former decision was relied upon as "*res adjudicata*" in this case was never in the mind of the one who drew it. The case of *Wilkes v. Hunt* is cited, but there is nothing added to the citation to show that the parties were in any manner identical with those of the case at bar, or that the decision therein was relied upon as in any way concluding their rights. It was simply cited as a case in point, as any other case involving a like principle would have been. This not only appears from what has been already said, but it further appears from the fact that later in the brief the question of *res adjudicata* is expressly presented, and the claim made that, when the board of county commissioners decided that there were no improvements of value upon the land, their decision was conclusive as to plaintiff's right to recover therefor. What was said in the former case as to the right of plaintiff to recover the value of his improvements in an action at law was not an adjudication that could conclude the parties. That matter was not before the court. What the court was called upon to adjudicate in that case was as to whether or not the plaintiff was entitled to an injunction. There was nothing set up in the complaint, or anywhere in the proceedings, which could in any manner authorize an adjudication by the court as to any recovery for the value of said improvements. What was said in relation thereto was only the stating of a reason why the injunction should not be granted. Such reason may not have been a good one, and yet the decision entirely correct. If, for any other reason founded upon the record, the injunction was properly refused, then the decision was right, even although one or a dozen faulty reasons were given therefor. The court was not called upon to say what was the remedy of the plaintiff. The most, under any circumstances, it could properly adjudicate, was that he had a remedy, and it was not called upon to adjudicate that fact to warrant the decision made. If, regardless of the question of remedy, he was not entitled to the injunction. There is another reason why what was said in that case should not conclude the parties to this. There is nothing to show that the improvements referred to in the two cases are the same. In the first case it is alleged that the improvements are upon a certain forty-acre tract, and there is no direct averment that any portion thereof are upon the particular twenty acres of said tract to which the complaint in this action is confined.

For the foregoing reasons I do not think that what was said in that case should be given any conclusive force in this one. But,

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if all that was so said is given full force, the contention of appellant is not aided. It cannot be fairly deduced therefrom that the court intended to hold that the owner of improvements, without surrendering possession thereof to the purchaser at the sale, could maintain an action against him for the value of such improvements. The most that can be claimed is that it was there held that the plaintiff had one of two remedies,—he could remain in possession of his improvements until compensated therefor, or surrender the possession to the purchaser, and maintain his action for their value. I cannot believe that the court intended to hold that by making a bid for school land, and accepting a contract therefor, the purchaser becomes at once liable to one having improvements thereon for the value thereof, where there had been no appraisal by the board of county commissioners, and nothing placed of record to show, in any manner, that there are any improvements on the land. Such a construction would compel a purchaser of such lands to settle with the owner of the improvements upon whatever terms he should dictate, or be put to the expense of a lawsuit, in which he was sure to have the costs of both parties to pay. A brief consideration of the facts, as applied to such ruling, will show that such results must follow. If, at the time plaintiff brought his action in this case, the defendant was liable for the value of such improvements, he must have made himself so liable by making the bid, or in accepting the contract from the state, for no other acts of his are alleged which could in any manner tend to establish such liability. It will follow that one in possession of improvements would have a direct interest in not having them appraised by the board of county commissioners. If not so appraised, he can get the value thereof at the time the land is sold, as found by a jury of his neighbors, and can have the beneficial enjoyment thereof while he is prosecuting his action for such value, and while, after the recovery of his judgment therein, the purchaser is waging his action of ejectment to obtain possession of the improvements for which a judgment has been theretofore rendered against him. Not only will he have the right to do this, but during the time of his beneficial enjoyment of the improvements he may make such use thereof as to absolutely destroy their value to one who afterwards comes into possession of the land. When a construction will lead to such hardships to the purchaser and to the state, some other should be adopted, if possible. As to the construction of the statute, it seems to me there can be little difference of opinion. This court has already announced—that is undoubtedly the law—that the one in possession of such improvements had, at the date of the passage of the act, no vested right to compensation therefor. Therefore, the measure of his rights must be found in the statute, an investigation of which will show that it is only to have the improvements appraised by the board of county commissioners, and, when appraised, to have the purchaser pay to him the value thereof as so appraised. There is nowhere in the act an

intimation that he shall have any right to recover, or anybody shall be in any manner liable to him for, the value of such improvements, excepting as so appraised. It must follow that, until there has been such an appraisal, there can be no foundation for his recovery of anything on account of such improvements. He can assert no rights to such improvements or their value, except in accordance with the provisions of the statute. The board of county commissioners will be presumed to have done their duty in that regard, unless the contrary appears, and as they are charged with that duty, and as he has no right to his improvements excepting such as grow out of their action in that regard, it is possible that he has no remedy, when they refuse to make an appraisal thereof, except an appeal to the board of state land commissioners. If he has any remedy aside from that, it can only be to have the board

required to make such appraisal by proceedings in mandamus. The majority of the court having expressly refused to say what the rights of the parties would be under the statute, I have a right to assume that, if they did, they would decide as above suggested. It must follow that, in their opinion, what was said by this court by way of argument in deciding a case in equity, where the only object sought was to stay the hands of certain officers, and to which this defendant was only an incidental party, was sufficient to create a liability on the part of the defendant, and a right in the plaintiff to enforce such liability without any contract existing between them, and without any authority of law whatever. I cannot consent that such results shall be held to flow from what was said in the former case. In my opinion the judgment should be affirmed.

NORTH CAROLINA SUPREME COURT.

J. J. ADAMS

v.

FIRST NATIONAL BANK OF WINSTON,
Appt.

-----N. C.-----)

The deposit of a partner cannot be applied to an overdraft of the firm, although the bank, in an action by the partner, might set up such overdraft as a counterclaim.

(November 23, 1893.)

A PPEAL by defendant from a judgment of the Superior Court for Forsyth County in favor of plaintiff in an action brought to recover the balance of a bank deposit, which the bank claimed a right to hold as a set-off to a claim against plaintiff on an overdraft by a partnership, of which he was a member. *Affirmed.*

Plaintiff's evidence tended to show that on the 21st day of March, 1892, the firm of J. J. Adams & Co., composed of himself and one J. A. Reid, dissolved co-partnership; that theretofore they had an account with the defendant bank, and plaintiff went to defendant bank before noon of the said day, and asked for the account in bank of J. J. Adams & Co., wishing to know the

balance; that he was told by the bookkeeper of the bank that the balance due J. J. Adams & Co. was \$201.08, which amount was there and then paid to him; that this sum was coming to witness as due him of the assets of J. J. Adams & Co.; that several days thereafter, about the 23d of March, the plaintiff deposited with the defendant bank the sum of \$615 of his own money from the sale of his own individual property, and opened the account in his own name; that he checked on this sum various times in various amounts, and that on the 5th day of April, 1892, he made a check for balance due him, when he was told by the officer of the bank that his check was not good by \$40; that this sum had been taken from his account, by order of the president of the bank, and paid on a draft drawn by J. J. Adams & Co.; that this balance, less the \$40, was paid to plaintiff, plaintiff demanding the total amount, including the \$40, which was refused. Plaintiff further testified that he did not know whether the check for \$40 drawn in the name of J. J. Adams & Co. was in the bank at the time he asked for the balance due J. J. Adams & Co., on March 21st, or not; that no notice of the dissolution of the copartnership of J. J. Adams & Co. has been given by publication. James Martin, in behalf of the defendant, testified that he was a bookkeeper in the defendant bank, and on the 21st March,

NOTE.—Application by bank of individual partner's deposit on firm debt.

In addition to the case of *Watts v. Christie*, 11 Beav. 555, which is cited in the above case as authority for the decision that the deposit of one partner cannot be applied to an indebtedness of the firm, other cases without any conflict have decided the same proposition. *Coates v. Preston*, 105 Ill. 470; *International Bank v. Jones*, 119 Ill. 407, 59 Am. Rep. 807; *Raymond v. Palmer*, 41 La. Ann. 425, 3 Bg. L. J. 141; *Ex parte McKenna*, 30 L. J. Bankr. 20.

Although the partner is individually liable for the firm debt, the denial of the right of the bank to

apply his deposit thereto involves something more than procedure. It may involve matters of substantial right in addition to those mentioned in the main case, especially if the depositor is insolvent. As is said in *International Bank v. Jones*, *supra*: "Notwithstanding he owed the duty to pay the firm debt, still, inasmuch as the bank could not set off the firm debt against his deposit, he could lawfully appropriate his deposit to a bona fide creditor by drawing a check in his favor." This well illustrates the importance of the decision as affecting the possible rights of third parties, as well as those of the bank and the depositor. B. A. R.

1892, the plaintiff asked him for balance of J. J. Adams & Co., which he told him was \$201.08, and which plaintiff made check for, and drew the amount out of bank. That a check of J. J. Adams & Co. for \$40, made by J. A. Reid, came into bank, I think, on that day. It might have been in the bank at the time I gave the balance of \$201.08 to Mr. Adams. It was not entered on the books, but might have been on the file. I cannot say whether it was in bank at the time or not. I did not know it had been paid by the teller. If I had known so, I would have charged it in the account of J. J. Adams & Co. before giving the plaintiff the balance. J. A. Reid, a witness for defendant, testified that he was a member of the firm of J. J. Adams & Co.; that he drew the check for \$40 on the firm account in bank to pay an individual debt due by him for rent; that the check was given several days before the 21st of March; that the firm agreed to dissolve on the 21st of March, but no final settlement of the copartnership had ever been made; that on the 21st of March they quit business, and Adams drew out all they had in bank.

The court instructed: "That if the check given by J. A. Reid was paid by the defendant after the payment to plaintiff of the balance of \$201.08, then the plaintiff would be entitled to recover; that if, as the defendant contended, the check for \$40 was paid by the bank before the check for \$201.08 was paid plaintiff, and the defendant gave the balance by mistake, the plaintiff would not be entitled to recover,"—to which defendant excepted. Defendant further excepted because the court did not tell the jury that the defendant had a right to offset the \$40 check as an overdraft of the firm against the individual account of J. J. Adams.

Messrs. Watson & Buxton for appellant.
Messrs. Glenn & Manly for appellee.

Clark, J., delivered the opinion of the court:

If the overdraft of the firm of which plaintiff was a member was paid by the bank after the balance was drawn out, it not appearing that the bank had any notice of the dissolution, such overdraft could be recovered by the bank out of the plaintiff as a member of the firm. If, at the time the plaintiff drew a check for the balance which the cashier told him was due the firm, in fact there was less due the firm, it was equally an overdraft, by mutual mistake of the parties, and the bank could recover it back out of the plaintiff as a member of the firm. But the bank had no right to charge up against the individual account of a member of a partnership a balance due it on the firm's account. Such right of set-off only exists between the same parties, and in the same right. *Morse, Banks*, § 384. The bank has no lien on the deposit of a partner for a balance due from the partnership. *Bolles, Banks*, § 885. The reason is thus given by *Lord Langdale*, master

of the rolls, in *Watts v. Christie*, 11 Beav. 555: "It is of the nature and essence of transactions between banker and customer that a customer, having a balance in the hands of his banker, should have full power over it, and be able to command payment at sight. If, where there is an account between a firm and the bank, and another account with one particular member of the firm, it be once held that the bank has a lien upon the balance due upon the separate account of the individual partner for a balance due to the bank from the firm, there would be an end to some transactions which it is most important to commerce should be continued." Inasmuch as the member of the partnership can draw in the name of the firm, if their overdrafts can instantly be charged up against the individual account of a member of the firm, no partner would be safe in keeping his private account in the same bank where the partnership account is kept. Otherwise, his private funds, deposited perhaps for special engagements he may have in view, would be liable at any time to be swept away by checks drawn by another for his own personal ends, but in the name of the firm, and the partner's checks on his private account would go to protest, to his damage and inconvenience. Then, too, in case of insolvency and an assignment by the partner or of the partnership, his available cash could be subject to appropriation by the bank in this shortland mode to his partnership liability, notwithstanding his or the firm's election in the deed of assignment to prefer another, or to share the assets *pro rata*; and this, also, would deprive the individual partner, having a sum to his credit, using it as his personal property exemption as against the indebtedness of the partnership to the bank. It is true, in the present case, the plaintiff being liable to the bank for the overdraft of the firm, the bank could sue him therefor, and hence, of course could have pleaded it as a counterclaim, instead of bringing an independent action. But the bank did not plead a counterclaim. It claimed the right to charge up against the individual account of the plaintiff the overdraft of the firm, and hence pleaded the general issue that it was not indebted. This it cannot do. The difference between a counterclaim and a payment is not merely technical, but substantial. Some of the differences are pointed out above. There are others, among them the cases in which the statute of limitations might be pleaded to the counterclaim. In the present case it is still open to the bank, as it did not plead the counterclaim, to bring an action against the plaintiff for the balance due by the firm. It is not yet barred by the statute of limitations, and, if the plaintiff has property in excess of his exemptions, the bank has lost nothing except the bill of cost in this case.

While not concurring altogether in the reasons of his honor, we reach the same conclusion, and declare the judgment affirmed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

RE MUNICIPAL SUFFRAGE TO WOMEN.

(.....Mass.....)

1. A statute providing that it shall take effect upon its acceptance by a majority vote of the people of the state cannot be upheld under the Constitution of Massachusetts, which makes the senate and house of representatives the legislative department of the government, and does not reserve to the people any direct power of supervision.
2. A statute allowing women to vote in town and city elections cannot be made to take effect in any city or town upon its acceptance by a majority vote of the voters of such city or town, since it is a matter of general and not local concern, to which the principle of local option cannot properly apply.

*(Holmes and Barker, JJ., dissent from proposition 1.)**(Holmes, Barker and Knowlton, JJ., dissent from proposition 2.)*

NOTE.—Power of the legislature to make a statute contingent on approval by vote of the people.

The above case presents both sides of a constitutional question of very great importance. The right of the legislature to refer to the people themselves the question of giving effect to a proposed statute is one that has been denied in a considerable number of cases in which the question was not fairly involved, as well as in a very few cases in which it was involved. Nearly all the cases in which this power is denied have been founded on the Pennsylvania case of *Parker v. Com.*, 6 Pa. 507, 47 Am. Dec. 480, and the Delaware case of *Rice v. Foster*, 4 Harr. (Del.) 492, which, although decided on the broad ground that the legislature cannot refer a statute to the people, were in fact local option cases and have been, on the express question involved in them, very generally repudiated by later cases, the Pennsylvania case being expressly overruled. But in the New York case of *Barto v. Himrod*, 8 N. Y. 463, declaring the same doctrine, these cases were not referred to, although they must have been considered as they had been discussed in earlier cases decided by the general term of the supreme court.

This New York case was one in which an act establishing free schools throughout the state, passed March 20, 1849, and providing that the electors shall determine by ballot at the next annual election, "whether this act shall or shall not become a law," was held by the court of appeals to be unconstitutional, on the ground that it attempted to make a delegation of legislative power to the people.

This case overruled *Johnson v. Rich*, 9 Barb. 680, in which the act had been held constitutional by the supreme court, while the other supreme court cases of *Thorne v. Cramer*, 15 Barb. 112, and *Bradley v. Baxter*, 15 Barb. 122, in other judicial departments of the state, had held the act unconstitutional. *Thorne v. Cramer* relied largely on *Parker v. Com.*, 6 Pa. 507, 47 Am. Dec. 480, and *Bradley v. Baxter* relied on the Pennsylvania case and also on *Rice v. Foster*, 4 Harr. (Del.) 479.

In *Santo v. State*, 2 Iowa, 165, 63 Am. Dec. 487, followed by *State v. Beneke*, 9 Iowa, 208, the submission to a vote of the people of the state of the provisions of a statute was held unconstitutional, but as the submission declared that in the event of a majority of votes in its favor "then this act shall

(February 28, 1894.)

ADVISORY OPINIONS in reply to an order of the House of Representatives submitting to the Supreme Judicial Court the following questions:

"(1) Is it constitutional, in an act granting to women the right to vote in town and city elections, to provide that such act shall take effect throughout the commonwealth upon its acceptance by a majority vote of the voters of the whole commonwealth? (2) Is it constitutional to provide in such an act that it shall take effect in a city or town upon its acceptance by a majority vote of the voters of such city or town? (8) Is it constitutional, in an act granting to women the right to vote in town and city elections, to provide that such an act shall take effect throughout the commonwealth upon its acceptance by a majority vote of the voters of the whole commonwealth, including women specially authorized to register and to vote on this question alone?"

take effect" "on" a day named, without any negative clause, the act was held to have been enacted by the legislature itself, and the proposed submission to the people was inoperative.

In *State v. Hayes*, 61 N. H. 264, the power of the legislature to refer to the people of the state the adoption or ratification of a statute as to corporate elections is denied on a very elaborate review of the authorities on the question.

In addition to these decisions there are some other local option cases and some dicta to the same effect.

Thus in *Ex parte Wall*, 48 Cal. 279, 17 Am. Rep. 425, the general doctrine is declared that the "power to make laws conferred on the legislature cannot be delegated by the legislature to the people of the state, or to any portion of the people." But the case was one as to local option, which was held unconstitutional and in this respect the case is in conflict with a large majority of modern decisions on the subject.

So in *Geebrick v. State*, 5 Iowa, 491, local option in the form of a vote to repeal a statute as to the sale of liquors, so far as it applied to the county in which the vote was taken, was held unconstitutional and seems to have been regarded as governed by the principle decided in *Santo v. State*, *supra*.

So in *State v. Weir*, 35 Iowa, 184, 11 Am. Rep. 115, local option was held unconstitutional, either as to the adoption or repeal of a statute.

Another case which held that local option was unconstitutional was that of *Maize v. State*, 4 Ind. 342, in which the court seemed to think that the same unconstitutionality would inhere in a statute referring the question to the people of the whole state.

To the same effect is *State v. Swisher*, 17 Tex. 441. In *Johnson v. Martin*, 75 Tex. 38, the court said: "It might not be allowed to submit a general law to the state at large," but the decision upheld a statute allowing commissioners in their discretion to call a local election to choose public weighers.

In *People v. Stout*, 23 Barb. 849, a law amending the charter of the state of New York was held unconstitutional, where it attempted to make its adoption depend on a vote of the electors of the city and county. This decision is based on *Barto v. Himrod*, but it does not seem possible to reconcile it with the numerous decisions in which the

To the Honorable the House of Representatives of the Commonwealth of Massachusetts:

In reply to your order of the 2d inst., a copy of which is annexed, we, the undersigned, four of the justices of the supreme judicial court, respectfully submit the following opinion:

The questions all impliedly assume that the legislature can constitutionally pass an act granting to women the right to vote in town and city elections, and we proceed to answer the questions on this assumption.

The constitution of Massachusetts was framed after much public discussion, and after nine of the original thirteen states had established constitutions. The opinions of some of the men engaged in framing these

constitutions are well known. John Adams took a principal part in framing the constitution of Massachusetts, and his opinions upon government, both before and after its adoption, are found in his published works. The characteristic feature of all these constitutions is that they establish a government by representatives of the people, and not a government directly by the people. This was the kind of government to which the people were accustomed. All hereditary offices having been abolished, so far as they ever existed in any of the colonies, and appointments to office by the British crown having ceased at the time of the Revolution, the chief executive officers and the members of both branches of the legislature, where there were two branches, were to be elected by the

adoption of municipal charters by vote of the people of the respective municipalities has been upheld.

In *Bradshaw v. Lankford*, 11 L. R. A. 523, 78 Md. 423, it is said to be "a well-settled principle of constitutional law that the power thus delegated (to the legislature) cannot be redelegated to the people themselves," but the case really decided was one as to the submission to the voters of a county of the question of taking oysters by scoop or dredge, and this was held to be unlawful because the oyster beds do not belong to the county but to the state.

In *State v. Wilcox*, 45 Mo. 458, it is said that undoubtedly the legislature cannot refer the passage of a law to their constituents, but that they may pass a law to take effect on an emergency. The point actually decided in the case was that a statute might authorize the vote of a city to organize for school purpose.

Similar expressions have been used in other cases which really decided nothing on the question.

In *State v. Copeland*, 3 R. I. 83, the decision was merely that a vote against the repeal of a statute was not effectual for any purpose, where it was taken under a statute submitting the question of repeal to the people. As to what effect a vote in favor of repeal would have there was no decision.

In *People v. Collins*, 3 Mich. 343, the court was equally divided as to the constitutionality of a statute to take effect on a vote of the people in its favor.

It was said by Green, *Ch. J.*, in that case that the principle was recognized by the constitutional convention of 1850, which expressly required the submission to the people of a banking law.

In *State v. Young*, 29 Minn. 474, a statute providing that no tax for the payment of certain bonds should be made without a vote of the people was held void on the ground that it impaired the obligation of the contract with the bondholders, and also that certain provisions constituted an unlawful delegation of legislative power to judges, but there was no decision as to the constitutionality of the delegation of power to the people.

On the other side of the question there are also some decisions and dicta.

In *State v. Parker*, 26 Vt. 357, the submission to the people of the state of the question whether a statute should go into effect at the time named by the legislature or at a later date, which was in this case in the same year, was held constitutional, and the opinion by Redfield, *Ch. J.*, is clearly in favor of the constitutionality of submitting a statute to the people for their approval.

So in *Smith v. Janesville*, 26 Wis. 291, it is held to be constitutional to submit to the vote of the whole

state the question of whether or not the statute should take effect.

In *Bull v. Read*, 13 Gratt. 73, although the question decided, was the validity of a statute allowing a vote as to the organization of a school district, the opinion argues in favor of the validity of laws to take effect on such contingencies.

So the supreme court of Georgia in *Caldwell v. Barrett*, 73 Ga. 604, although the case was one of local option, expressed the opinion "that when the wishes of the people as to whether a proposed act should become a law can be clearly ascertained by an election, this mode would be consonant with the genius and form of our government."

It will be seen from the above cases that the judicial opinion in this country has been divided in about the same ratio that is shown in the opinions of the justices of Massachusetts in the above case. But since the early cases started out with the denial of the right of the legislature to pass local option laws, which are now almost everywhere held valid, and these local option cases have been largely relied on as authority for the general doctrine that the legislature cannot refer to a vote of the people the question of the approval of a law, these general expressions, found by way of recital in various cases, cannot be regarded as of very great weight. Excluding these "the tendency of judicial decision," which seems to *Mr. Justice Holmes* to be against his own in the above case, is not very strongly against him. And when the question of authority is narrowed down to those cases in which the reference of a law to the people of the whole state is involved, the weight of authority is not very unequally divided. In the language of *Judge Cooley*: "If it is not unconstitutional to delegate to a single locality the power to decide whether it will be governed by a particular charter, must it not quite as clearly be within the power of the legislature to refer to the people at large, from whom the power is derived, the decision upon any proposed statute affecting the whole state?" *Cooley*, Const. Lim. p. 120. And, as he further inquires: "Can that be called a delegation of power which consists only in the agent or trustee referring back to the principal the final decision in a case where the principal is the party concerned?" *Ibid*.

While the eminent author considers the weight of authority up to the time of his writing to be against him, he declares that the decision in *Smith v. Janesville*, *supra*, appears entirely sound and reasonable. The question is therefore entirely unsettled, with the weight of authority somewhat against the delegation or reference to the people, but with almost equal authority on the other side.

For note on the subject of the right of women to vote, see *Coffin v. Thompson* (Mich.) 21 L. R. A. 632.

B. A. H.

people. But the model adopted was in other respects the English form of government. While a purely democratic form of government existed in the towns of New England, few if any persons seem to have been in favor of such a form of government for the state.

By the constitution of Massachusetts, as originally adopted, not only were the powers of the representatives of the people limited, but the powers of the people themselves were limited. The people limited their right to vote by requiring for the electors of state officers certain qualifications, among which was a low property qualification. They required in the persons to be voted for, higher qualifications. They provided that the judges should be appointed by the governor and council, and should hold their offices during good behavior, subject to removal only by impeachment or by address. They provided that "the department of legislation shall be formed by two branches, senate and house of representatives; each of which shall have a negative on the other." Part 2, chap. 1, § 1, art. 1. They gave to the governor a qualified veto over the acts of the legislature. They provided for annual elections, and they declared that "the people of this commonwealth are not controllable by any other laws than those to which their constitutional representative body have given their consent" (part 1, art. 10); that "the people have a right, in an orderly and peaceable manner, to assemble to consult upon the common good; give instructions to their representatives, and to request of the legislative body, by the way of addresses, petitions, or remonstrances, redress of the wrongs done them, and of the grievances they suffer" (Id. art. 19); and that "the legislature ought frequently to assemble for the redress of grievances," etc. (Id. art. 22). But there is nothing in any part of the constitution which tends to show that the people desired that any law should ever be submitted to them for approval or rejection. The only expression of this kind relates to the manner of collecting the sentiments of the people in the year 1795, "on the necessity or expediency of revising the constitution, in order to amendments," found in part 2, chap. 6, art. 10. They indeed declared that "all power residing originally in the people, and being derived from them, the several magistrates and officers of government, vested with authority, whether legislative, executive, or judicial, are their substitutes and agents, and are at all times accountable to them" (part 1, art. 5); but they provided for no appeal to themselves from any legislative, executive, or judicial act. They apparently relied upon frequent elections, when the officers were elective; upon the right of meeting and consulting upon the common good; upon the right to petition and of instructing their representatives; upon impeachment; and upon the right of reforming, altering, and totally changing the form of government, when the protection, safety, prosperity, and happiness of the people required it. Part 1, art. 7. Apparently, it was thought that the persons selected for the executive, legislative, and

judicial offices, in the manner prescribed in the constitution, would be men of good character and intelligence, of some experience in affairs, and of some independence of judgment, and would have a better opportunity of obtaining information, taking part in discussion, and carefully considering conflicting opinions, than the people themselves; and the people therefore put the responsibility of carrying on the government upon their representatives. In the legislative department they were particularly careful. They declared for the "freedom of deliberation, speech, and debate, in either house of the legislature" (part 1, art. 21), and they secured deliberation in legislation by establishing two branches of the legislature, and by requiring a submission of every legislative act to the governor; but they reserved to themselves no direct power of supervision.

The constitutions of the different states resemble each other in many of their principal provisions, and it generally has been held, whenever the subject has come before the courts, that legislative power cannot be delegated by the legislature to any other body or authority, and that the people themselves have not retained this power, except where they have expressly provided for it. It is true that a general law can be passed by the legislature, to take effect upon the happening of a subsequent event. Whether this subsequent event can be the adoption of the law by a vote of the people has occasioned some differences of opinion, but the weight of authority is that a general law cannot be made to take effect in this manner. Whether such legislation is submitted to the people as a proposal for a law, to be voted upon by them, and to become a law if they approve it, or, as a law, to take effect if they vote to approve it, the substance of the transaction is that the legislative department declines to take the responsibility of passing the law; but the law has force, if at all, in consequence of the votes of the people. They, ultimately, are the legislators. It seems to us that by the constitution the senate and the house of representatives have been made the legislative department of the government, and that there has not been reserved to the people any direct part in legislation. The various amendments made to the constitution since its adoption have not changed its character in this respect. By article 2 and article 9 of the Amendments, an act constituting a town or towns a city government can be passed only with the consent of the inhabitants of such town or towns; and specific amendments to the constitution, proposed by the general court, must be submitted to the qualified voters of the commonwealth. A city charter resembles a state constitution in this: that the government of the town is made by the charter a representative government; and it was originally declared that the people alone have a right to institute government, and to change it. Part 1, art. 7. These amendments, as well as the other amendments, to the constitution, indicate no intention of having laws submitted to the people for adoption or rejection.

For these reasons, we are of opinion that the first question should be answered in the negative.

The second question requires additional consideration. There have been laws, from the earliest times, which delegated legislative powers to the inhabitants of towns, or permitted legislative powers to be exercised by such inhabitants over subjects which were declared proper for municipal control. Laws conferring additional powers on towns or cities have been passed, and made to take effect in any town or city upon acceptance by the qualified voters of the town or city, or of the city council. Some examples are found in Pub. Stat. chap. 27, §§ 13, 27, 65, 74. Special laws have been passed, conferring special powers on particular towns or cities, and general laws have been passed which relate to towns and cities having a certain population; and the consent of the inhabitants of a city or town, sometimes, has been required, before certain special powers can be used. See Pub. Stat. chap. 44, §§ 2, 7; Id. chap. 54, § 13; Stat. 1887, chap. 411, § 92; Stat. 1891, chap. 870. These statutes, in general, relate to local affairs, or to what has been called "police regulations." In *Stone v. Charlestown*, 114 Mass. 214, it was decided that a statute was constitutional which united two municipalities, and provided that the act should not take effect unless accepted by the voters of the respective municipalities. It was said: "Amid all the diversity of opinion upon the much-vexed question how far statutes may be made contingent upon being accepted by popular vote, without violating the principle that legislative power cannot be delegated, there is a complete harmony of adjudication in favor of the authority of the legislature, unless controlled by a special constitutional provision upon the subject, to submit statutes dividing or uniting counties or towns, or establishing or enlarging a city, to a vote of the inhabitants of the territory immediately affected." There has been some conflict of authority upon the constitutionality of what are called "local option laws," which have been principally laws regulating the sale of intoxicating liquors, but they have been held to be constitutional by a majority of the courts which have considered them. They have been held to be constitutional in this commonwealth. *Com. v. Bennett*, 108 Mass. 27, 11 Am. Rep. 804. In that case it is said: "It has been argued in other cases, which have been brought before the court since the argument of the present case, that these statutes are unconstitutional because they delegate to cities and towns a part of the legislative power. But we can see no ground for such a position. Many successive statutes of the commonwealth have made the lawfulness of sales of intoxicating liquors to depend upon licenses from the selectmen of towns or commissioners of counties, and such statutes have been held to be constitutional. 7 Dane, Abr. 48, 44; *Com. v. Blackington*, 24 Pick. 853.

"It is equally within the power of the legislature to authorize a town, by vote of the inhabitants, or a city, by vote of the city

council, to determine whether the sale of particular kinds of liquors within its limits shall be permitted or prohibited. This subject, although not embraced within the ordinary power to make by-laws and ordinances, falls within the class of police regulations, which may be intrusted by the legislature, by express enactment, to municipal authority." Certainly, it is a difficult question to determine how far the principle of local option can be carried, and to what subjects it can be applied. An act granting to women the right to vote in town and city elections does not relate to the powers of towns and cities, which in some respects may well be different in different towns and cities, on account of the number, wealth, and pursuits of the inhabitants. Such an act relates solely to the persons who should be invested with a share of political power. Whether women should be permitted to vote in town and city elections seems to us a matter of general, and not of local, concern. There is nothing in the history of Massachusetts which tends to show that the right to vote in towns and cities on town and city affairs has ever been regarded as a matter of police regulation, or of merely local interest, or as a right which might be granted or withheld by a licensing board. It always has been determined by the legislature by a general law, in force uniformly throughout the commonwealth. Article 9 of the Declaration of Rights declares that "all elections ought to be free; and all the inhabitants of this commonwealth, having such qualifications as they shall establish by their frame of government, have an equal right to elect officers, and to be elected, for public employments." This, in terms, is confined to elections in which the qualifications of the electors and of the persons to be elected are established by the frame of government; but the principle declared, up to the present time, always has been adopted by the legislature, in passing laws relating to the right to vote in the election of town and city officers. The qualified voters in towns in this commonwealth, and their representatives in cities, are possessed of a large measure of political power. They have the taxing power for all municipal purposes, and it is well known that the amount of the city or town tax of any person usually exceeds that of his state and county tax. The tax is imposed on all the inhabitants in the town or city liable to be taxed, and on all the real property situated within the town or city, whether owned by residents or nonresidents. The power of taxation is one of the essential and fundamental powers of government. It certainly would constitute an anomaly heretofore never known in this commonwealth, if, in some cities and towns, women were permitted to vote on questions which concern taxation, and in other cities and towns were not permitted. The question, we think, comes to this: Whether the legislature, constitutionally, can delegate to the qualified voters of the inhabitants of a city or town the power of granting or refusing to grant to women who are inhabitants the right to vote in city and town affairs. We are not aware that, in any of the states

where statutes have been passed conferring suffrage or municipal suffrage upon women, the principle of local option has been adopted in such statutes. The language of the constitution, from which the legislature derives the power of prescribing the qualifications of the electors of town and city officers, was taken from the province charter; and it is, in effect, that the general court shall have full power and authority to make all manner of wholesome and reasonable laws, not repugnant to the constitution, which they shall judge to be for the good and welfare of the commonwealth, and "to name and settle annually, or provide by fixed laws, for the naming and settling all civil officers within the said commonwealth, the election and constitution of whom are not hereafter in this form of government otherwise provided for." Considering the nature of the power intended to be conferred, the history of legislation on the subject from the earliest times, and the language of the constitution, we are of opinion that, if a law is to be enacted such as the question contemplates, it must operate uniformly throughout the commonwealth, and that the second question should be answered in the negative.

For the reasons hereinbefore given, without considering others which might be suggested, the third question should be answered in the negative.

Walbridge A. Field.
Charles Allen.
James M. Morton.
John Lathrop.

To the Honorable the House of Representatives of the Commonwealth of Massachusetts.

In reply to your order, I respectfully submit the following answer:

If the questions proposed to the justices came before us as a court, and I found myself unable to agree with my brethren, I should defer to their opinion, without any intimation of dissent. But the understanding always has been that questions like the present are addressed to us as individuals, and require an individual answer.

It is assumed in the questions that the legislature has power to grant women the right to vote in town and city elections. I see no reason to doubt that it has that power.

1. I admit that the constitution establishes a representative government, not a pure democracy. It establishes a general court, which is to be the law-making power. But the question is whether it puts a limit upon the power of that body to make laws. In my opinion, the legislature has the whole law-making power, except so far as the words of the constitution, expressly or impliedly, withhold it; and I think that, in construing the constitution, we should remember that it is a frame of government for men of opposite opinions, and for the future, and therefore not hastily impart into it our own views, or unexpressed limitations derived merely from the practice of the past. I ask myself, as the only question, what words express or imply that a power to pass a law subject to rejection by the people is withheld? I find none which do so. The question is not whether

the people of their own motion could pass a law without any act of the legislature. That, no doubt, whether valid or not, would be outside the constitution. So, perhaps, might be a statute purporting to confer the power of making laws upon them. But the question, put in a form to raise the fewest technical objections, is whether an act of the legislature is made unconstitutional by a proviso that, if rejected by the people, it shall not go into effect. If it does go into effect, it does so by the express enactment of the representative body. I see no evidence in the instrument that this question ever occurred to the framers of the constitution. It is but a short step further to say that the constitution does not forbid such a law. I agree that the discretion of the legislature is intended to be exercised. I agree that confidence is put in it as an agent. But I think that so much confidence is put in it that it is allowed to exercise its discretion by taking the opinion of its principal, if it thinks that course to be wise. It has been asked whether the legislature could pass an act subject to the approval of a single man. I am not clear that it could not. The objection, if sound, would seem to have equal force against all forms of local option. But I will consider the question when it arises. The difference is plain between that case and one where the approval required is that of the sovereign body. The contrary view seems to me an echo of Hobbes' theory that the surrender of sovereignty by the people was final. I notice that the case from which most of the reasoning against the power of the legislature has been taken by later decisions states that theory in language which almost is borrowed from the Leviathan. *Rice v. Foster*, 4 Harr. (Del.) 479, 488. Hobbes urged his motion in the interest of the absolute power of King Charles I., and one of the objects of the constitution of Massachusetts was to deny it. I answer the first question, "Yes." I may add that, while the tendency of judicial decision seems to be in the other direction, such able judges as *Chief Justice Parker*, of Massachusetts, *Dixon*, of Wisconsin, *Redfield*, of Vermont, and *Cooley*, of Michigan, have expressed opinions like mine.

2. If the foregoing view of the power of the legislature is right, I am of opinion that the second question also should be answered, "Yes." I find nothing which forbids the legislature to establish a local option upon this point, any more than with regard to the liquor laws. Under the circumstances, I do not argue this or the following question at length.

3. The act suggested by the third question is open to the seeming objection that it might take a part of their power out of the hands of the present possessors, without their assent, except as given by their representatives. But if, as I believe, the legislature could give to women the right to vote, if they accepted it by a preliminary vote, and could impose as a second condition that the grant should not be rejected by the voters of the commonwealth, I do not see why it might not combine the two conditions into one, al-

though, as a result, the grant might become a law against the will of a majority of the male voters. I answer this question, also, "Yes."

Oliver Wendell Holmes, Jr.

To the Honorable the House of Representatives of the Commonwealth of Massachusetts.

I have carefully considered the questions submitted to the justices of the supreme judicial court by the honorable house of representatives on February 2, 1894, and am of opinion that the first and third should be answered in the negative, and the second in the affirmative.

In adopting the constitution, the people of the commonwealth established a representative government, consisting of three departments,—the executive, the legislative, and the judicial. In these all the power originally residing in the people was vested, and through them all the functions of the government are to be performed. The framers of the constitution did not seek to establish a pure democracy, but they preferred a system in which all power should be vested in officers chosen by the people. The execution of the laws is intrusted to the governor and his associates in his department; the enactment of laws, to the legislature, subject, qualifiedly, to the approval of the governor; and the interpretation of the laws, to the justices appointed for that purpose. The members of each of these departments of the government are charged with the duty of doing that which belongs to their department. They cannot delegate their official power to others. The governor is not a mere agent of the people, who can refuse to assume the responsibility of action in matters within his department, and put upon the electors, as his principals, the duty of deciding for him whether his actions shall be of one kind or another. He is for the time the repository of all the power of the people in those matters which belong to his office. He must do his official duty, and there is no way in which he can shift the burden of the executive business from his shoulders to those of the people of the commonwealth. If an application for the pardon of a criminal is made to him, he cannot relieve himself of responsibility by entering an order that the pardon shall be granted if the people of the state, at a meeting called for the purpose, vote in favor of it. A judge, who, under the constitution, derives all his power from the people, cannot refer back to the people the cases which he is called upon to decide. He cannot enter a decree that this case shall be decided for the plaintiff, or this law shall be declared unconstitutional, if a majority of the people so decide upon the submission of the question to them at their next election. The sole power to grant pardons is in the governor, and the sole power to decide judicial controversies is in the judges. By the bestowal of this power in the adoption of their constitution, the people were divested of that which was bestowed; and it can be restored to them by nobody, so long as the constitution remains unchanged. Nor was it any more contemplated by the framers of

the constitution that the department of the government which is charged with the duty of enacting laws should fail to do its whole duty, and should merely propose to the people laws which shall or shall not take effect as the people vote. The legislature is the law-making body. The people's representatives, acting together after due deliberation, are to complete the work of making such laws as seem to them good. The people deliberately put away from themselves, into the hands of this body, all authority touching this subject; and, until there is a change of the constitution, neither they nor the legislature can put it, or any part of it, back. Their supreme power may find full exercise from time to time in choosing those who represent them, and in amending the constitution or adopting a new one. Under our frame of government, to call in the people to vote directly upon the enactment of a law is, in my opinion, as much an attempt to delegate legislative power as the submission of such a question to any other tribunal. The reasons which induced our forefathers to adopt such a system might be considered at great length, but we are not now so much concerned with the reasons for their action, as with the nature and effect of it. The important fact is that their scheme of government was intended to cover the whole field, and it leaves no place for the people in the enactment of laws, except as they speak through their representatives. In the interpretation of similar constitutions in other states, there is a great weight of judicial authority in favor of this view. Decisions in accordance with it have been made by the courts of last resort in New Hampshire, New York, Pennsylvania, Delaware, Indiana, Iowa, Missouri, California, and Texas.

This is the rule in regard to what is strictly legislation,—that is to say, the enactment of general laws for the people of a state,—but it is very generally held that a legislature may submit to the voters of towns and cities questions which are local in their nature, or which have in them a local element, such as make it proper that they should be dealt with differently in different places. This rule prevails in Massachusetts. A familiar example of the application of it is the so-called "local option" provision of our law in regard to the sale of intoxicating liquors. In Massachusetts, from the earliest times, the towns have been, in a great degree, intrusted with the management of their own affairs. For a time after the separation from England, previously to the adoption of our constitution, they would seem to have been independent democracies. Since that time they have been allowed large liberty in the transaction of their business. The systems which the legislature has provided for them have been elastic, so that they might be adapted to the different wants of the people of different municipalities. Towns are allowed to adopt by laws on a great variety of subjects. Pub. Stat. chap. 27, §§ 15-23. To a large degree, cities and towns may determine for themselves the machinery, as well as the methods, by which they will manage their affairs. Within certain lim-

its towns may determine the number of their selectment, of their assessors, and their school-committee, and the length of their respective terms of office. Id. chap. 27, §§ 64, 65; Id. chap. 44, § 21. They may determine whether they will elect road commissioners (Id. chap. 27, § 74); whether they will establish fire districts (Id. § 87); and whether they will adopt the Australian method of voting in town elections (Stat. 1890, chap. 386). These are only a few of the matters which are left to their option. Statutes are passed nearly every year to take effect only in such cities or towns as choose to act under them. Stat. 1871, chap. 882; 1873, chap. 95; 1867, chap. 247; 1882, chaps. 154, 255; 1888, chap. 203; 1886, chap. 295; 1888, chaps. 804, 481; 1890, chaps. 264, 319; 1891, chap. 870. The doctrine on which these statutes are founded is not that the legislature may delegate legislative authority,—that is, authority to enact laws for all the people of the commonwealth,—but that it may submit to the voters of a city or town the right to vote on any question which may affect their interests differently from the interests of those in other parts of the commonwealth. In doing this, the legislature recognizes the principle of local self-government, which has always been a distinctive feature of our New England system.

Voting, in city and town elections, is simply a part of the management of the city's or town's business. It can in no way affect the state at large. The legislature may give cities and towns as large liberty as it chooses in regard to any question which is local. If the education, or experience in business, or wealth, of women, as compared with that of men, or the relative number of women and men, differs materially in different municipalities, so as to make the considerations properly to be regarded in favor of allowing women to vote in town elections much stronger in one town than in another, the legislature may leave to the voters of the town the question whether they will extend municipal suffrage to women. I think the legislature may find great differences in different parts of the commonwealth in regard to the desirability of the proposed change, and that the question to be considered is, in part at least, a local one. May there not be seaport towns where there are many widows of men lost at sea, and wives of seamen who, by reason of their occupation, are unable to be present at town meetings, and who are accustomed to be represented by their wives in the management of their business, and where a large part of the taxable property could not be represented at town meetings, except by women? And may there not be other cities or towns in the commonwealth where the relative number of men and women, and their respective occupations, and their connections with the management of property, would be very different, and where the legitimate arguments which could be adduced in favor of municipal suffrage for women would not be the same? If citizens of Boston should petition for an amendment of the charter of that city, giving women the right to vote at city elections, it would seem that the legis-

lature might enact such an amendment to be adopted by the city or not, as the voters should determine. I think that a town may as well be permitted to decide whether, in conducting its government, it will invite women to the polls, as whether it will adopt the Australian ballot, or whether it will act alone instead of being merged in another city or town by annexation. It seems to me that the legislature has constitutional authority to pass a law allowing women to vote at city and town elections in such cities and towns as shall determine in favor of giving them the ballot. Marcus P. Knowlton.

To the Honorable the House of Representatives of the Commonwealth of Massachusetts.

In compliance with your order of February 2, 1894, I herewith respectfully submit my opinion upon the questions of law therein stated:

I assume that an act granting to women the right to vote in town and city elections is constitutional. I see no reason why such an act may not properly be made to take effect in particular towns and cities only, as well as in all. The right of the general court to grant to the inhabitants of a particular place powers and privileges necessary or expedient for its regulation or government is plain and unquestioned. I find nothing in the constitution to require uniformity throughout the commonwealth in the selection of the inhabitants to whom the local government of a town or city shall be committed. In my opinion, under our constitution, the general court may provide that any act of the legislature shall take effect upon acceptance by some body of voters designated in the act. This practice has been not infrequent here, from an early date, both in local statutes and statutes concerning corporations, and has been held constitutional by decisions of the supreme judicial court. See *Wales v. Belcher*, 8 Pick. 508, 510; *Stone v. Charlestown*, 114 Mass. 214, 221. It is true that the act under consideration in *Wales v. Belcher* may find special justification under the provisions of article 2 of the articles of amendment; but the act dealt with in *Stone v. Charlestown*, though local, was not within the letter of that amendment, and in both of those decisions the judgment of the court was put on broad grounds. In the former, *Chief Justice Parker* said: "Why may not the legislature make the existence of any act depend upon the happening of any future event?" And in the latter *Chief Justice Gray* held that the legislature did not in any sense delegate its constitutional authority, in passing the act in that form. In respect to this question, I am unable to see any sound distinction between general and local acts. If the power resides in the legislature at all, it may be exercised in its discretion. The provision of the Constitution, in part 1, art. 10, that "the people of this commonwealth are not controllable by any other laws than those to which their constitutional representative body have given their consent," impliedly sanctions the power. The constitutional representative body "give their

consent" to every such law in the most formal manner. Nor is it, to my mind, an objection to the validity of a law so framed that the body whose further assent is required is composed in part of inhabitants other than qualified voters. In case of acts of incorporation the members of the voting body need

not be even inhabitants, and yet without their assent the act is not law, and with their assent it is law. For the reasons stated, I am of opinion that each of the three questions set forth in the order should be answered in the affirmative.

James M. Barker.

WEST VIRGINIA SUPREME COURT OF APPEALS.

H. H. CRUMLISH'S ADMINISTRATOR v. CENTRAL IMPROVEMENT CO. *et al.*

B. K. JAMISON & CO. *et al.*, Inter-
venors, *Appts.*

(88 W. Va. 300.)

*1. A stranger, paying the debt of

*Headnotes by BRANNON, J.

another without request, cannot sustain an action at law against such other unless he has in some way ratified such payment.

2. Such payment by a stranger, if accepted as such by the creditor, discharges the debt, so far as the creditor is concerned, and also as to the debtor, if he ratify it.

3. A stranger who pays a debt without request by the debtor, when his payment is not ratified by the debtor, may bring a suit in equity praying relief in the alternative:

NOTE.—The effect of payment of a debt by a volunteer or stranger to the original undertaking.

I. Extinguishment.

II. Contrary doctrine.

III. Necessity of ratification.

IV. Question of intention.

V. Right of action.

VI. As to bills and notes.

VII. Subrogation.

a. General doctrine.

b. Payment for protection.

c. By special agreement.

d. Fraud.

VIII. As against executors, etc.

IX. Judgment debt.

X. Purchase money item.

XI. Mortgage debt.

XII. Creditor of wife.

I. Extinguishment.

Where the demand of a creditor is paid with the money of a third person, not himself a creditor, without any agreement that the security shall be assigned or kept on foot for such party's benefit it has been held that the demand is absolutely extinguished. *Harrison v. Hicks*, 1 Port. (Ala.) 423, 27 Am. Dec. 638; *Webster v. Wyser*, 1 Stew. (Ala.) 184; *Logan v. Williamson*, 3 Ark. 216; *Martin v. Quinn*, 37 Cal. 55; *Moran v. Abbey*, 63 Cal. 56; *Hough v. Etna L. Ins. Co.* 37 Ill. 318, 11 Am. Rep. 18; *Small v. Stagg*, 95 Ill. 39; *White v. Cannon*, 125 Ill. 412; *Pearce v. Bryant Coal Co.* 121 Ill. 597; *Binford v. Adams*, 104 Ind. 41; *Ritenour v. Mathews*, 42 Ind. 7; *Harvey v. Tama County*, 63 Iowa, 228; *Oliver v. Bragg*, 15 La. Ann. 402; *Nolte v. Creditors*, 7 Mart. (N. S.) 602; *Tuckerman v. Sleeper*, 9 Cush. 177; *Bunn v. Lindsay*, 95 Mo. 250; *Anglade v. St. Avit*, 67 Mo. 434; *Shinn v. Budd*, 14 N. J. Eq. 234; *Wilson v. Brown*, 13 N. J. Eq. 277; *Fowler v. Moller*, 10 Bosw. 374; *Sandford v. McLean*, 3 Paige, 117, 3 L. ed. 80, 23 Am. Dec. 773; *Burr v. Smith*, 21 Barb. 262; *Boyd v. McDonough*, 39 How. Pr. 399; *La Farge v. Herter*, 11 Barb. 159; *Wood v. Jefferson County Bank*, 9 Cow. 206; *Hayes v. Ward*, 4 Johns. Ch. 123, 1 L. ed. 788, 3 Am. Dec. 554; *Banta v. Garino*, 1 Sandf. Ch. 385, 7 L. ed. 368; *Conkling v. King*, 10 N. Y. 40; *Wilkes v. Harper*, 1 N. Y. 438; *Dusenbury v. Callaghan*, 3 Hun, 541; *Griffin v. Petty*, 101 N. C. 390; *Leavitt v. Morrow*, 6 Ohio St. 71, 67 Am. Dec. 334; *Cottrell's App.* 23 Pa. 204; *Oury v. Saunders*, 77 Tex. 278; *National Bank of Royalton v. Cushing*, 53 Vt. 323; *Douglass v. Fagg*, 8 Leigh. 588; *Feamster v. Withrow*, 12 W. Va. 658; 23 L. R. A.

Pelton v. Knapp, 21 Wis. 63; *Kimball v. Noyes*, 17 Wis. 605; *Putney v. Farnham*, 27 Wis. 189; *Gray v. Herman*, 6 L. R. A. 691, 75 Wis. 453; *Bank of United States v. Winston*, 2 Brock. 252; *Belshaw v. Bush*, 11 C. B. 191, 22 L. J. C. P. 24, 17 Jur. 67; *Welby v. Drake*, 1 Car. & P. 537.

In the absence of all circumstances tending to show the contrary, the inference is that the act being for the debtor's benefit was done with his consent, or if without his knowledge at the time that it was ratified by him afterwards, and such a payment would bar any subsequent action by the creditor. *Leavitt v. Morrow*, *supra*.

Such payment extinguishes the debt and all rights under the judgment and execution. *Wilson v. Brown*, *supra*.

The acceptance is not only an extinguishment of the debt but creates an estoppel. *Leavitt v. Morrow*, *Pelton v. Knapp*, *Kimball v. Noyes*, and *Putney v. Farnham*, *supra*.

An obligation may be discharged by a third person in no way concerned in it, provided he act in the name and for the discharge of the debtor, or that if he act in his own name he be not subrogated to the creditor's rights under article 2130 of the Louisiana Civ. Code (old). *State v. Pilsbury*, 29 La. Ann. 787.

The money must be accepted in payment. *Martin v. Quinn*, 37 Cal. 55; *Leavitt v. Morrow*, 6 Ohio St. 71, 67 Am. Dec. 334.

The payment must be made in full. *Swann v. Patterson*, 7 Md. 164.

As between the person who paid it and him for whose benefit it was intended, a question might arise whether it was purely voluntary or not, which would depend on the circumstances of previous requests or of subsequent assent, either expressed or implied. *Harrison v. Hicks*, 1 Port. (Ala.) 423, 27 Am. Dec. 638.

It is for the party alleging extinguishment of payment of a debt, to prove the same. *Gernon v. McCan*, 23 La. Ann. 84.

In *Dusenbury v. Callaghan*, 3 Hun, 541, the money was paid by the stranger for his specific purpose and not with an intention of relieving the defendant from any liability. The court held that in order to make such payment effectual, it must be made by the third party as agent for and on account of the debtor, and with the prior authority of subsequent ratification.

Where payment by a third party, by delivery of property, was pleaded in defense between the

that is, that if the debtor do not ratify such payment the debt may be enforced in his favor, as its equitable assignee, or, if so ratified, that he be decreed repayment of the amount paid for the use of the debtor.

4. The stranger, when he pays the debt of another, may take an assignment of it from the creditor, and enforce the debt against the debtor; and if, when he pays, the creditor agrees to assign him the debt, though no assignment in writing be made, the stranger will be, in equity, regarded as the equitable assignee of the debt, and the transaction will be regarded equivalent to a purchase of the debt.

5. It is well settled that the judgment of a sister state must be accorded in this state

the same faith and credit it has in the state where rendered.

6. When such judgment is sought to be enforced here, our courts may inquire into the jurisdiction of the court rendering the judgment, and if it appear that the court had not jurisdiction the judgment will be held void here; otherwise, it is valid and binding in this state.

7. A judgment in a court of a sister state, without service of process in any manner, and without appearance, will be held void in this state.

8. Under the law of Pennsylvania, the president of a private corporation created by that state cannot recover from the corporation upon a *quantum meruit* for official services there

debtor and creditor, the creditor denying the same and alleging his own personal independent purchase of the property, the court held that the jury should be instructed that if they found from the evidence an implied agreement to that effect, a verdict for defendant was correct. *Griffin v. Petty*, 101 N. C. 330.

A debt may be paid or extinguished by a third person becoming responsible to the creditor with the concurrence of the debtor. *Logan v. Williamson*, 3 Ark. 216, following *Tatlock v. Harris*, 3 T. R. 180; *Wilson v. Coupland*, 5 Barn. & Ald. 238.

A third party delivering chattels in satisfaction of a debt, after inducing the creditor to accept them in payment, is estopped from alleging the voidability of the contract and claiming the price of such goods, such delivery working a satisfaction of the debt. *Fowler v. Moller*, 10 Bosw. 374.

The payment of a note by anticipation extinguishes a mortgage securing it, being an accessory to the contract. *Hoyle v. Cazabat*, 25 La. Ann. 438.

After such a payment, a purchaser at an execution sale acquires no title to the property sold. *Terry v. O'Neal*, 71 Tex. 592.

Under article 2131 of the Louisiana Code a third party may put the obligee in default by offering to perform for the debtor even without the latter's knowledge, if it be shown that it was for his advantage, and not merely for the purpose of changing the creditor. *State v. Pillsbury*, 20 La. Ann. 787.

In *Belshaw v. Bush*, 11 C. B. 191, 22 L. J. C. P. 24, 17 Jur. 87, it is stated that if a stranger, in the name of a mortgagor or of his heir, with his consent or privity, tender the debt to the mortgagee and the latter accept it, the debt is satisfied.

Where the plaintiff agreed with a third party to accept a sum in discharge of a debt, the advance of such amount by such third party was held a satisfaction of the debt. *Welby v. Drake*, 1 Car. & P. 557.

Such a payment was held to be a discharge of the debt and a defense to an action for the price of goods sold. *Gray v. Herman*, 6 L. R. A. 691, 75 Wis. 453.

Payment may be made by an arrangement whereby a creditor is given other funds supplied by a third party to the creditor at the instance of the debtor, the arrangement being carried into actual effect. *First Nat. Bank of Nashville v. McClung*, 7 Lea. 422, 40 Am. Rep. 66; 3 Parsons, Cont. 137.

In *Hun v. Van Dyck*, 26 Hun. 567, the defendants were allowed to plead payment by another in discharge of their illegal acts in the purchase of bonds, the principal and interest of which had been reimbursed by the obligors.

The payment must be deliberate and intentional on the third party's part, payment being performance of the obligation or there is no extinguishment of the debt. *Gernon v. McCan*, 23 La. Ann. 84.

If the debtor repudiate the payment made by the stranger, the payment will not operate as a discharge of the debt. *Neely v. Jones*, 16 W. Va. 625, 23 L. R. A.

It has been held that to be available as a defense to an action by the original creditor, such payment must be made by the third party either as agent for and on account of the debtor or with his authority. *Kromer v. Heim*, 75 N. Y. 574, 31 Am. Rep. 491; *Atlantic Dock Co. v. New York*, 53 N. Y. 69; *Bleakley v. White*, 4 Paige, 654, 3 L. ed. 598; *Tilton v. Alcott*, 16 Barb. 598.

So it must be proved to have been made and received in discharge of the debt and so as to extinguish it. *Brook v. Blanchard*, 23 N. H. 802, 41 Am. Dec. 527.

Under article 2131 of the Civil Code of Louisiana, the obligation may be discharged by a third party in no way concerned in it, provided he acts in the name and for the discharge of the debtor, or that if he act in his own name he is not subrogated to the rights of the creditor. *Gernon v. McCan*, *supra*.

It is not a contract but the discharge of a contract in which the party of the first part has a right to demand payment, and the party of the second part has a right to make payment. *Binford v. Adams*, 104 Ind. 41.

A previous request must in such cases be both alleged and proved. To the same effect are the cases of *Kaye v. Dutton*, 7 Mann. & G. 507; *Victors v. Davies*, 12 Mees. & W. 758.

Payment must be shown to be for the debtor's benefit. *James v. Isaacs*, 12 C. B. 791, 22 L. J. C. P. 73, 17 Jur. 69.

II. Contrary doctrine.

But the above view is disapproved of in other cases.

In *Whiting v. Independent Mut. Ins. Co.*, 15 Md. 297, 314, the payment of a debt by a stranger without the consent or knowledge of the debtor was held not necessarily to discharge the debtor, and that such payment would not be taken advantage of by him without showing by an acquittance or other means that it was intended by the payor and receiver to operate as a discharge.

The payment or satisfaction by a stranger cannot, even at law, be pleaded in bar of a debt or covenant which the defendant was legally bound to pay or perform himself. *Bleakley v. White*, 4 Paige, 654, 3 L. ed. 598; *Clow v. Borst*, 6 Johns. 37; *Edgcombe v. Rod*, 1 Smith, 515.

Neither could such payment avail defendant where there was not even a pretense of equity in the defense set up. *Bleakley v. White*, *supra*; *Blum v. Hartman*, 3 Daly, 49; *Daniels v. Hallenbeck*, 19 Wend. 409; *Grymes v. Blofield*, Cro. Eliz. 541; *Atlantic Dock Co. v. New York*, 53 N. Y. 67.

In *First Nat. Bank of Pueblo v. Newton*, 10 Colo. 161, 171, it was held that the giving of the check of a third person to meet an antecedent indebtedness was *prima facie* not a payment of discharge of such indebtedness even though a receipt in full was given at the same time and such note was accepted by a creditor, the same being construed to be upon the condition that the note should be

rendered, in the absence of any by-law or resolution of the directors allowing compensation. Nor can one who is treasurer and secretary of the corporation, and a stockholder and director, recover on a *quantum meruit* for his official services without such by-law or resolution. The law of that state raises no promise on the part of the corporation in such cases, and the question whether, in such cases, there is an implied promise, depends on the law of that state.

9. The obligation of a supposed contract made and to be performed in another state is tested by its law.

(December 6, 1893.)

A PPEAL by intervenors from a decree of the Circuit Court for Jefferson County rejecting their claims to a fund which had arisen

in a suit by Crumlish's Administrator against the Central Improvement Company for distribution among the creditors and stockholders of the corporation. *Affirmed.*

The facts are stated in the opinion.

Messrs. Barton & Boyd, U. L. Boyce, Wm. M. Stewart, Jr., and George Baylor for appellants.

Mr. Frank P. Clark for appellee.

Brannon, J., delivered the opinion of the court:

In a suit in equity in the circuit court of Jefferson county of *H. H. Crumlish's Administrator v. The Central Improvement Company* there was a fund for payment of creditors of that company, and then for division among

paid at maturity, in such cases the burden being upon the debtor to prove that such note was taken as payment of the original indebtedness.

The mere fact that the party pays as agent for the parties and for the payor who was desirous of purchasing the notes, with the belief that he was so doing, will not constitute such payment an extinguishment of the notes, even though the creditor received it in payment. *Gernon v. McCan*, 23 La. Anst. 84.

Voluntary payment to a creditor of the United States is no defense to a suit on an official bond. *United States v. Keebler*, 76 U. S. 9 Wall. 83, 19 L. ed. 574, a case of action of debt upon an official bond as postmaster.

The English case of *Grymes v. Blofield*, Cro. Elis. 541, declared that the payment of a debt by a stranger was no satisfaction.

This case, however, has been much criticised and materially limited by the subsequent English cases of *Jones v. Broadhurst*, 9 C. B. 173, and *Simpson v. Eggrington*, 10 Exch. 845, 24 L. J. Exch. 812.

In *Simpson v. Eggrington*, *supra*, it was held that payment was no discharge, unless made by a third party as agent for and on account of the debt, and with his prior authority or subsequent ratification.

To the same effect, *Jones v. Broadhurst*, 9 C. B. 173; *Belshaw v. Bush*, 11 C. B. 191, 22 L. J. C. P. 24, 17 Jur. 67; *James v. Isaacs*, 22 L. J. C. P. 73, 12 C. B. 791, 17 Jur. 66; *Kemp v. Balls*, 10 Exch. 607, 24 L. J. Exch. 47; *Lucas v. Wilkinson*, 1 Hurlst. & N. 420, 26 L. J. Exch. 18; *Neely v. Jones*, 16 W. Va. 625, 37 Am. Rep. 741; *Lipscomb v. Winston*, 1 Hen. & M. 458.

In *Wellington v. Kelly*, 84 N. Y. 543, the question was commented upon by the court but not finally decided.

In *Stark v. Thompson*, 3 T. B. Mon. 206, the court followed the doctrine as declared in *Grymes v. Blofield*, *supra*, and *Clow v. Borst*, 6 Johns. 37.

In *Hawkshaw v. Rawlings*, 1 Strange, 24, it is said that there could be no payment in satisfaction without an acceptance in satisfaction, and that although payment by a stranger was no legal discharge, yet acceptance in satisfaction worked its discharge.

III. Necessity of ratification.

A stranger who pays the debt of another without his knowledge or authority cannot sue the debtor for money paid for his use unless the debtor has ratified the act of the stranger by promising to repay him the amount or in some other manner. *Neely v. Jones*, 16 W. Va. 625, 37 Am. Rep. 794; *Beach v. Vandenburg*, 10 Johns. 331; *Jones v. Wilson*, 3 Johns. 434; *Menderback v. Hopkins*, 8 Johns. 456; *Walkill Poor Overseers v. Mamakating Poor Overseers*, 14 Johns. 87; *Lipscomb v. Winston*, 1 Hen. & M. 458; *Harrison v. Hicks*, 1 Port. (Ala.) 423, 27 Am. Dec. 638; *Carter v. Black*, 20 N. C. 425.

Where, however, the consideration is beneficial to 28 L. R. A.

the party sought to be charged, and is actually adopted or taken advantage of by him, the person executing the consideration becomes the agent of the promisor by the adoption of his act by the latter; *Omnis ratihabito retrotrahitur et mandato equiparatur*. *Roundtree v. Holloway*, 18 Ala. 357; *Kenan v. Holloway*, 16 Ala. 53, 50 Am. Dec. 162.

So the payment of a mere stranger without the request or assent or subsequent ratification thereof by the debtor, confers no right of subrogation. *The Jersey City*, 43 Fed. Rep. 166, 187.

Where one party paid the debt of another without any previous request, and the original debtor upon being informed thereof merely asked why such payment was made, the court held that such interrogatory did not ratify the act of payment so as to render the debtor liable for reimbursements. *Winsor v. Savage*, 9 Met. 343.

An unauthorized payment may be ratified, such ratification being equivalent to an original request. *Ibid.*

Payment by a stranger considered to be for a debtor and on his account, and afterwards ratified by him is a good payment. *Belshaw v. Bush*, 11 C. B. 191, 22 L. J. C. P. 24, 17 Jur. 67.

But payment by a stranger, without the authority, prior or subsequent, of the debtor, is not. *James v. Isaacs*, 12 C. B. 791, 22 L. J. C. P. 73, 17 Jur. 66; *Cook v. Lister*, 13 C. B. N. S. 543, 33 L. J. C. P. 121, 9 Jur. N. S. 823, 7 L. T. N. S. 712.

The ratification in such case may be after the commencement of the action, as where the defendant adopts the payment of the stranger by pleading it as a payment to the plaintiff. *Simpson v. Eggrington*, 10 Exch. 845, 24 L. J. Exch. 812; *Belshaw v. Bush*, 11 C. B. 191, 22 L. J. C. P. 24, 17 Jur. 67.

A plea of payment will be a sufficient ratification. *Walter v. James*, L. R. 6 Exch. 124, 40 L. J. Exch. 104, 24 L. T. N. S. 183, 19 Week. Rep. 472.

A party making payment may, however, withdraw such payment before ratification by the debtor, where such payment is not intended as a gift. *Ibid.*

Where an indorsee of a bill of exchange sued the acceptor, who pleaded an accommodation bill indorsed with other bills to the plaintiff as security for repayment of money advanced by him to the drawer, and satisfaction by payment to the plaintiff by the acceptor of one of the other bills of the money so advanced, the court held, that the plea was no bar to the further maintenance of the action, the payment having been made by a stranger, not ratified by the plaintiff. *Kemp v. Balls*, 10 Exch. 607, 24 L. J. Exch. 47.

When a creditor accepts payment of a debt from a stranger without the authority of the debtor, it is competent to the creditor, on discovering the want of authority and before any ratification of the payment by the debtor, to cancel the payment by returning the money to the stranger; and the

stockholders. A commissioner was directed to ascertain the debts having a right to be paid out of the fund. Various demands were presented before the commissioner for audit as debts; and among them was a judgment in favor of B. K. Jamison & Co. against the Central Improvement Company, an account in favor of R. D. Barclay against same company, and an account in favor of John P. Green against same, which three demands having been disallowed by the commissioner and court, Jamison & Co. and Barclay and Green united in this appeal.

The Jamison Judgment.

A judgment was rendered in 1877 in the court of common pleas, No. 8, of the county of Philadelphia, Pa., in favor of B. K. Jamison & Co. against the Central Improvement

Company for \$25,168.85 and costs, and afterwards, in 1890, upon a writ of *scire facias* upon this judgment, another judgment was rendered by the same court for \$26,378.08 and costs. Jamison & Co. and U. L. Boyce and the Fidelity Insurance Trust & Safe-Deposit Company each claimed the right to said judgment before the commissioner; and the Norfolk & Western Railroad Company, being a large owner of stock in the Central Improvement Company, pleaded payment. Jamison & Co. and Boyce having excepted to the report, and appealed, what we have to decide is whether they have any cause to complain of the refusal to allow them the judgment.

Jamison & Co., by process on said first

debtor cannot in such a case ratify the payment by placing a plea of payment on the record in an action brought against him for the amount by the creditor. *Walter v. James, supra.*

When a payment is made, not by way of gift for the benefit of the debtor, but by an agent who intended to be reimbursed by the debtor, but who had not the debtor's authority to make it, it is competent to the creditor, as the party paying, to rescind the transaction at any time before the debtor has affirmed the payment, and to repay the money, when the payment of the debt will be at an end, and the original debtor will be again responsible. *Ibid.*

In *Sargeant v. Sunderland*, 21 Vt. 284, the payment by a town treasurer was presumed to be with the approbation of the town.

IV. Question of intention.

In *Coe v. New Jersey Midland R. Co.*, 31 N. J. Eq. 105, it was held that the real question in all cases of subrogation is, whether the payment made by the stranger was a loan to the debtor through a mere desire to aid him, or whether it was made with the expectation of being substituted in the place of the creditor, and that in the former case he would not be entitled to subrogation, while in the latter he would.

The question whether a payment made by a guarantor or surety or generally by any one not liable or primarily liable for the debt on account of which the payment is made, operates as a payment and extinguishment, or as a purchase of the debt, must depend upon the intention of the party at the time the payment is made. *Kinley v. Hill*, 4 Watts & S. 428; *Elkinton v. Newman*, 20 Pa. 231; *Morris v. Oakford*, 9 Pa. 491; *Low v. Blodgett*, 21 N. H. 121; *Carter v. Jones*, 40 N. C. 198, 49 Am. Dec. 425; *Mathews v. Aikin*, 1 N. Y. 505.

In *Neely v. Jones*, 16 W. Va. 623, 37 Am. Rep. 794, the court stated the true basis of the decisions to be, that a stranger might purchase the debt of a creditor without the knowledge or consent of the debtor; that the debt might be expressly assigned to such stranger, and that if the design of the stranger was to purchase the debt and the money was received by the creditor with that intention, it would operate as a purchase and as an equitable transfer of the debt; but where there was simply a payment of the debt, the presumption was that the stranger merely expected the debtor to repay the money advanced and there was no implication of an express or implied agreement for a transfer of the securities.

And in such case the stranger would be entitled as the equitable owner of the debt, and suit could be brought at law in the name of the original creditor for his use. *Neely v. Jones, supra.*

Whether a transaction between the holder of a promissory note and the person who pays the 28 L. R. A.

money is of such a character as to constitute a payment that will operate to extinguish the debt, is generally a question of fact. *Binford v. Adams*, 104 Ind. 41; *Dougherty v. Deeney*, 45 Iowa, 443; *Moran v. Abbey*, 63 Cal. 58; *Jones v. Bobbitt*, 60 N. C. 391; *Balohradsky v. Carlisle*, 14 Ill. App. 289.

Whether the payment of a note by a stranger is a purchase or a payment thereof, must depend upon the facts of the case. *Wilcoxon v. Logan*, 91 N. C. 449.

It is a contract which does not extinguish a bill or note, but continues it in circulation as a valid security against all parties. *Binford v. Adams, supra.*

Where payment is made of an execution by a third party, who takes an assignment, he is a purchaser of the creditor's rights which are not satisfied by such payment. *Carter v. Sheriff of Halifax*, 8 N. C. 433.

In *Stokes v. Lewis*, 1 T. R. 20, it was held that in order to ground assumpsit for money paid, it must be shown to have been paid upon an express or implied promise or contract.

V. Right of action.

It is a well-settled rule of law that the payment of the debt of another raises no assumpsit against the person whose debt is paid, and no action lies by reason of such payment, unless a request, either expressed or implied, to make such payment, is proved. *South Scituate v. Hanover*, 9 Gray, 420.

A mere voluntary payment of another's debt imposes no duty upon the debtor to repay. *Wheatfield Twp. v. Brush Valley Twp.*, 25 Pa. 112; *Hehn v. Hehn*, 23 Pa. 415; *Breneman's App.*, 121 Pa. 641, 648.

A party furnishing money for the payment of a debt has not the right of the creditor whose debt is paid, the legal claim only attaching to him who is bound to pay. *Nolte v. Creditors*, 7 Mart. N. S. 602.

The mere payment of money does not necessarily impose a liability. *Kenan v. Holloway*, 16 Ala. 53, 50 Am. Dec. 163.

A stranger paying the debt of another has no right of action in the payor's name. *Brown v. Chesterville*, 63 Me. 241.

The law does not permit the liability of a party for a debt to one person to be shifted so as to make him the debtor of another, without his consent. *South Scituate v. Hanover, supra*; *Winsor v. Savage*, 9 Met. 343.

One man cannot of his own will pay another's debt without his consent and thereby convert himself into a creditor. *Kenan v. Holloway, supra*; *Weakley v. Brahan*, 2 Stew. (Ala.) 500; *Durnford v. Measiter*, 5 Maule & S. 446.

A mere advance to pay a debt is no bar to an action by the original creditor, nor a defense to a suit in his name and with his consent instituted by the payor. *Brown v. Chesterville, supra.*

judgment, had attached \$250,000 of second mortgage bonds and \$175,000 of income bonds of the Shenandoah Valley Railroad Company, held in the hands of a third party for the benefit of the Central Improvement Company. The Shenandoah Valley Railroad Company desiring to make a contract for its completion, and make another mortgage to raise money to complete it, and desiring to cancel and retire the bonds so attached, Boyce, the vice-president of the Shenandoah Valley Railroad Company, opened negotiations with Jamison & Co. looking to securing those bonds, and Jamison & Co. expressed their willingness to take any step which would get their money advanced to the Shenandoah

Valley Railroad Company represented by said judgment. Boyce made an arrangement with E. W. Clark & Co., bankers,—who were financial agents of the Shenandoah Valley Railroad Company, and wished to obtain said bonds for cancellation, out of the way of a new series,—to furnish the money. Thereupon, on July 12, 1879, Jamison & Co. and E. W. Clark & Co. made a written agreement providing that Jamison & Co. should transfer to Clark & Co. all their right, title, and interest to the bonds aforesaid, as also some others; that Jamison & Co. should proceed to get judgment upon their attachments, levy on said securities, and sell the same so as to pass title to the purchaser; that, if they

The only remedy a party making a payment at the request of the debtor has, is by action of assumpsit for money paid and not in the name of the creditor. *Simmons v. Walker*, 18 Ala. 664.

It has been held that a simple acknowledgment to a stranger or volunteer is not sufficient of itself to imply a promise to repay such party the money paid. *Kenan v. Holloway*, *supra*.

So where the debtor makes a promise to repay such volunteer or stranger being ignorant at the time that he is legally discharged from liability upon the original contract. *Ibid.*; *New Hampshire Sav. Bank v. Colcord*, 15 N. H. 119, 41 Am. Dec. 685.

The payment of the amount of a bond by a third party at the request of the obligor, extinguishes the debt due to the obligee who cannot bring suit thereon in his own name, even for the use of the party making the payment. *Simmons v. Walker*, *supra*.

Such a party becomes entitled, on the principles of subrogation, to the remedies to which the person to whom payment was made was entitled, or he may maintain an equitable suit as for money paid to the use of all other. *Weiss v. Gurineau*, 109 Ind. 438; *Brice's App.* 95 Pa. 145; *Stiger v. Bent*, 111 Ill. 323.

Such subrogation is equivalent to an expressed authority to use the plaintiff's name in suing the debtor. *King v. Dwight*, 3 Rob. (La.) 2.

Where an agent of an insurance company issued a policy accepted by the insured, and paid the premium which the insured had neglected to do under his contract with the company, the court held in an action brought in the company's name for the benefit of such agent, that the latter was subrogated to the company's rights, and that no assignment was necessary for the recovery of the premium. *Gillett v. Insurance Co. of North America*, 39 Ill. App. 284.

In a creditor's bill founded on a judgment, a plea that the judgment had been paid as a gratuity to the complainant, a police officer who had obtained the judgment for costs in an action against him for false imprisonment, was held to be bad. *Bleakley v. White*, 4 Paige, 654, 8 L. ed. 568.

VI. As to bills and notes.

A third party paying a note at the request of the maker to a collection agency extinguishes the note. *Moran v. Abbey*, 68 Cal. 55.

Such a payment extinguishes the debt of the maker. *Oliver v. Bragg*, 15 La. Ann. 402.

And a subsequent transfer of such note will not revive it. *Moran v. Abbey*, *supra*.

In *Burr v. Smith*, 21 Barb. 262, where a stranger paid the amount due upon a note after its maturity, declining to have it canceled and taking it into his own possession, nothing being said about a sale thereof, it was held that it operated as a payment and satisfaction of the note, and no action could be brought thereon by any person taking it from such stranger.

Where a third party, with knowledge of the circumstances, paid an accommodation acceptance before its maturity, without the knowledge or consent of the indorser to the prejudice of the indorser, the latter was held discharged from all liability upon the note in question. *Boyd v. McDonough*, 39 How. Pr. 389; *La Farge v. Herter*, 11 Barb. 159; *Wood v. Jefferson County Bank*, 9 Cow. 203; *Hayes v. Ward*, 4 Johns. Ch. 120, 1 L. ed. 793, 8 Am. Dec. 554.

In *Conkling v. King*, 10 N. Y. 440, the creditor had taken a third party's note upon the understanding that if the same were paid at maturity it should be a satisfaction of the debt. The court held that the fact of the creditor's receiving payment of the note when overdue discharged the debtor, as the same was a waiver of the condition attached to the note.

A party giving the maker of a note money to pay the same and purchase it for him is not entitled thereto, where the maker makes such payment without making a statement to that effect. *Cason v. Heath*, 86 Ga. 433.

Where a third party paid an installment note for purchase money, upon an agreement that he should be substituted to the vendor's rights "to the extent that he should have their lien *pro tanto* upon the said land for the money thus advanced," it was held that he was entitled, the purchaser's assets being insufficient to pay all the notes, to share in the proceeds in proportion of the note paid to the amount of all the notes. *Owen v. Cook*, 3 Tenn. Ch. 73.

In *Francis v. Del Banco*, 2 Duer, 133, the question whether or not an existing debt was satisfied by the delivery to the creditor of the promissory note of a third party indorsed by him, was not fully determined, but it was held that where such a note was transferred and received in payment by the understanding and agreement of the parties, the debtor's prior liability was extinguished and that he was only liable as an indorser.

In *St. John v. Purdy*, 1 Sandf. 9, it was held that the acceptance of a stranger's note was a satisfaction of the debt and a discharge of the debtor.

VII. Subrogation.

a. General doctrine.

The right of subrogation or of equitable assignment is not founded upon contract nor upon the absence of contract, but is founded upon the facts and circumstances of a particular case and upon principles of natural justice, and generally where it is equitable that a person furnishing money to pay a debt should be substituted for the creditor or in the place of a creditor, such person will be so substituted. *Crippen v. Chappel*, 35 Kan. 495, 57 Am. Rep. 192; *Hayes v. Ward*, 4 Johns. Ch. 120, 1 L. ed. 793, 8 Am. Dec. 554; *Hodgson v. Shaw*, 3 Myl.

should not be bid up to a figure above Jamison & Co's judgment, Jamison & Co. were to buy them at the sale, and transfer them to Clark & Co.; that "the said E. W. Clark & Co. are to pay B. K. Jamison & Co. the amount of their judgment against the Central Improvement Company, with interest and costs, the amount of said judgment being \$25,168.85, with interest from July 10, 1877, the said payment to be made as follows: \$10,000 in cash, and the balance in the notes of E. W. Clark & Co., drawn in equal amounts," etc. The said bonds were sold to Jamison & Co. under said attachments at \$11,000, which was credited on the judgment, and Jamison & Co. transferred the bonds to

Clark & Co., and received from them the \$10,000 cash, and their notes in full payment of the amount of said judgment. By reason of said agreement the commissioner reports the judgment as paid "so far as claimant is concerned;" that is, Jamison & Co. The object of Jamison & Co. being only to get their money, and the language of the writing being, "the said E. W. Clark & Co. are to pay [note the word 'pay'] B. K. Jamison & Co. the amount of their judgment," these facts lead me to the conclusion that the parties contemplated it as a payment, so far as Jamison & Co. were concerned. But this payment was made by a stranger, without request or ratification by the debtor, so far as appears.

& K. 183; Hart v. Western R. Co. 13 Met. 99, 46 Am. Dec. 719; Amory v. Lowell, 1 Allen, 504; Wall v. Mason, 102 Mass. 313; Suppliger v. Garrela, 20 Ill. App. 625; DeConcillo v. Brownrigg (N. J. Eq.) Nov. 25, 1892; Brewer v. Naab, 16 R. L. 458; Stevens v. King, 84 Me. 291; Blackburn Bldg. Soc. v. Cunliffe, L. R. 22 Ch. Div. 61, 81 Week. Rep. 96; Skinner v. Tirrell, 21 L. R. A. 673, 159 Mass. 474.

The doctrine of subrogation, being one of mere equity and benevolence, will not be enforced at the expense of a legal right. Barnes v. Diokey, 181 Pa. 88.

It comprehends all parties who are obliged to pay to protect their own interests. Bayles v. Husted, 40 Hun, 378.

Subrogation is a pure unmixed equity. Gadsden v. Brown, 1 Speers, Eq. 40, a case of payment of a mortgage by a stranger at the request of the mortgagor.

The general principles of equity are the foundations of the right. Pease v. Eagan, 131 N. Y. 282; Cottrell's App. 23 Pa. 284.

Legal subrogation only exists in favor of those who are bound to pay the debt. Harrison v. Bland, 5 Rob. (La.) 204.

The doctrine is only to be applied where it will promote justice. Aocer v. Hotchkiss, 97 N. Y. 386.

A party who has covenanted or promised must perform the engagement himself in all its legal consequences. Muller v. Eno, 14 N. Y. 597, 606.

Where a person is in no manner bound, and on his own motion in the absence of a contract, or expectation that he will be substituted in the place of the creditor, pays the debt of another, he will be rewarded as an intermeddler and not entitled to subrogation. Wormer v. Waterloo Agr. Works, 68 Iowa, 699; Shinn v. Budd, 14 N. J. Eq. 234; Coe v. New Jersey Midland R. Co. 31 N. J. Eq. 106; Tradesmen's Bldg. & Loan Asso. v. Thompson, 32 N. J. Eq. 133; Kitchell v. Mudgett, 37 Mich. 81; Gillett v. Gilbert, 39 Iowa, 657; Barber v. Lyon, 15 Iowa, 37.

The same doctrine is held in Redington v. Cornwell, 90 Cal. 49; Wilson v. Fridenberg, 21 Fla. 386; Rough v. Aetna L. Ins. Co. 57 Ill. 318, 11 Am. Rep. 18; Young v. Morgan, 39 Ill. 199; Bayard v. McGraw, 1 Ill. App. 134; Crippen v. Chappel, 36 Kan. 466, 57 Am. Rep. 122; Stevens v. King, 84 Me. 291; Swann v. Patterson, 7 Md. 164; Smith v. Austin, 9 Mich. 465; Slaton v. Alcorn, 51 Miss. 75; Wilkes v. Harper, 1 N. Y. 596; Marvin v. Vedder, 5 Cow. 671; Lewis v. Palmer, 28 N. Y. 271; Aocer v. Hotchkiss, *supra*; Gans v. Thiemie, 98 N. Y. 238; Clute v. Emmerich, 69 N. Y. 351; Dodge v. Zimmer, 110 N. Y. 43; Pease v. Eagan, 131 N. Y. 282, 273; Hoover v. Epler, 52 Pa. 522; Webster's App. 86 Pa. 409; Cottrell's App. 23 Pa. 284; Mosier's App. 56 Pa. 79, 93 Am. Dec. 733; Oury v. Saunders, 77 Tex. 273; Downer v. Wilson, 33 Vt. 1; National Bank of Royalton v. Cushing, 53 Vt. 326; Douglass v. Fagg, 8 Leigh, 401; McNeil v. Miller, 29 W. Va. 430, 433; Clevinger 23 L. R. A.

v. Miller, 37 Gratt. 740; Enders v. Brune, 4 Rand. (Va.) 436.

The doctrine could never, from its nature, have been intended for the relief of those who were in any condition in which they were at liberty to elect whether they would or would not be bound, and has never been so applied. Gadsden v. Brown, Speers, Eq. 38, 41.

The voluntary performance of a service or expenditure of money for another will not create the position of debtor and creditor. There must at the least be an implied request. Webb v. Cole, 20 N. H. 490.

No one can make himself the creditor of another without his consent or against his will. Dawson v. Lea, Lee v. Hill, 83 Ky. 49.

Voluntary payment without consent does not place the payor in the creditor's position or entitle him to sue the debtor, the law not permitting one officiously and without solicitation to intermeddle with another's affairs. Winder v. Diffenderfer, 2 Bland, Ch. 199; McGee v. San José, 68 Cal. 91.

To the same effect, Slaton v. Alcorn, 51 Miss. 75; Truesdell v. Callaway, 6 Mo. 605; Douglass v. Fagg, 8 Leigh, 601; Johnson v. Credit Lyonnais Co. L. R. 8 Q. P. 43.

The same conclusions were reached in Iowa Homestead Co. v. Des Moines Nav. & R. Co. 81 U. S. 17 Wall. 153, 21 L. ed. 622, a petition to quiet title.

No man is allowed to intrude himself as another's surety. Winder v. Diffenderfer, *supra*.

The right is never accorded in equity to one who is a mere volunteer in paying a debt of one person to another. Aetna L. Ins. Co. v. Middleport, 124 U. S. 534, 31 L. ed. 537.

The doctrine has been exclusively directed to the relief of those who were already bound, or who could not but choose to abide the penalty. Gadsden v. Brown, Speers, Eq. 37, 41.

In Bank of United States v. Winston, 2 Brook. 254, the doctrine of subrogation or substitution was confined to sureties and held not applicable to a mere volunteer.

The payment by one having no obligation to pay nor interest in the contract personally will not entitle such payor to subrogation or substitution. Moody v. Moody, 68 Me. 155.

It does not exist where there is no duty or obligation to pay, either moral or otherwise. Hoover v. Epler, 52 Pa. 622.

The same doctrine was declared in Childress v. Allen, 3 La. 477, a case of a purchaser at a forced sale.

A mere stranger is not entitled to subrogation. Wormer v. Waterloo Agr. Works, 68 Iowa, 699, where money was furnished for the purpose of redeeming property from a judicial sale, the court holding that the party advancing the money for such redemption was not entitled to be placed in the position of the purchaser at the sale.

A volunteer never could claim the benefit of the

Does it satisfy the judgment? As it seems to me, the answer depends upon whether you mean as to the creditor or debtor. It remains a correct legal proposition, to the present, that one man who is under no obligation to pay the debt of another cannot, without his request, officiously pay that other's debt, and charge him with it. If he ratify such payment, the debt is discharged, and he becomes liable to the stranger for money paid to his use. If he refuse to ratify it, he disclaims the payment, and the debt stands unpaid as to him (the debtor). In the one case the stranger would, at law, sue the debtor for money paid to his use; in the other, enforce the debt in the creditor's name for his use.

law of subrogation. So held in *Fay v. Fay*, 48 N. J. Eq. 433, where an administrator of an intestate's estate paid the funeral expenses of a minor entitled to an undivided interest in the intestate's estate, taking no assignment of the debt.

The case of *Skinner v. Tirrell*, 21 L. R. A. 673, 159 Mass. 474, further exemplifies these principles of subrogation and holds that they do not apply to the case of a volunteer supplying money to a married woman. In that case the court pointed out an additional reason for refusing such relief, namely, that a special remedy was afforded to the wife by statute.

Where a party paid a debt of another under the impression that he was legally compellable to do so, the court held he was a mere stranger or volunteer not entitled to the creditor's rights against the principal. *Dawson v. Lee*, Lee v. Hill, 33 Ky. 49.

One who advances money to pay off a deed of trust at the instance of a life tenant, taking a new deed of trust from the latter in the belief that he has an absolute title, is a mere volunteer as against parties in interest, excepting the life tenant, and not entitled to subrogation. *Kleimann v. Geiselmann*, 45 Mo. App. 497.

There is no subrogation in the case of payment of a privileged debt. *Shaw v. Grant*, 13 La. Ann. 53.

So one cannot acquire a lien upon property purchased by another, by the mere voluntary payment of the purchase money. *Truesdell v. Callaway*, 6 Mo. 605.

Where a party makes such payment as a mere volunteer, under a mistake of law, he will not be entitled to relief in equity upon the ground of subrogation. *Norton v. Highleyman*, 33 Mo. 621; *Price v. Batill*, 37 Mo. 378.

A legatee voluntarily paying a debt for which he is not personally liable, and which is no charge upon his property, is not entitled to be subrogated to a lien which the creditor had upon the deceased's estate. *Wilkes v. Harper*, 1 N. Y. 596.

Where an administrator made a voluntary payment of a debt of the deceased, upon the mistaken belief that the assets were sufficient to reimburse him, the court held he was not entitled to be subrogated to the rights of the creditor under the trustee. *Evans v. Halleck*, 33 Mo. 378.

Such payment was a misappropriation of the funds, and it being voluntarily made, the fact of his being mistaken in the supposition that he had funds of the estate sufficient to justify him in so doing, did not entitle him to the relief asked, and he made the payment at his peril. *Ibid.*; *Dullard v. Hardy*, 47 Mo. 404; *Garesche v. Priest*, 73 Mo. 127; *Brown v. Fagan*, 71 Mo. 563.

Equity will not relieve by enforcing a volunteer's rights to pay off another's mortgage. *Smith v. Austin*, 9 Mich. 465.

The mere fact that a party lent money to pay the purchase money upon land, does not entitle him to 23 L. R. A.

If his payment is not ratified, he may go into equity, praying that if the debtor ratify it he may be decreed to repay him, or, if he do not ratify the payment, that the debt be treated as unpaid, as between him and the debtor, and that it be enforced in his favor, as an equitable assignee. *Neely v. Jones*, 16 W. Va. 625, 87 Am. Rep. 794; *Moore v. Ligon*, 22 W. Va. 292; *Beard v. Arbuckle*, 19 W. Va. 185.

But how as to the creditor? When a stranger pays him the debt of a third party, without request of such third party, as in this case, can the creditor say the debt is yet unsolved, and enforce it against the debtor, as is attempted to be done by Jamison & Co.? Can

be substituted to the vendor's rights. *Durant v. Davis*, 10 Heisk. 622.

The payment of purchase money due to the vendor of real estate by a mere volunteer or stranger creates no subrogation as to the vendor's lien. *Nichol v. Dunn*, 23 Ark. 129.

One with no title to or interest in land cannot redeem at a tax sale, so as to deprive the defendant of his lien or interest acquired by tax sales certificates. *Baton v. North*, 23 Wis. 614.

In *Muller v. Eno*, 14 N. Y. 597, it was held that if a third person, without the authority of the plaintiff and not in privity with him, paid to the defendants in money a full satisfaction for the breach of a warranty, such payment and satisfaction was no defense to an action on the warranty, and no answer to the defendant's right of recoupment.

A stranger lending money to pay the wages of a seaman is not subrogated to the statutory attachment lien of such seaman. *Steamboat "P. H. White" v. Levy*, 10 Ark. 411.

A party making a payment without a request of the debtor is not entitled to charge the latter. *McGee v. San José*, 68 Cal. 91.

Third parties having no rights or interest cannot divest a purchaser at a tax sale by redemption of the property. *Byington v. Bookwalter*, 7 Iowa, 512, 74 Am. Dec. 279.

In *Penn v. Clemans*, 19 Iowa, 372, the court held that a party having no interest in property could not redeem it from a tax sale, and that such redemption did not divest the title of a tax purchaser or inure to the benefit of the real owner.

Where taxes which should have been paid by the defendants were paid by a third party without the former's request or assent, the court held that the taxpayer's refusal or neglect of such payment did not authorize contestants of his title to make him their debtor, by voluntarily stepping in and paying such taxes. *Iowa Homestead Co. v. Des Moines Nav. & R. Co.* 51 U. S. 17 Wall. 158, 31 L. ed. 622.

A payment by a party not interested in a note does not entitle him to a conventional subrogation. *Oliver v. Bragg*, 15 La. Ann. 402.

A party agreeing to pay the debt of another in installments is not entitled to subrogation until interest is paid. *Soulie v. Brown*, 13 La. Ann. 531.

Where one borrowed money to pay a note with the intention of discharging the same, and subrogating the mortgagee's rights, the court held, the mortgagee not being a party to the subrogation, that the same was without authority and no subrogation existed. *Hoyle v. Cambat*, 25 La. Ann. 433.

Where a stockholder in a foreign corporation paid corporate debts, the court held, there being no proof that he was legally liable therefor, that his payment was voluntary. *Eastman v. Crosby*, 8 Allen, 203.

he accept such payment, and say, because it was made by a stranger, it is no payment? Is his acceptance not an estoppel by conduct *vis-à-vis* him? There has been a difference of opinion in this matter. The old English case of *Grymes v. Blofield*, Cro. Eliz. 541 (decided in Elizabeth's reign), is the parent of the cases holding that even the creditor accepting payment from a stranger may repudiate, and still enforce his demand as unpaid. That case is said to have decided that a plea of accord and satisfaction by a stranger is not good, while Rolle, Abr. 471 (condition F), says it was decided just the other way. Denman, *Ob. J.*, questioned its authority in *Thurman v. Wild*, 11 Ad. & El.

453. Opposite holding has been made in England in *Hawkeshaw v. Rawlings*, 1 Strange, 24. Its authority is questioned at the close of the opinion by Cresswell, J., in *Jones v. Broadhurst*, 9 C. B. 173, as contrary to an ancient decision in 36 Hen. VI., and against reason and justice. Parke, B., seemed to think it law in *Simpson v. Eggington*, 10 Exch. 845. It was followed in *Edgecombe v. Rodd*, 5 East, 294, and *Stark v. Thompson*, 8 T. B. Mon. 296. Lord Coke held the satisfaction good. Co. Litt. 206b, 207a. See 5 Rob. Pr. (new,) 884; 7 Rob. Pr. (new,) 548.

The cases of *Goodwin v. Cremer*, 18 Q. B. 757, and *Kemp v. Balls*, 28 Eng. L. & Eq. 498, seem to hold that payment must be made

Where a town made a voluntary payment of commissioner's fees appointed by the legislative resolve, providing for the payment of such fees by the towns, the court held that the town making such payment could not recover from the other town any portion of the amount paid. *South Scituate v. Hanover*, 9 Gray, 420.

In *Van Winkle v. Williams*, 38 N. J. Eq. 105, where money was advanced to a party for the purpose of loan to another person by equitable mortgage, the court held there was no right to subrogation.

In the course of the construction of a railroad, the superintendent of the workman who was not legally bound to do so, voluntarily and believing the principals solvent, as a friendly act to the workmen, advanced moneys for the payment of wages without taking an assignment of the claims, or making any agreement for the benefit of their liens. The court held, upon the subsequent insolvency of the principals, that such superintendent was not entitled by subrogation to the statutory liens of the workmen. *North River Constr. Co's Case*, 38 N. J. Eq. 433.

Voluntary payment by surety upon a void note or obligation does not entitle him to contribution from other sureties. *Russell v. Fallor*, 1 Ohio St. 327, 59 Am. Dec. 681.

The cessation of action cannot be compelled by a stranger who pays a debt for which he is not liable. *Douglass v. Fagg*, 8 Leigh, 601.

The voluntary payment of a debt constituting a lien upon land does not entitle the party paying to be substituted to the lien of the judgment creditor. *Janney v. Stephens*, 2 Patton & Heath (Va.) 11.

The mere loan of money is not sufficient. *Watson v. Wilcox*, 39 Wis. 650, 20 Am. Rep. 63; *Downer v. Miller*, 15 Wis. 612; *Pelton v. Knapp*, 21 Wis. 63.

Where a trustee of a deceased partner paid a debt of the dissolved firm out of his own money, it was held voluntary, and being the act of a stranger, did not entitle him to the rights of the creditor unless such payment were made at the request of the partner. *Conrad v. Buck*, 21 W. Va. 395.

Actual payment is a discharge at law, but where justice requires it the debt will be kept on foot for the payor's benefit. *Cottrell's App.* 23 Pa. 294.

b. Payment for protection.

Generally, where it is equitable that a person furnishing money to pay a debt should be substituted for the creditor or in the place of the creditor, such person will be so substituted. *Yaple v. Stephens*, 36 Kan. 680.

A party seeking to take advantage of the equitable doctrine of subrogation must show that he paid the debt, before he can be substituted to the creditor's rights, and also that he acted, not as a mere volunteer, but on compulsion to save himself from loss by reason of a superior lien or claim on the part of the person to whom he paid the debt, as 23 I. R. A.

in cases of sureties, prior mortgages, etc. *Atina L. Ins. Co. v. Middleport*, 124 U. S. 534, 31 L. ed. 537.

It is only in cases where a payment has been made under a legitimate and fair effort to protect the ascertained interests of the party paying, and when intervening rights are not legally jeopardized or defeated, that the doctrine of subrogation applies. *Mosier's App.* 55 Pa. 76, 93 Am. Dec. 733.

Yet the payment by a stranger of a debt for the protection of his own property entitles him, upon the principles of subrogation, to the creditor's remedies. *Cockrum v. West*, 123 Ind. 372; *Weiss v. Guerinneau*, 109 Ind. 438; *Lowrey v. Byers*, 80 Ind. 443; *Edinburg American Land Mortg. Co. v. Latham*, 38 Ind. 88.

As in the case of payment, by a vendee of an incumbered estate, of a charge upon land which would cause him loss of interest thereon. *Arnold v. Green*, 116 N. Y. 536; *Johnson v. Zink*, 51 N. Y. 333; *Cole v. Malcolm*, 66 N. Y. 363; *Twombly v. Cassidy*, 33 N. Y. 155; *Gans v. Thieme*, 33 N. Y. 226, 232; *Averill v. Taylor*, 8 N. Y. 44, 51.

Or that of a junior incumbrancer. *Jenkins v. Continental Ins. Co.* 12 How. Pr. 66.

In *Weiss v. Guerinneau*, 109 Ind. 438, the court held that in the ordinary case of one person paying a debt for which another was personally and primarily liable, in order to protect his own property, the person so paying is entitled to recover from one whose default has imposed upon him the burden of paying a debt for which he was neither legally nor equitably liable, following *Dunning v. Seward*, 90 Ind. 63; *Bunn v. Lindsay*, 95 Mo. 250; *Wade v. Beldmeir*, 40 Mo. 486; *Woodbridge v. Scott*, 69 Mo. 669; *Ellsworth v. Lockwood*, 42 N. Y. 89; *Sandford v. McLean*, 3 Paige, 117, 3 L. ed. 80, 23 Am. Dec. 773; *Atlantic Ins. Co. v. Storow*, 5 Paige, 235, 3 L. ed. 720; *Slade v. Van Vechten*, 11 Paige, 21, 5 L. ed. 42; *Graham v. Dickinson*, 3 Barb. Ch. 169, 5 L. ed. 861; *Patterson v. Birdsall*, 6 Hun, 632; *Lidderdale v. Robinson*, 2 Brock. 169; *Cottrell's App.* 23 Pa. 294.

Even in the absence of a contract or understanding, as where he is a juvenile lien holder and pays the senior lien. *Wormer v. Waterloo Agr. Works*, 62 Iowa, 699.

In *Acer v. Hotchkiss*, 97 N. Y. 395, it was said that the right of subrogation may be claimed by one who pays the debt of another under some compulsion.

The payment of a debt of a co-stockholder of the corporation by a stockholder, is not a voluntary payment so as to deprive the payor of his right to subrogation. *Redington v. Cornwell*, 90 Cal. 43.

In *Curry v. Curry*, 87 Ky. 667, it was held that an agent making a payment out of his own money for the protection of his principal, was not a mere volunteer and was entitled to the equities.

c. By special agreement.

Subrogation must take place at the time of payment. *Sewall v. Howard*, 15 La. Ann. 400.

by a third person as agent for and on account of debtor, with his assent or ratification. In New York, old cases held this doctrine. *Olow v. Borst*, 6 Johns. 87; *Bleakley v. White*, 4 Paige, 654, 8 L. ed. 598. But later, in *Wellington v. Kelly*, 84 N. Y. 548, Andrews, J., said that the old cases were doubtful, but had not been overruled, but it was not necessary in that case to say whether it should longer be regarded as law, and the syllabus makes a *quarre* on the point. It was held in *Harrison v. Hicks*, 1 Port. (Ala.) 428, 27 Am. Dec. 688, that "payment of a debt, though made by one not a party to the contract, and though the assent of the debtor to the payment does not appear, is still the extinguish-

ment of the demand." The opinion says that, as between the person paying and him for whose benefit it was paid, a question might arise whether it was voluntary, which would depend on circumstances of previous request, or subsequent, express or implied. This doctrine is sustained by *Martin v. Quinn*, 67 Cal. 55; *Gray v. Herman*, 75 Wis. 458, 6 L. R. A. 691; *Cain v. Bryant*, 13 Helsk. 45; *Leavitt v. Morrow*, 6 Ohio St. 71, 67 Am. Dec. 884; *Webster v. Wyser*, 1 Stew. (Ala.) 184; *Harvey v. Tama County*, 58 Iowa, 228. Bishop, Cont. § 211, holds that, if payment "be accepted by creditor in discharge of debt, it has that effect." See 2 Whart. Cont. § 1008.

A mere unexecuted intention of the parties is not sufficient. *Harrison v. Bisland*, 5 Rob. (La.) 304.

But there may be an expressed subrogation which must be made at the time of payment. *Ibid.* An agreement to subrogate before payment or an actual subrogation after payment is not enough. *Gernon v. McCan*, 28 La. Ann. 64.

There must be a new consideration for the promise. *New Hampshire Sav. Bank v. Colcord*, 15 N. H. 119, 41 Am. Dec. 685.

A prior agreement to subrogate may be gathered from a previous request by a subsequent assent. *Roifman v. Sanders*, 44 Ark. 504.

In *Sandford v. McLean*, 3 Paige, 122, 3 L. ed. 83, 23 Am. Dec. 773, it was said it was only where the person advancing money to pay the debt of a third person stands in the situation of a surety, or is compelled to pay to protect his own rights, that a court of equity will substitute him in the place of the creditor as a matter of course, without any agreement to that effect.

To entitle a third party, being merely a volunteer or stranger, to subrogation, the payment must be made upon an express agreement entered into at the time of payment. *Swann v. Patterson*, 7 Md. 164; *Brice v. Watkins*, 30 La. Ann. 21; *Bank of United States v. Winston*, 2 Brock. 264; *Virgin's Succession*, 18 La. Ann. 42; *Burr v. Smith*, 21 Barb. 222; *National Bank of Royalton v. Cushing*, 53 Vt. 320; *Mosier's App.* 56 Pa. 76, 38 Am. Dec. 788; *Dillon v. Kauffman*, 58 Tex. 696; *Clark v. Moore*, 76 Va. 262; *King v. Dwight*, 3 Rob. (La.) 2; *Baltimore v. Hughes*, 1 Gill & J. 480, 19 Am. Dec. 248; *Oury v. Saunders*, 77 Tex. 275.

Subrogation can be accomplished by payment in accordance with an express understanding between the debtor and creditor and a third party, to the effect, that if such third party pays the debt, he may hold the security for his reimbursement. *Dillon v. Kauffman*, *supra*; *Flanagan v. Cushman*, 48 Tex. 241; *Fievel v. Zuber*, 67 Tex. 275.

If a third party pays the entire debt pursuant to an agreement between himself and the debtor, that upon his doing so he shall be subrogated to the creditor's rights, the agreement will be effectual and the third party will stand in the place of the creditor as to all interested in the property or security. *Fievel v. Zuber*, *supra*; *Fuller v. Hollis*, 57 Ala. 435; *Owen v. Cook*, 3 Tenn. Ch. 78; *Mitchell v. Butt*, 45 Ga. 162; *New Jersey Midland R. Co. v. Wortendyke*, 27 N. J. Eq. 668; *Morgan v. Hammett*, 25 Wis. 30; *Caudle v. Murphy*, 39 Ill. 362; *Oury v. Saunders*, *supra*.

The debt must be paid at the instance of the debtor, or the person paying it must be liable as surety or otherwise for its payment in order to entitle the payor to subrogation, the principle not extending to a case of a mere volunteer. *Wilson v. Brown*, 13 N. J. Eq. 277.

A stranger, who by the authority and consent of

the debtor, and on his agreement that he shall be subrogated to the rights of the creditor, makes payment for the debtor, will be subrogated if the payment is made with the expressed declaration of the subrogation in the release made by the creditor. *Shreve v. Hankinson*, 84 N. J. Eq. 76, 81, where a brother of a mortgagor made a payment of the first mortgage after the execution of the second mortgage upon such understanding.

So payment upon a like agreement between a stranger and a creditor will entitle the former to subrogation. *Fievel v. Zuber*, *supra*.

So where a party who has agreed to advance money for the payment of a debt applies the same in payment, and discharge of the debt himself, he is not to be regarded as a volunteer, and may be subrogated to the creditor's rights. *Tradesmen's Bldg. & Loan Asso. v. Thompson*, 22 N. J. Eq. 123; *Payne v. Hathaway*, 3 Vt. 212.

It is not sufficient that a person paying the debt of another should do so, merely with the understanding on his part that he should be subrogated to the rights of the creditor, conventional subrogation only resulting from an express agreement, either with the debtor or creditor. *New Jersey Midland R. Co. v. Wortendyke*, 27 N. J. Eq. 668; *Sandford v. McLean*, 3 Paige, 117, 3 L. ed. 80, 23 Am. Dec. 773; *Shinn v. Budd*, 14 N. J. Eq. 234.

Conventional subrogation exists upon an attorney's statement that the payment and the acts of subrogation were made at the same time. *Nugent v. Potter*, 21 La. Ann. 746.

It must be shown that the payment was upon request or as surety or under compulsion. *Acer v. Hotchkiss*, 97 N. Y. 396.

Under clause 2, article 2160, Rev. Civ. Code of Louisiana, a debtor borrowing money and intending to subrogate the lender to the creditor's rights, must borrow and execute the receipt in the presence of a notary and two witnesses, and declare that the loan was for the payment and that the same was made with the money advanced, in order to subrogate the payor to the creditor's rights independently of the creditor's will. *Durao v. Ferrari*, 23 La. Ann. 114.

In Louisiana the law is governed by article 2156 of the Civil Code, which shows the rule of law in that state to be contrary to the doctrine established elsewhere. *Harrison v. Bisland*, 5 Rob. (La.) 304; *Hoyle v. Cazabat*, 26 La. Ann. 428; *Brice v. Watkins*, 30 La. Ann. 21.

But it is otherwise if reliance is expressly placed upon the debtor's promise to pay and the debt will be extinguished. *Fievel v. Zuber*, 67 Tex. 275.

Where a party showed that the money furnished by him to an infant was expended for necessities, or in paying debts incurred therefor, he was subrogated to the rights of the party furnishing such necessities. *Price v. Sanders*, 60 Ind. 310.

Where money was paid out to satisfy a debt which an infant owed for necessities, at his re-

It seems utterly unjust, and repugnant to reason, that a creditor accepting payment from a stranger, of the third person's debt, should be allowed to maintain an action against the debtor pleading and thereby ratifying such payment, on the technical theory that he is a stranger to the contract. He has himself, for this purpose, allowed him to make himself a quasi party. He consents to treat him so, so far as payment is concerned. To regard the debt paid, so far as he is concerned, is but to hold him to the result of his own act. Shall he collect the debt again? Then, can the stranger recover back? What matters it to the creditor who pays? As the supreme courts of Wisconsin and Ohio, in

cases above cited, said, this doctrine is against common sense and justice. It does not at all infringe the rule that one cannot at law make another his debtor, without request to allow such payment to satisfy the debt as to the creditor; and this court, while recognizing the rule that one cannot officiously pay the debt of another, and sue him at law, unless he has ratified it, by allowing the stranger to go into equity and get repayment, makes the payment, in the eyes of a court of equity, operate to satisfy the debtor, and render the stranger a creditor of the debtor. *Neely v. Jones, supra*. I know that in *Neely v. Jones*, 16 W. Va. 625, 87 Am. Rep. 794, it is held that, "if a payment by a

quest, the court held the infant liable. *Randall v. Sweet*, 1 Denio, 460.

Where a third party, at the instance of one of several partners, paid a debt upon the property of the firm, it was held that he should be reimbursed the amount paid by him, and have a lien upon the common property of the firm to secure him. *Stebbins v. Willard*, 53 Vt. 565.

Where there was an agreement to apply assets held by the promisor belonging to the debtor for the benefit of his creditor, the court held that the same was invalid and not enforceable by the creditor against such promisor unless it was shown that the debtor had authorized or consented to the assets being so applied. *Bowman v. Ainslie*, 1 Idaho, 644.

The mere fact of the loan of money to be applied in part satisfaction of a judgment debt will not create a transfer of the lien, although there be an understanding to that effect. *Unger v. Leiter*, 22 Ohio St. 210.

d. Fraud.

A party who has paid a debt at the request of a debtor, under circumstances which would operate as a fraud upon him, if the debtor were afterwards allowed to insist that the security of the debt was discharged by his payment, may be subrogated to the security as to the debtor. *Stevens v. King*, 84 Me. 291.

He is not entitled to subrogation, although induced to do so by fraud practiced upon him by the latter's agent. *McCleary v. Savage* (Pa.) 20 W. N. C. 547.

A mere stranger who pays off a mortgage without an assignment cannot subsequently come into equity in the absence of fraud, mistake, or accident and ask to be placed in the mortgagee's position. *Guy v. Du Uprey*, 16 Cal. 126, 78 Am. Dec. 512.

VIII. As against executors, etc.

The courts have held that a mere volunteer who pays the funeral expenses of a deceased cannot rely upon an implied promise of repayment by the personal representatives. *Re Miller*, 4 Redf. 303; *Ward v. Jones*, 44 N. C. 127; *Foley v. Bushway*, 71 Ill. 286; *Gregory v. Hooker*, 8 N. C. 394, 9 Am. Dec. 646; *Lerch v. Emmett*, 44 Ind. 351.

An executor or administrator having assets is liable to a third party who pays the funeral expenses of the deceased. *Rappelyea v. Russell*, 1 Daly, 214; *Tugwell v. Hayman*, 3 Campb. 298; *Rogers v. Price*, 3 Young & J. 28; *Corner v. Shaw*, 8 Mees. & W. 350; *Brice v. Wilson*, 3 Ad. & El. 848; *Hagood v. Houghton*, 10 Pick. 154.

In *Re Hill*, 17 Abb. N. C. 273, the same doctrine was followed, although in that case the party ordering was held personally liable having assumed the entire charge and showed a personal intention of discharging the costs.

Where the wife's executor was held entitled to

recover against the husband it was stated that the law implies a promise on the part of an administrator with assets to pay the party furnishing the funeral expenses of the deceased. *Re Miller, supra*. To the same effect, *McCue v. Garvey*, 14 Hun, 562.

One voluntarily incurring expense for which there is no necessity, before the appointment of an administrator, does so at his own risk and cannot recover from the administrator when appointed. *Samuel v. Thomas*, 51 Wis. 549.

A voluntary payment by a plaintiff, although made under a mistake or misapprehension as to his legal liability, constitutes no debt against an intestate's estate. *Bancroft v. Abbott*, 3 Allen, 524.

Such a debt can arise only where a payment of money, in accordance with the written contract into which the plaintiff entered, was at the request of and as surety for a deceased. *Idid*.

Where a widow advanced money in payment of her husband's debts she was subrogated to the rights of the creditor, such act being beneficial to the estate. *Brown v. Forst*, 95 Ind. 248.

In *France's Estate*, 75 Pa. 220, the assent of an executor to the payment by a widow of the funeral expenses of the deceased husband was presumed, and she was held entitled to recover the same from the estate, even though she had stated that she did so voluntarily out of respect for deceased.

But in *Hyneman's Estate*, 11 Phila. 135, the widow having received moneys from benevolent societies was limited in her claim for funeral expenses to the amount over and above that received from such societies.

And in *Green v. Weaver*, 78 Ind. 494, the widow was held personally liable, she having expended or procured the entire estate of the deceased which was less than \$500.

In *Coleby v. Coleby*, 12 Jur. N. S. 496, 14 L. T. N. S. 697, the heir voluntarily paying the funeral expenses of his testator was held not to be entitled to reimbursements out of the estate.

Where a husband paid the wife's funeral expenses and claimed the same from her executor, his claim was allowed in *Gregory v. Lockyer*, 6 Madd. 90. To the same effect, *Lightbown v. McMyn*, L. R. 38 Ch. Div. 575, 55 L. J. Ch. 845, 55 L. T. N. S. 834, 35 Week. Rep. 179; *Freeman v. Coit*, 27 Hun, 447, 66 N. Y. 63.

In *Jenkins v. Tucker*, 1 H. Bl. 90, a third person, voluntarily paying the funeral expenses of a wife suitable to the rank and fortune of the husband was entitled to recover the same from the husband, even though such payments were made without the latter's knowledge. To the same effect, *Bertie v. Lord Chesterfield*, 9 Mod. 31.

These principles were followed in *Darmody's Estate*, 13 Phila. 207.

Where a third party, before the appointment of an administrator of a deceased's estate, incurred expenses for a tombstone, curbing of the grave, and memorial cards, the court refused an order

stranger is neither ratified nor authorized by the debtor, it will not be held to be a discharge of the debt;" but, though this point is general, that was a case of the stranger seeking to make the debtor repay, and the case and opinion intended to lay down the rule at law only as between the stranger paying and the debtor, not as between the creditor and debtor. So I hold that, when Jamison & Co. received the money for this judgment, it operated as a discharge as to them.

But it is said that such payment, though a payment, is inoperative, because, after it was made, a writ of *scire facias* issued to revive the judgment, and a judgment was ren-

dered thereon that the plaintiffs recover their debt, and thus such payment amounts to nothing. This judgment is not, as with us, according to common law, a simple award of execution, but a judgment *quod recuperet*, as in an original action. Such a judgment would be void here by some authorities. 2: Barton, Law Pr. 1081; *Lovell v. McCurdy*, 77 Va. 768. I have entertained doubts whether it would be void, as distinguished from voidable, though I have not fully examined the subject. But in Pennsylvania a *scire facias* is a substitute for an action of debt, and the judgment is properly *quod recuperet*. *Duff v. Wynkoop*, 74 Pa. 800; 1 Black, Judgm. § 499. We must, under the United States-

compelling the administrator to repay the same. *Samuel v. Thomas*, 51 Wis. 549.

Payment by a party by mistake as surety upon an administration bond entitles such party to subrogation to the rights of the next of kin, who are also mistaken, against the real surety for the insolvent administrator. *Capehart v. Mhoon*, 58 N. C. 178.

It has been held that a county is not liable to a volunteer who pays the funeral expenses of a pauper. *Handlin v. Morgan County*, 57 Mo. 114; *Duval v. Laclède County*, 21 Mo. 806.

The lender of money to an executor carrying on the testator's business has no rights against the estate not connected with the business. *Fridenburg v. Wilson*, 20 Fla. 350.

IX. Judgment debt.

A person not a party to an execution may advance the money upon it, and agree to have it assigned to him and keep it in force, but payment by such party in whole or in part without an agreement that it is not to operate as a discharge, or without an assignment, satisfies the execution *pro tanto*, and it cannot be afterwards enforced. *Morris v. Lake*, 9 Smedes & M. 521, 48 Am. Dec. 724; *Reed v. Pruyn*, 7 Johns. 426, 5 Am. Dec. 287; *Sherman v. Boyce*, 15 Johns. 443; *Harwell v. Worsham*, 2 Humph. 525, 37 Am. Dec. 573.

In *St. Francis Mill Co. v. Sugg*, 88 Mo. 476, it was held that the voluntary payment by a third party of a judgment debt, if made unconditional and without any reservation of the right to keep the judgment alive, was an entire satisfaction of the writ, no matter by whom the payment was made. *Weston v. Clark*, 37 Mo. 569, to the same effect.

The same doctrine was adopted in *Terry v. O'Neal*, 71 Tex. 592, except it could be shown that there was an agreement for its continuance in course for such party's benefit.

A legal subrogation exists upon payment by a third party of a judgment debt to an attorney of the judgment creditor, taking an order of the court subrogating the payor to the creditor's rights. *Nugent v. Potter*, 21 La. Ann. 746.

The advance of a portion of the money to pay a judgment in ejectment does not entitle the lender to possession upon an assignment of the judgment to him. *Riffle's App.* 8 Brewst. (Pa.) 94.

In *Clevinger v. Miller*, 27 Gratt. 740, it was held that the sheriff paying off an execution without taking an assignment of the judgment or of the debt, was not entitled to subrogation of the creditor's lien, as against other creditors having liens by judgment or otherwise. To the same effect, *Fearnster v. Withrow*, 12 W. Va. 658.

Where the payment of an execution by an assignee of one of several debtors was intended as a purchase, it was held that the correction of the sheriff's indorsement was allowable, otherwise if it

was intended as a payment of the debt. *Kuhn v. North*, 10 Serg. & R. 399.

In *Cain v. Bryant*, 12 Heisk. 45, money paid by a third party to the constable having charge of judgments was held a good payment, although the money was not paid over by the constable in proceedings to supersede and quash the levy of the execution.

In *Beard v. Arbuckle*, 19 W. Va. 136, a sheriff paying an execution was held entitled to enforce payment as against the debtor, no matter whether he took an assignment of the judgment or not, there being no intention on his part to extinguish the debt.

X. Purchase money lien.

The equitable doctrine of subrogation is strictly confined to those third parties who advance money in such a manner as to lead to the presumption that they have either paid it or caused it to be paid to the purchaser. *Carey v. Boyle*, 53 Wis. 574.

But if the money is in the nature of a general loan to be used by the purchaser to pay the consideration of his purchase, or for any other purpose at his pleasure, the simple fact that the money can be traced to his hands or into the land, will give such third party no right of subrogation. *Ibid*.

The mere advance of money by way of loan to pay purchase-money notes gives the party paying the same no right to enforce any lien upon property. *Jones v. Lockard*, 89 Ala. 575.

A mere lender of money which is applied by the borrower in part payment of purchase money, is not entitled as a mere matter of right to substitution to the rights and remedies of the vendor. *Rodman v. Sanders*, 44 Ark. 504; *Griffin v. Proctor*, 14 Bush, 571.

A payment by a stranger of a debt due to the vendor of real estate extinguishes the debt and the lien also. *Rodman v. Sanders*, *supra*, following *Nichol v. Dunn*, 25 Ark. 129.

The lender is not subrogated to the lienholder's rights by virtue of a mere loan of money to discharge a land lien. *Kline v. Ragland*, 47 Ark. 111, following *Rodman v. Sanders*, *supra*; *Mather v. Jenswold*, 73 Iowa, 550.

If, however, such party becomes the transferee of such notes by purchase, whether verbal or in writing, he acquires such right. *Jones v. Lockard*, *supra*; *Pettus v. McKinney*, 74 Ala. 108; *Weaver v. Brown*, 87 Ala. 538; Code 1896, § 1784.

A part payment of a debt at the instance of the debtor does not constitute the party making the payment a mere volunteer, and if when such party makes the payment he manifests an intention to keep the prior lien alive for his protection, he will be deemed in equity a purchaser of the incumbrance. *Rodman v. Sanders*, *supra*.

In *Price v. Courtney*, 37 Mo. 387, 56 Am. Rep. 453, it was held that a party advancing money for the

Constitution, give it the same faith and credit here which it has there. *Black v. Smith*, 18 W. Va. 780; *Gilchrist v. West Virginia Oil & Oil Land Co.* 21 W. Va. 115, 45 Am. Rep. 555; *Stewart v. Stewart*, 27 W. Va. 167. If it were a valid judgment, it would nullify the payment above spoken of, on familiar principles. Such would be its effect in Pennsylvania, and it is to its effect there that we look. *Custer v. Dettlerer*, 8 Watts & S. 28; *McVeagh v. Little*, 7 Pa. 279; *Potter v. Hartnett*, 143 Pa. 15; *Mills v. Duryee*, 11 U. S. 7 Cranch, 481, 8 L. ed. 411.

But while a judgment of a sister state, if valid, is given here the same effect it has there, yet, consistently with this rule, we

can look into its record to see whether it had jurisdiction of the defendant; and, looking into the record of this judgment, we find no service whatever of the *scire facias*, personal or by return of *nilhil*, or any appearance, and therefore the judgment is void, as would be a judgment here, for that cause. *Gilchrist v. West Virginia Oil & Oil Land Co.* 21 W. Va. 115, 45 Am. Rep. 555; *Stewart v. Stewart*, 27 W. Va. 167; *D'Arcy v. Ketchum*, 52 U. S. 11 How. 165, 18 L. ed. 648; *Thompson v. Whitman*, 85 U. S. 18 Wall. 457, 21 L. ed. 897; *Knowles v. Logansport Gas-Light & Coke Co.* 86 U. S. 19 Wall. 58, 22 L. ed. 70; *Guthrie v. Lowry*, 84 Pa. 538; *Steel v. Smith*, 7 Watts & S. 447; *Noble v. Thompson Oil Co.*

purpose of removing a lien upon real estate was not subrogated to the rights of the lienor.

The mere fact that money borrowed by a debtor has been used to discharge a homestead lien will not entitle the lender, in the absence of an agreement, to the benefit of the lien. *White v. Curd*, 88 Ky. 191.

Where a party advanced money for the purchase of land, the court held he could not be subrogated to the rights of the vendor, if the latter's lien would be defeated thereby. *Brower v. Witmeyer*, 121 Ind. 88.

The mere loan of part of the purchase money will not entitle the lender to subrogation, where no agreement to substitute or to hold the property for his benefit is shown. *Griffin v. Proctor*, *supra*.

In *Mitchell v. Butt*, 45 Ga. 168, however, it was held that a party paying the purchase money at the instance of a purchaser was entitled to the vendor's lien.

A party lending money for the payment of a land purchase upon the understanding that he shall have the vendor's remedies, is substituted to his rights. *Warbmond v. Merritt*, 60 Tex. 24.

Where the intervenor advanced money for the purpose of redeeming property from a judicial sale, the court held that he was not entitled to the rights of a purchaser at that sale, he being a mere volunteer. *Wormer v. Waterloo Agr. Works*, 62 Iowa, 699.

Where property was conveyed with a condition attached, and subsequently sold for nonpayment of taxes, a deed being made to the city, and afterwards an entry was made for breach of the condition, and the two years had elapsed for redemption from the tax sale, the court held, the property being sold by private treaty, the consideration being the payment of the taxes for which the property was originally sold with intervening taxes and charges, the purchaser taking a quitclaim deed, that even though the deed was invalid the payment made by the purchaser inured for the benefit of the original owner and extinguished the city's title. *Langley v. Chapin*, 184 Mass. 82.

Under *Mansf. (Ark.) Dig.*, § 474, providing that a lien of the vendor, when expressed on the face of the conveyance, shall inure to the benefit of the assignee of the note or obligation to secure payment of the purchase price, the lien will not pass by assignment of the debt where the vendor conveys the title by an absolute deed. *Crossland v. Powers (Ark.)* April 19, 1890.

In *Moore v. Ligon*, 22 W. Va. 232, a married woman purchasing land under order of the court contracted with a third party for the payment of the unpaid purchase money substituting him as the purchaser, except as to a specified portion, the third party paying all the consideration money and the wife refusing to carry out the contract. It was held that such third party was entitled to have the purchase money treated as an unauthorized

payment and it was therefore no discharge of the debt due from her under the original contract, and to have the same enforced for his benefit.

XI. Mortgage debt.

A junior mortgagee or judgment creditor has a right to protect his lien or interest by paying a prior mortgage due and payable, and if he does pay it, he succeeds by subrogation, on settled principles of equity, to the rights and interests of such prior mortgagee in the lands, as security for the amount so paid, without any assignment or act of transfer, by or on the part of the prior mortgagee. *Brainard v. Cooper*, 10 N. Y. 356; *Silver Lake Bank v. North*, 4 Johns. Ch. 870, 1 L. ed. 871; *Dale v. McEvers*, 2 Cow. 118; *McLean v. Towle*, 8 Sandf. Ch. 119, 7 L. ed. 738; *Burnet v. Dennison*, 5 Johns. Ch. 86, 1 L. ed. 999; *Ellsworth v. Lockwood*, 42 N. Y. 86.

Where he could not protect himself without paying the antecedent mortgage, his right to be subrogated was perfect and complete. Nor does it matter that the motion was made after instead of before judgment, if the mortgage is an existing lien upon the property mortgaged. *Twombly v. Cassidy*, 82 N. Y. 159; *Johnson v. Zink*, 51 N. Y. 338; *McLean v. Tompkins*, 18 Abb. Pr. 24; *Marsh v. Pike*, 10 Paige, 595, 4 L. ed. 1104; *Averill v. Taylor*, 8 N. Y. 44; *Sanford v. McLean*, 3 Paige, 117, 3 L. ed. 80, 23 Am. Dec. 778.

It is necessary for one paying a mortgage debt to show a payment at the mortgagor's instigation, or for the purpose of protecting his own interest, before he can be subrogated to the rights of the mortgagee. *Norton v. Higleyman*, 88 Mo. 621; *Wolff v. Walter*, 56 Mo. 233.

Where a mortgage was paid off with money provided by a third person with the intention of purchasing the security for the party making such payment, the court held that the mortgage would not be considered satisfied. *Denton v. Cole*, 30 N. J. Eq. 244.

It would be otherwise if such payment were made with the mortgagor's money, even though with the intention of remortgaging. *Ibid*.

The payment by a creditor of a mortgage debt in foreclosure proceedings is not a voluntary payment. *Payne v. Hathaway*, 3 Vt. 212, where the creditor could otherwise receive no benefit from his debtor's estate.

Before a third party making payment of a debt secured by mortgage can be subrogated to the rights of the mortgagee, he must show either that he made the payment at the request of the mortgagor, or to protect some interest he has of his own at the time of the payment. *Norton v. Higleyman* and *Wolff v. Walter*, *supra*; *Evans v. Halleck*, 88 Mo. 376.

The payment of the mortgage debt by a third party at the request of the mortgagor with an arrangement to have the mortgage lien and a new mortgage, entitles the party paying to be subro-

79 Pa. 354, 21 Am. Rep. 66; Story, Const. § 1297; 1 Greenl. Ev. § 548. This is a good reason for disallowing the judgment.

Argument is made that, in Pennsylvania, judgment upon two returns of *nilhil habet* is good, and as effective as a return of *scire facias*. As I find no return whatever of the *scire facias*, I have not so closely examined this question as otherwise I would have done. There seems some authority for the proposition that two returns of *nilhil* will sustain a judgment *in personam*. *Compher v. Anawall*, 3 Watts, 490. The cases cited by counsel (*Warder v. Tainter*, 4 Watts, 274; *Taylor v. Young*, 71 Pa. 85; *Colley v. Latimer*, 5 Serg. & R. 211; *Edmonson v. Nichols*, 23 Pa. 74;

Chambers v. Carson, 2 Whart. 9; *Hartman v. Ogborn*, 54 Pa. 120, 93 Am. Dec. 679; *Allison v. Rankin*, 7 Serg. & R. 269) were cases of *scire facias sur mortgage*, as to which the rule of judgment of foreclosure upon two *nilhils* seems established in Pennsylvania. The practice of taking judgment on two returns of *nilhil* is properly, perhaps, confined to *scire facias* upon a mortgage. The case of *Compher v. Anawall*, *supra*, says, in the opinion, that it is liable to abuse; and I notice, in the case of *Ouster v. Detterer*, 3 Watts & S. 28 (decided only seven years after the former case), the opinion says that, as a judgment on *scire facias* is a new judgment, two returns of *nilhil* will not do. I should

gated to the rights of the first mortgagee, if such new mortgage be void. *Crippen v. Chappel*, 35 Kan. 495, 57 Am. Rep. 192.

Where a party paid off an execution from a judgment on a mortgage bond with money raised upon his own note and the mortgagor's securities, and had the same marked to his credit, the court held him entitled to the judgment, and also to an assignment of the mortgage. *Borland v. Meurer*, 139 Pa. 518.

Where one at the request of another advances his money to redeem or even pay off a security in which that other has an interest, or to the discharge of which he is bound, in the absence of an express agreement one would be implied, if necessary that it shall subserve for his use and it will be so enforced. *Gans v. Thieme*, 93 N. Y. 232.

Where a third party obtained, at the request of a mortgagor, an absolute assignment of the mortgage after possession taken for foreclosure purposes and paid the amount of the mortgage, the court held that such party did not postpone the foreclosure or make himself a trustee for the mortgagor by an oral agreement, but held the mortgage as security for the defense, and the estate for the use and benefit of the mortgagor, permitting the latter to sell paying the proceeds to the party so discharging the mortgage, until reimbursed with permission for the mortgagor to redeem at any time. *Capen v. Richardson*, 7 Gray, 364.

Where the friend of a mortgagor paid part of a debt pending foreclosure proceedings with the approval of the mortgagee, upon an agreement for a *lien pro tanto*, it was held that such party was an assignee in equity, so that junior incumbrancers could not treat the same as a partial payment in an action for account between the mortgagee and such junior incumbrancers. *McMillan v. Gordon*, 4 Ala. 116.

In *Silver Lake Bank v. North*, *supra*, a mortgagee was subrogated to the rights of an execution creditor upon paying off the judgment.

Such a payment in discharge of a mortgage of a partnership property will not extinguish the mortgage, it being the payment by the partner himself in effect. *Stebbins v. Willard*, 53 Vt. 655.

Where the payment of another's bid at a sheriff's sale of mortgaged property was made without consent or knowledge of the bidder, upon the mistaken notion that such payment would vest the title in him, the court held it a mistake of law, and that such payment as a mere volunteer gave the payor no such rights. *Ibid.*; *Norton v. Highleyman*, 88 Mo. 621.

Where a party, at the request of a mortgagor in foreclosure proceedings, took the mortgagor's note for usurious interest secured by a mortgage and collateral security, the court held, such party not being otherwise connected with the proceedings, that he was not entitled, as against intervening in-

cumbrancers, to be subrogated to the rights of a first mortgagee, as it was not in his interest or duty to make such payment. *Downer v. Wilson*, 83 Vt. 1.

Where a mortgage by husband and wife upon the latter's furniture was paid off by the husband's father, who received the papers, and an assignment thereof without the wife's concurrence, the court held such payment created no right to subrogation or substitution, and that the wife held her property free from the mortgage debt. *Moody v. Moody*, 68 Me. 155.

Payment of a note secured by mortgage by one not bound for it, and who had no interest in discharging it, will not subrogate him to the rights of the party to whom he paid. *Well v. Enterprise Ginney & Mfg. Co.* 42 La. Ann. 422.

The payment of a mortgage debt by a third person was held not to exempt the property from an execution, such payment alone not vesting an interest in either the debt or property in such party. *Woods v. Gilson*, 17 Ill. 218.

A party paying a note and mortgage at the request of the mortgagor upon an understanding that he is to have a new mortgage and note which are never executed is entitled to enforce the old mortgage. *Lockwood v. Marsh*, 3 Nev. 138.

A party taking an assignment of the equity of redemption and paying the mortgage note upon the understanding that he held the same in the same manner as the mortgagee has a *lien*. *Morrow v. United States Mortg. Co.* 96 Ind. 21.

XII. *Creditor of wife.*

In *Kenyon v. Farris*, 47 Conn. 510, 35 Am. Rep. 83, the defendant was sued for money furnished to his wife and expended by her in the purchase of necessities. The court held that the same could be recovered from the husband in equity although not at law.

The husband is only chargeable at law for necessities supplied to his wife at her request and not with moneys lent or advanced to her, yet where such money has been applied to the payment of necessities furnished to her equity will put the party lending in the place of the party supplying the necessities. *Walker v. Simpson*, 7 Watts & S. 83, 42 Am. Dec. 216.

The two preceding cases are commented upon and dissented from in *Skinner v. Tirrell*, 21 L. R. A. 673, 159 Mass. 474, as are also the English authorities upon which they are based. In that case, however, the court mainly based its refusal of relief upon the ground that the wife had a statutory right of action against the husband refusing or neglecting to support her.

The English cases held the husband liable for necessities supplied under such circumstances. *Harris v. Lee*, 2 P. Wms. 422; *Deare v. Soutten*, L. R. 9 Eq. 151; *Jenner v. Morris*, 3 DeG. F. & J. 45, 30 L. J. Ch. 361, 7 Jur. N. S. 373, 3 L. T. N. S. 371, 9 Week. Rep. 361.

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doubt as to personal judgments. But though such a judgment would be good in Pennsylvania, it does not follow that it would be good here, for the supreme court of Pennsylvania, in *Steel v. Smith*, 7 Watts & S. 447, in an opinion delivered by the eminent *Chief Justice* Gibson, held that a judgment of Louisiana on attachment of property and summons served on one of the joint owners, which by the Louisiana law was good as to all defendants, was a nullity in the courts of Pennsylvania as to parties not served. The only Pennsylvania statute to which I have access provides that service of process on a corporation shall be on its president or other chief officer, cashier, treasurer, secretary, or chief clerk. No service of any kind appears here. For this reason the judgment was properly disallowed. No plea of *nul tiel* record was necessary. It is a chancery suit, and concerns the audit of debts, on a reference before a master; and when the judgment creditors presented the judgment, adverse interests could contest it on any legal ground without formal plea. I remark that it was not this *scire facias* judgment which was considered on the appeal reported in *Fidelity Ins. Trust & S. D. Co. v. Shenandoah Valley R. Co.* 33 W. Va. 761, but the original one. But let us suppose that the judgments were valid, and that, treating Clark & Co.'s payment simply as a payment, it would be cut off by the judgment so the payment could not now be pleaded. What then? Jamison & Co. are no longer its owners, but Clark & Co. are assignees of it, and they are not asking its allowance, but Jamison & Co. are claiming for their own use. When Clark & Co. paid it, the law implied that Jamison & Co. would assign it to them, and, without assignment actual, a court of equity treats them as its equitable owners. The case of *Neely v. Jones*, 16 W. Va. 625, in point 4, clearly supports this position. Boyce's evidence, uncontradicted, is that Jamison & Co., in the agreement they made with him promised to assign the judgment to him, and their attorney did transmit him a copy of the judgment. Now, if this evidence is not forbidden from consideration by the execution of the writing between Clark & Co. and Jamison & Co., then either Clark & Co. or Boyce have an express agreement to assign, tantamount to an assignment, and, though no actual assignment be made, equity regards it as an equitable assignment; and this is the letter of point 5 in *Neely v. Jones*, *supra*, and *Beard v. Arbuckle*, 19 W. Va. 185. It may be with some force said that, as between Jamison & Co. and Boyce, the assignment should go to Boyce, and then there would be no ground for saying that the oral agreement to assign would be excluded by the writing. In fact, Jamison & Co. admit in their petition for this appeal that they assigned it to Boyce; so this court ought not to decree it to them. Thus, I think, law excludes the allowance of this judgment to Jamison & Co., and this conclusion accords with the real justice of the case. Jamison & Co. only wanted the amount they advanced to the Central Improvement Company. They got it. They do not deny, but admit, they received all the company owed

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them, but they want now to hold it as collateral for a merely personal loan to Boyce.

And now as to U. L. Boyce's claim to said Jamison & Co.'s judgment. He has no title to it, to his own use. Any shadow of interest that may be vested in him was for other use than his own: First. He negotiated for the acquirement of it from Jamison & Co. for Clark & Co. as financial agents of the Shenandoah Valley Railroad Company, whose vice-president Boyce was at that very time, and in whose service and interest he acted touching this judgment. Clark & Co. paid for the judgment, and took the contract in their name. Boyce explicitly says as a witness, and in a letter to Doran, that he was to get assignment of it, and transfer it to the parties furnishing the money, and that Clark & Co. furnished the money. Never was a resulting trust more plainly established than that any show of technical right in Boyce was for the use of Clark & Co. And then, further, consider that Clark & Co. were agents of the Shenandoah Valley Railroad Company, and Boyce its vice-president. And that he was acting for it, he does not deny, but admits; and a receipt to his company for hotel bill on the trip to acquire the judgment confirms it.

Thus we conclude that neither Jamison & Co. nor Boyce have right to this judgment. It is urged by counsel that the Shenandoah Valley Railroad Company, in a certain answer, stated that a balance was due on this judgment, treating it thus as not paid. If it belonged to the Fidelity Company, under its mortgage, could the Shenandoah Valley Railroad Company, by this admission, prejudice the right of that company? It could not. But, if the Shenandoah Valley Railroad Company owned it, it could say, with entire consistency with the fact that Clark & Co. had paid it as regards Jamison & Co., that a balance was due on it from the Central Improvement Company, as it had never paid it. As assignee, it could say that the Central Improvement Company yet owed a balance.

Barclay's and Green's Demands.

Barclay filed before the commissioner, and asked payment out of the fund, an account for \$10,000, for services for four years and one month as president of the Central Improvement Company, and Green filed an account for \$6,250 for two and one-half years' services as treasurer and secretary. Both these gentlemen were stockholders and directors of the company. The commissioner rejected the claims. The Central Improvement Company is a Pennsylvania corporation, having its habitat and chief office there, and there the services were performed and were to be paid for, if at all; and, if any contract were implied by law to pay compensation for service of those officers of the corporation, it would be a Pennsylvania contract. Hence, the law of that state operates upon the case specially. We must therefore see whether the law of Pennsylvania would raise an implied contract to pay for such service. *Klinck v. Price*, 4 W. Va. 4, 6 Am. Rep. 268; *Stevens v. Brown*, 20 W. Va. 450; *Heffebower v. Detrick*, 27 W. Va. 16. There was no express contract to pay for such services, and, if there can be

any recovery therefor, it must be on the theory that the law raises an implied promise to pay for the service. I think the case of *Kilpatrick v. Penross Ferry Bridge Co.*, 49 Pa. 118, 88 Am. Dec. 497, uncontrollably decides against the allowance of these accounts. It holds that "corporations are not liable on a *quantum meruit* for services performed by their officers. There must be an express contract for compensation, or there can be no recovery." In that case, Sersill claimed for service as president, and Kilpatrick as treasurer, as in this case, and the court held that they could not recover. The court said: "The salary or compensation of corporate officers is usually fixed by a by-law or by a resolution either of the directors or stockholders, but, where no salary has been fixed, none can be recovered. Corporate offices are usually filled by the chief promoters of the corporation, whose interests in the stock or in other incidental advantages is supposed to be a motive for executing the duties of the office without compensation, and this presumption prevails until overcome by an express prearrangement of salary. Hence, we held in *Accommodation Loan & Sav. Fund Assn. v. Stonemets*, 29 Pa. 534, as a general principle, that a director of a corporation, elected to serve without compensation, could not recover in an action against the company for services rendered in that capacity, though a subsequent resolution of the board, agreeing to pay him for past services, was shown. . . . And the rule is just as applicable to presidents and treasurers and other officers as to directors. . . . It is well the law is so. Corporate officers have ample opportunities to adjust and fix their compensation before they render service, and no great mischief is likely to result from compelling them to do so. But if, on the other hand, actions are to be maintained by corporate officers for services, which, however faithful and valuable, were not rendered on the foot of an express contract, there would be no limitation to corporate liabilities, and stockholders would be devoured by officers." In the later case of *Martindale v. Wilson-Cass Co.*, 134 Pa. 848, it is held: "The general rule on the subject of compensation to the directors of a private corporation is that they are not entitled to compensation for official services unless it is provided for in the corporate charter or by-laws. In the absence of such provision, a director or president of such corporation cannot recover pay for official services, when no agreement for compensation preceded them, no presumption of such agreement arising from their performance." A by-law

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of the Central Improvement Company provided that the directors "shall have power to appoint all other officers or agents of the company, and fix the compensation and define the duties of all their officers or agents," but the directors never fixed any compensation. This was a mere power, given to be exercised or not, as the directors might choose, and does not itself give compensation, and the very fact that the directors, having this power, never exercised it, negatives the idea that any compensation was intended. *Re Bolt & Iron Co.*, 14 Ont. Rep. 211. So it is clear that, under the Pennsylvania law, these officers can recover nothing.

Though not necessary to go further, my examination has led me to the conclusion that the decisions in Pennsylvania reflect the true rule applicable nearly everywhere, in denying pay without express provision or contract, not only to the president, but a treasurer or secretary, when stockholders or directors. The authorities have led my mind to the conclusion that the law raises no implied promise to pay compensation to directors, president, or vice-president of a private corporation, in the absence of provision in by-law or order of the directors. They are trustees charged with the funds, and cannot recover on a *quantum meruit*. *Gridley v. Lafayette, B. & M. R. Co.* 71 Ill. 200; *Cheaney v. Lafayette, B. & M. R. Co.* 68 Ill. 570, 18 Am. Rep. 584; *Santa Clara Min. Assn. v. Meredith*, 49 Md. 889, 88 Am. Rep. 264; *Citizens Nat. Bank v. Elliott*, 55 Iowa, 104, 89 Am. Rep. 167; *Swayer v. Farmers Bank*, 6 Allen, 207; *New York & N. H. R. Co. v. Ketchum*, 27 Conn. 180; *Ogden v. Murray*, 89 N. Y. 202; 1 Beach, Priv. Corp. § 208. And that if the treasurer, secretary, or other executive officer be a stockholder or director, no such promise is raised by law in his favor; but, if not, then the law does raise such promise, and presume that pay was intended, from the fact of appointment, and he may get compensation. *Smith v. Long Island R. Co.* 102 N. Y. 190; *Holder v. Lafayette, B. & M. R. Co.* 71 Ill. 106, 109, 22 Am. Rep. 89; *Cheaney v. Lafayette, B. & M. R. Co.* 68 Ill. 570, 18 Am. Rep. 584; 1 Beach, Priv. Corp. § 200; *note to Grundy v. Pine Hill Coal Co.* (Ky.) 28 Am. & Eng. Corp. Cas. 616. Of course, I do not here speak of the mere employes of corporations, they being entitled to compensation.

Therefore, so much of the decree of March 2, 1891, as rejects the claim of B. K. Jamison & Co. and U. L. Boyce to said judgment, and the said accounts of R. D. Barclay and John P. Green, is affirmed.

PENNSYLVANIA SUPREME COURT.

George M. COTE

v.

Hugh MURPHY *et al.*, *Appts.*

(150 Pa. 420.)

1. Greed of profit or malice toward others is an essential element to an unlawful conspiracy at common law to restrain trade.
2. A combination of employers to resist an advance in wages determined upon by an association of employees, by refusing to sell to any persons who concede such advance, is not an unlawful conspiracy, since the passage of the Pennsylvania statute making it lawful for employes to combine to raise wages, and to persuade by all lawful means others from working for a less sum, as such combination is not to lower the price of wages as regulated by supply and demand, but to resist an artificial price made by a combination which by statute is lawful.
3. That one whose business is injured by a combination of employers to resist a demand of workmen for an increase of wages is not a workman nor a member of a workmen's union will not entitle him to recover his damages from the members of the combine if the combination was lawful as to the workmen and he had undertaken to aid their cause.
4. Sending notices to wholesalers that members of an employers' organization formed to resist a demand by workmen for an increase in wages will withdraw their patronage if sales are made to persons acquiescing in the workmen's demand is not such coercion or threat as will render the combination unlawful.

(January 2, 1894.)

APPPEAL by defendants from a judgment of the Court of Common Pleas for Allegheny County in favor of plaintiff in an action brought to recover damages for injuries alleged to have been caused to plaintiff by reason of a conspiracy between defendants to damage plaintiff in his business. *Reversed.*

The facts sufficiently appear in the opinion. *Messrs. J. McF. Carpenter, J. S. Ferguson and E. G. Ferguson*, for appellants:

All that can be claimed by the plaintiff is that the defendants in effect declared to Woods, Jenks & Co., Loeb, and others, that

they would not buy from them if they sold to Cote while he was employing strikers and selling to persons who had acceded to their demands, and that they, believing that the trade of the defendants was more valuable to them than that of Cote, saw fit for the time being to discontinue dealing with him. They were free in every sense of the word to do as they pleased.

Any one of the defendants could have done any of these things without incurring any legal responsibility.

Payne v. Western & A. R. Co. 13 Lea, 507, 49 Am. Rep. 666; *Heywood v. Tillson*, 75 Me. 227, 46 Am. Rep. 373.

If, then, each of these defendants could have lawfully done the acts complained of, why might they not all agree to do the same things?

In law a threat is a declaration of an intention or determination to injure another by the commission of some unlawful act. If the act intended to be done is not unlawful then the declaration is not a threat in law, and the effect thereof is not intimidation in a legal sense.

Payne v. Western & A. R. Co. supra.

It is absurd to say that any man is coerced to do that which he does after balancing the advantage of one course or the other to himself. The agreement of a number of men to do that which each of them could lawfully do does not make an actionable conspiracy.

Rogers v. Dutt, 18 Moore, P. C. C. 209; *Bowen v. Matheson*, 14 Allen, 499; *Mogul S. S. Co. v. McGregor*, L. R. 21 Q. B. Div. 544, L. R. 23 Q. B. Div. 598 [1892], A. C. 25; *Bohn Mfg. Co. v. Hollis* (Minn.) 48 Alb. L. J. 307.

The same right which we claim has been conceded to the employed by many decisions.

State v. Donaldson, 32 N. J. L. 151, 90 Am. Dec. 649; *People v. Wiley*, 4 N. Y. Crim. Rep. 403.

Messrs. J. A. Wakefield and J. W. Kinnear, for appellees:

We rely on *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 173, 8 Am. Rep. 159.

See also *Morres v. Bricklayers Union No. 1*, 7 R. R. & Corp. L. J. 108.

Dean, J., delivered the opinion of the court:

The defendants were members of the Planning Mill Association, of Allegheny county, and Builders' Exchange, of Pittsburgh. The

NOTE.—The law of conspiracy as touching the lawfulness of combinations of employes or employers has become so important in the last few years that any new development of that branch of the law must claim attention. In the above case the lawfulness of a combination of employers to resist demands of employes is held to be implied from the statutory right of employes to make a combination which the employers are resisting, and this is we believe a new point in the law of this subject.

As to boycotts generally, see *notes to Casey v. Cincinnati Typographical Union No. 3* (C. C. S. D. Ohio) 12 L. R. A. 198, also the cases, *Toledo, A. A. & 23 L. R. A.*

N. M. R. Co. v. Pennsylvania Co. (C. C. N. D. Ohio) 19 L. R. A. 395, and *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.* (C. C. N. D. Ohio) 19 L. R. A. 387; *Cosur D'Alene Consol. Min. Co. v. Miners Union of Wardner* (C. C. D. Idaho) 19 L. R. A. 382.

As to procuring discharge of nonunion employes see *Lucke v. Clothing Outlets & T. Assembly*, No. 7507, K. of L. (Md.) 19 L. R. A. 408; while as to black-listing by employers, see *Worthington v. Waring* (Mass.) 20 L. R. A. 342.

The unlawfulness of a combination to drive a competitor out of business is decided in *Jackson v. Stauffeld* (Ind.) post, 598.

different partnerships and individuals composing these associations were in the business of contracting and building, and furnishing building material of all kinds. On the 1st of May, 1891, there was a strike of the carpenters, masons, and bricklayers in the building trades, bringing about, to a large extent, a stoppage of building. The men demanded an eight-hour day, with no reduction in wages theretofore paid, which the employers refused to grant. Then a strike by the unions of the different trades was declared. The plaintiff at the time, was doing business in the city of Pittsburgh, as a dealer in building materials. He was not a member of either the Planing Mill Association, or of the Builders' Exchange. There were also contractors and builders, who belonged to neither of these organizations, who conceded the demands of the workmen. They sought to secure building material from dealers, wherever they could, and thus go on with their contracts. If they succeeded in purchasing the necessary material, the result would be that at least some of the striking workmen would have employment at a higher rate of wages than the two associations were willing to pay. The tendency of this was to strengthen the cause of the strikers, for those employed were able to contribute to the support of their fellow workmen who were idle. The two associations already named sought to enlist all concerned, as contractors and builders, or as dealers in supplies, whether members of the associations or not, in the furtherance of the one object,—resistance to the demands of the workmen. The plaintiff, and six other individuals or firms engaged in the same business, refused to join them, and undertook to continue sales of building material to those builders who had conceded the eight hour day. The Planing Mill Association and Builders' Exchange tried to limit their ability to carry on work at the advance by inducing lumber dealers and others to refrain from shipping or selling them, in quantities, the lumber and other material necessary to carrying on the retail business. In several instances their efforts were successful, and the plaintiff did not succeed in purchasing lumber from certain of the wholesale dealers in Cleveland and Dubois, where he wanted to buy. The defendants were active members of one or other or both of the associations engaged in the contest with the striking workmen. The strike continued about two months. After it was at an end, the plaintiff brought suit against defendants, averring an unlawful and successful conspiracy to injure him in his business, and to interfere with the course of trade generally, to the injury of the public; that the conspiracy was carried out by a refusal to sell to him building materials, themselves, and by threats and intimidation preventing other dealers from doing so. Under the instructions of the court upon the evidence, there was a verdict for plaintiff in the sum of \$2,500 damages, which the court reduced to \$1,500; then judgment; and from that defendants take this appeal.

The plaintiff's case is not one which appeals very strongly to a sense of justice. The
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mechanics of Pittsburgh, engaged in the different building trades, on the 1st of May, 1891, demanded that eight hours should be computed as a day, in payment of their wages. Their right to do this is clear. It is one of the indefeasible rights of a mechanic or a laborer, in this commonwealth, to fix such value on his services as he sees proper, and under the constitution there is no power lodged anywhere to compel him to work for less than he chooses to accept. But in this case the workmen went further. They agreed that no one of them would work for less than the demand, and by all lawful means, such as reasoning and persuasion, they would prevent other workmen from working for less. Their right to do this is also clear. At common law, this last was a conspiracy, and indictable, but under the Acts of 1869, 1872, 1876, and 1891, employees, acting together by agreement, may, with few exceptions, lawfully do all those things which the common law declared a conspiracy. They are still forbidden, in the prosecution of a strike, preventing any one of their number who may desire to labor from doing so, by force, or menace of harm to person or property; but the strike here was conducted, throughout, in a lawful, orderly manner. The employers—contractors and others engaged in building and furnishing supplies, members of the two associations already mentioned, to which these defendants belonged—refused to concede the demands of the workmen, and there then followed a prolonged and bitter contest. The members of the associations refused to furnish supplies to those engaged in the construction of any building where the contractor had conceded the eight-hour day. This, as individual dealers, they had a clear right to do. They could sell and deliver their material to whom they pleased. But they also went further. They agreed among themselves that no member of the association would furnish supplies to those who were in favor of, or had conceded, the eight-hour day, and that they would dissuade other dealers, not members of the associations, from furnishing building material to such contractors or retail dealers. To the extent of their power, this agreement was carried out. This, clearly was combination, and the acts of assembly referred to do not, in terms, embrace employers. They only include, within their express terms, workmen. Hence, it is argued by counsel for appellee, these defendants are subject to all the common-law liability of conspirators, in their attempts to resist the demands for increased wages; that is, there can be a combination among workmen to advance wages, but there can be no such combination of employers to resist the advance. That which, by statute, is permitted to the one side, the common law still denies to the other. If this position be well taken, we then have this inequality: The plaintiff, who is aiding a combination, either directly or indirectly, intentionally or unintentionally, to advance wages, sues, for damages, members of another combination, who resist the advance. Nor is there any difference in the character of the acts or means on both sides in fur-

therance of their purposes. The workmen will not work themselves, and they use persuasion and reason with their fellows to keep them from going to work, until the demand is conceded. The employers will not sell to contractors who concede the demand, and they do their best to persuade others engaged in the said business from doing so. Then, the element of real damage to plaintiff is absent. By far the larger number of dealers in the city and county were members of the combination which refused to sell. Only the plaintiff and six others refused to enter the combination. The result was that these seven had almost a monopoly of furnishing supplies to all builders who conceded the advance. Plaintiff admits in his own testimony that thereby his business and profits largely increased. In a few instances, he paid more to wholesale dealers, and put in more time buying, than he would have done if the associations had not interfered with those who sold him. But it is not denied that as a result of the combination he was, individually, a large gainer. True, he avers that if defendants had gone no further than to refuse to sell, themselves, he would have made a great deal more money; that is, he did not make as large a sum as he would have made if they had not dissuaded others, not members of the association, from selling to him. But that, by the fact of the combinations and strike, he was richer at the end than when they commenced, is not questioned.

We then have these facts, somewhat peculiar in the administration of justice: A plaintiff suing and recovering damages for an alleged unlawful act, of which he himself, in so far as he aided the workmen's combination, is also guilty, and both acts springing from the same source,—a contest between employers and employed as to the price of daily wages,—and then the further fact that this contest, instead of damaging him, resulted largely to his profit. We assume, so far as concerns defendants, if their agreement was unlawful, or, if lawful, it was carried out by unlawful acts, to the damage of plaintiff, the judgment should stand. All the authorities of this state go to show that, while the act of an individual may not be unlawful, yet the same act, when committed by a combination of two or more, may be unlawful, and therefore be actionable. A dictum of Lord Denman in *Rex v. Seward*, 1 Ad. & El. 711, gives this definition of a "conspiracy": "It is either a combination to procure an unlawful object, or to procure a lawful object by unlawful means." This leaves still undetermined the meaning to be given the words "lawful" and "unlawful," in their connection in the antithesis. An agreement may be unlawful, in the sense that the law will not aid in its enforcement, or recognize it as binding upon those who have made it, yet not unlawful in the sense that it will punish those who are parties to it, either criminally or by a verdict in damages. Lord Denman is reported to have said afterwards in *Reg. v. Peck*, 9 Ad. & El. 690, that his definition was not very correct. See note to section 2291, 8 Wharton on Criminal Law. It is conceded, however, in the case in hand,

any one of defendants, acting for himself, had a right to refuse to sell to those favoring the eight-hour day, and so, acting for himself, had the right to dissuade others from selling. If the act were unlawful at all, it was because of the combination of a number. Gibson, J., in *Com. v. Carlisle*, Bright. (Pa.) 40, says: "Where the act is lawful for the individual, it can be the subject of conspiracy, when done in concert, only where there is a direct intention that injury shall result from it, or where the object is to benefit the conspirators to the prejudice of the public or the oppression of individuals, and where such prejudice or oppression is the natural and necessary consequence." In the same case it is held: "A combination is criminal wherever the act to be done has a necessary tendency to prejudice the public, or to oppress individuals by unjustly subjecting them to the power of the confederacy, and giving effect to the purposes of the latter, whether of extortion or mischief. According to this view of the law, a combination of employers to depress the wages of journeymen below what they would be if there was no recurrence to artificial means on either side is criminal." This case puts the law against the combination in as strong terms, if not stronger, than any others of our own state. The significant qualification of the general principle, as mentioned in the last three lines, will be noticed: "If there was no recurrence to artificial means on either side." The prejudice to the public is the use of artificial means to affect prices, whereby the public suffers. A combination of stock-brokers, to corner a stock; of farmers, to raise the price of grain; of manufacturers, to raise the price of their product; of employers, to reduce the price of labor; of workmen, to raise the price,—were at the date of that decision, at common law, all conspiracies. The fixed theory of courts and legislators then was that the price of everything ought to be, and in the absence of combination necessarily would be, regulated by supply and demand. The first to deny the justice of this theory, and to break away from it, was labor; and this was soon followed by the legislation already noticed, relieving workmen from the penalties of what for more than a century had been declared unlawful combinations or conspiracies. Wages, it was argued, should be fixed by the fair proportion labor had contributed in production. The market price, determined by supply and demand, might or might not be fair wages,—often was not,—and as long as workmen were not free, by combination, to insist on their right to fair wages, oppression by capital, or, which is the same thing, by their employers, followed. It is not our business to pass on the soundness of the theories which prompt the enactment of statutes. One thing, however is clear: The moment the legislature relieves one, and by far the larger number, of the citizens of the commonwealth from the common-law prohibitions against combinations to raise the price of labor, and by a combination the price was raised, down went the foundation on which common-law conspiracy was based, as to that particular

subject. Before any legislation on the question, it was held that a combination of workmen to raise the price of labor, or of employers to depress it, was unlawful, because such combination interfered with the price, which would otherwise be regulated by supply and demand. This interference was in restraint of trade or business, and prejudicial to the public at large. Such combination made an artificial price. Workmen, by reason of the combination, were not willing to work for what, otherwise, they would accept. Employers would not pay what, otherwise, they would consider fair wages. Supply and demand consist in the amount of labor for sale, and the needs of the employer who buys. If more men offered to sell labor than are needed, the price goes down, and the employer buys cheap. If fewer than required offer, the price goes up, and he buys dear. As every seller and buyer is free to bargain for himself, the price is regulated solely by supply and demand. On this reasoning was founded common-law conspiracy, in this class of cases. But in this case the workmen, without regard to the supply of labor, or the demand for it, agreed upon what, in their judgment, is a fair price, and then combined in a demand for payment of that price. When refused, in pursuance of the combination, they quit work, and agree not to work until the demand is conceded. Further, they agree, by lawful means, to prevent all others, not members of the combination, from going to work until the employers agree to pay the price fixed by the combination. And this, as long as no force was used, or menaces to person or property, they had a lawful right to do; and, so far as is known to us, the rise demanded by them may have been a fair one. But it is nonsense to say that this was a price fixed by supply and demand. It was fixed by a combination of workmen on their combined judgment as to its fairness; and, that the supply might not lessen it, they combined to prevent all other workmen in the market from accepting less. Then followed the combination of employers, not to lower the wages theretofore paid, but to resist the demand of a combination for an advance; not to resist an advance which would naturally follow a limited supply in the market, for the supply, so far as the workmen belonging to the combination were concerned, was, by combination, wholly withdrawn, and, as to workmen other than members, to the extent of their power, they kept them out of the market. By artificial means, the market supply was almost wholly cut off. The combination of the employers, then, was not to interfere with the price of labor, as determined by the common law theory, but to defend themselves against a demand made altogether regardless of the price, as regulated by the supply. The element of an unlawful combination to restrain trade because of greed of profit to themselves, or of malice towards plaintiff or others, is lacking, and this is the essential element on which is founded all the decisions as to common-law conspiracy in this class of cases; and, however unchanged may be the law as to combinations of employers to interfere with

wages, where such combinations take the initiative, they certainly do not depress a market price, when they combine to resist a combination to artificially advance price. "The reason of the law is the life of the law," and, as given in the cases cited by appellee, irresistibly impels to the conclusion that the combination here was not unlawful; a conclusion which is clearly indicated in *Com. v. Carlisle*, *supra*,—that it would not be unlawful if there was first recurrence to artificial means by workmen to raise the market price. Here, the first step provocative of a combination by the employers was an attempt, by lawful, artificial means on part of the workmen, to control the supply of labor, preparatory to a demand for an advance. Nor does the fact that the appellee was not a workman, nor a member of any of the unions of workmen, put him in any better attitude than if he were. He undertook, for his own profit, to aid the cause of the workmen. His right so to do was unquestionable. But if the employers, by a lawful combination, could limit his ability so to do, they did not make themselves answerable in damages to him for the consequences of a lawful act.

The case of *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. 178, 8 Am. Rep. 159, is not in point. It was the attempt to enforce the collection of a draft given by one member of a combination formed to raise the price of coal to another, in consideration of certain stipulations in the agreement. It was held that the combination, being in restraint of trade, was unlawful, and, as the draft was given in pursuance of the unlawful contract, it, also, was tainted with the illegality, and there could be no recovery. But, if the agreement itself were not unlawful, were the methods to carry it out unlawful? If the employers' combination here had used illegal methods or means to prevent other dealers from selling supplies to plaintiff, the conspiracy might still have been found to exist. The threats referred to, although what are usually termed "threats," were not so in a legal sense. To have said they would inflict bodily harm on other dealers, or vilify them in the newspapers, or bring on them social ostracism, or similar declarations,—these the law would have deemed threats, for they may deter a man of ordinary courage from the prosecution of his business in a way which accords with his own notions. But to say—and even that is inferential from the correspondence—that if they continued to sell to plaintiff the members of the association would not buy from them, is not a threat. It does not interfere with the dealer's free choice. It may have prompted him to a somewhat sordid calculation. He may have considered which custom was most profitable, and have acted accordingly. But this was not such coercion and threats as constituted the acts of the combination unlawful. *Rogers v. Dutt*, 18 Moore, P. C. C. 209; *Bowen v. Matheson*, 14 Allen, 499; *Bohn Mfg. Co. v. Hollis* (Minn.) 55 N. W. Rep. 1119 (not yet officially reported). On the main question the case last cited goes further than we are called upon to go, as yet, in this state. It holds that what is not unlawful when done

by an individual cannot be unlawful when done by many, and therefore the combination not to deal with those who broke the rules of the association was not a conspiracy. For this a number of cases from other states, as well as from England, are cited. But the law in this state has heretofore been determined otherwise, from a very early day, by an unbroken line of decisions, which here call for no qualification; for, so far as concerns the facts of this case, the legislature has so changed the law as to render these decisions inapplicable. We concede, however, that the decisions of other courts are by no means uniform. Mr. Wright, in his work on the Law of Criminal Conspiracies and Agreements (London, 1873), says: "It is conceived that, on a review of all the decisions, there is a great preponderance of authority in favor of the proposition that as a rule an agreement or combination is not criminal, unless it be for acts or omissions, whether as ends or means, which would be criminal apart from agreement." Logically, the same rule would apply, as was held in *Bohn Mfg. Co. v. Hollis*, to combinations which, although not criminal, are alleged to be unlawful. But without regard to whether the general rule be settled by weight of authority, as claimed by appellants, we hold here that this combination was not unlawful, because (1) it was not made to lower the price of wages, as regulated by the supply and demand, but to resist an artificial price made by a combination which, by statute, was not unlawful; (2) the methods adopted to further the objects of the combination were not unlawful.

Another point has been most earnestly pressed upon our consideration by counsel for appellants. It is argued that, under our declaration of rights, either the Acts of Assembly of 1869, 1872, 1876, and 1891, ex-

empting employes from the penalties of unlawful combination to fix the price of labor, are void, because, by their terms, they embrace only a particular class of citizens of the commonwealth, or their scope must be enlarged beyond the express terms of these acts, so as to include within their protection all those interested in the same subject of legislation. It is argued that it is not within the power of the legislature to declare some citizens innocent of any offense against the law, for the very same act which, when committed by some others in the same business, the law will still hold to be criminal; that what the statute declares is not conspiracy in one case cannot, under the law, be conspiracy in the other; and therefore, in every contest of this kind between workmen and employers, the statute, if not void, must at least be held to operate equally to the exemption of all citizens interested in the subject affected by the combination. If there be nothing criminal in a combination to artificially raise wages, there can be nothing criminal in an employers' combination to resist the advance, or to artificially depress them. This question is not in the case, in the view we have taken of the facts. We are at all times averse to passing on questions, the answers to which are not necessary to a decision of the case immediately before us. Much less are we inclined to discuss and decide questions involving the constitutional power of a co-ordinate branch of the government. For this reason we refrain from a consideration of the able argument of counsel for appellants on this point.

The refusal of the court below to affirm appellants' seventh prayer for instructions, that "under all the evidence the verdict must be for defendants," was error, and, being here assigned for error, the appeal is sustained, and judgment reversed.

ILLINOIS SUPREME COURT.

PEOPLE of the State of Illinois, *ex rel.*
Tida BRADLEY,
v.

BOARD OF MANAGERS, etc., OF ILLINOIS STATE REFORMATORY.

(148 Ill. 413.)

1. A sentence to a state reformatory of an infant charged with crime must be regarded as a penalty and punishment for crime, where the statute authorizes sentence only after conviction of crime and requires the sentence to be "to imprisonment."

2. The maximum term of imprisonment for a crime is to be taken as that for which an infant is sentenced to a reformatory, where the statute provides that the court shall not fix the limit of duration of the term, but that it shall not exceed the maximum term provided by law for that crime and that it may be terminated by the board of managers on certain conditions.

3. A constitutional provision that "all penalties shall be proportioned to the nature of the offense" is not violated by committing infants to a reformatory with a maximum sentence for the crime, subject to be

NOTE.—The disposition and treatment of children convicted of crime has become a question of the highest practical importance and the conformity to the constitution of statutes relating to this matter is not altogether without difficulty.

In respect to general power of the state to assume the guardianship of children, see *Whalen v. Olmstead* (Conn.) 15 L. R. A. 568, and *note*.

As to commitment of minors to reformatories without conviction of crime, see *State v. Brown* (Minn.) 16 L. R. A. 691, and *note*.

28 L. R. A.

When infants have actually committed crime their punishment therefor is clearly within the department of criminal law. The validity of sentences which shall be contingent on good behavior or subject in any way to the discretion of the managers of a reformatory, which is a question touched in the above case, is one that touches the vital point in respect to such institutions. As to the lawfulness of paroles or conditional pardons, see *note* to *People v. Cummings* (Mich.) 14 L. R. A. 385.

reduced on recommendation of the board of managers, while an adult convicted of the same crime has a statutory right to have the term of his imprisonment within the limits fixed by statute determined by a jury.

4. **The constitutional right of trial by jury** does not extend in a criminal case to the determination of the term of imprisonment by the jury.

5. **Articles 5 and 8 of the Amendments** to the United States Constitution have no application to the states.

6. **The unconstitutionality of a section as to the transfer of incorrigible infants** from a reformatory to a penitentiary does not make the whole statute as to the commitment of infants to reformatories necessarily void.

(Shope and Magruder, JJ., dissent.)

(January 16, 1894.)

PETITION for a writ of habeas corpus to secure the release of Joseph Bradley and Harry Justice from the Illinois State Reformatory. *Dismissed.*

The facts are stated in the opinion.

Messrs. Sands & Murphy for petitioner.

Mr. M. T. Moloney, Atty. Gen., for respondent:

This act is not designed for the purpose of punishment. It is not a penal act, either in its title, its scope, or its results.

Articles 5 and 8 of the Constitutional Amendments have no application to state governments.

Twitchell v. Pennsylvania, 74 U. S. 7 Wall. 821, 19 L. ed. 223.

Have the petitioners been deprived of their liberty without due process of law? And has "the right of trial by jury" been interfered with?

Due process of law undoubtedly means in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights.

Board of Education of the State v. Bakewell, 132 Ill. 848.

These parties have not been deprived of their liberty without due process of law.

Ferrier's Petition, 108 Ill. 867, 48 Am. Rep. 10; *McLean County v. Humphreys*, 104 Ill. 879. See also *Milwaukee Industrial School v. Milwaukee County Supra*, 40 Wis. 398, 23 Am. Rep. 702; *Prescott v. State*, 19 Ohio St. 186, 2 Am. Rep. 888; *Roth v. House of Refuge*, 81 Md. 880; *Ex parte Orouse*, 4 Whart. 11; *People v. Degnen*, 6 Abb. Pr. N. S. 87.

It is said it deprives the petitioners of a trial by jury, in this, that it does not permit the jury to fix the length of time the petitioners may be confined in this reformatory. There is no force in this. At common law, the jury found a person charged with crime, guilty or not guilty. They did not fix the punishment.

2 Bl. Com. bk. 4, p. 861.

The object of the adult's sentence is purely penal, while that of the minor's is entirely reformatory. The legislature, having power over both, might legislate in the way it thought most conducive to attain the best results. To send a minor to a reform school

for one year may be of no lasting benefit to him, while one year may be a proper punishment for an adult in a penal institution. But this sentence is not indefinite, in any strict or proper sense.

See *People v. Degnen*, 54 Barb. 107, 6 Abb. Pr. N. S. 87.

It makes no difference to the petitioners in this case whether section 15 is constitutional or not. Even if it was unconstitutional, that would not release the petitioners, as the balance of the act could be properly and intelligently enforced and applied, if it was entirely eliminated.

Donnersberger v. Prendergast, 128 Ill. 234, and authorities there cited; *People v. Nelson*, 133 Ill. 565.

Baker, Ch. J., delivered the opinion of the court:

A writ of habeas corpus was issued herein by order of this court, upon the petition of Tida Bradley, for the purpose of inquiring into the cause of the imprisonment and detention of Joseph Bradley and Harry Justice in the Illinois State Reformatory at Pontiac. The writ was directed to superintendent, board of managers, and officials in charge of the Illinois State Reformatory, and a return was made to the writ. Said Joseph Bradley and Harry Justice were indicted in the circuit court of Peoria county for burglary and larceny, were tried before a jury upon pleas of not guilty, and the jury returned a verdict finding them guilty in manner and form as charged in the indictment, and that they were each above the age of ten years, and under the age of twenty-one years, *i. e.* of the age of eighteen and twenty years, respectively. The jury did not, in their verdict, fix any punishment or term of imprisonment. Thereupon the circuit court ordered and adjudged that said Joseph Bradley and Harry Justice should be confined in the Illinois State Reformatory, in safe and secure custody, for and during a term of commitment to be terminated by the board of managers of said Illinois State Reformatory. A mittimus was issued by the clerk of the court, which contained a true copy of the final judgment and sentence of the court as entered of record, and was directed to the sheriff of Peoria county to execute; and the detention of said Joseph Bradley and Harry Justice in the reformatory is by virtue of said judgment, sentence, and commitment.

The trial and proceedings upon said indictment for burglary and larceny, and the judgment that was rendered by the court, were based upon the provisions of an act of the legislature of the state entitled "An Act to Establish the Illinois State Reformatory, and Making an Appropriation therefor," approved June 18, 1891. Laws 1891, p. 51. Section 9 of the Act divides the inmates sentenced to the reformatory into two divisions, the first to include males between the ages of ten and sixteen years, and the second to include males between the ages of sixteen and twenty-one years. Section 10 provides, in substance, that in all criminal cases tried by jury, in which the jury shall find the defendant guilty, they shall also find by their

verdict whether or not the defendant is between the ages of ten and twenty-one years, and, if between said ages, then find, as nearly as may be, the age of the defendant; and that if the defendant is found to be between said ages, and it shall not be shown in the cause that the defendant has previously been sentenced to a penitentiary, and if the offense of which the defendant is convicted is not a capital offense, then the jury shall not fix the punishment. Section 11 makes provision for the cases of boys between the ages of ten and sixteen years who are convicted of crime. Section 12 provides as follows: "Any court in this state exercising criminal jurisdiction may sentence to the said reformatory any male criminal between the ages of sixteen and twenty-one years, and not shown to have been previously sentenced to a penitentiary in this or any other state or country, upon the conviction, in such court, of such male person, of a crime punishable under existing laws in a penitentiary. And the said board of managers shall receive and take into said reformatory all male prisoners of the class aforesaid who may be legally sentenced on conviction, as aforesaid; and all existing laws requiring the courts of the state to sentence to the penitentiary male prisoners convicted of any criminal offense, between the age of sixteen and twenty-one years, and not shown to have been previously sentenced to a state prison in this or any other state or country, shall be applicable to said reformatory so far as to enable courts to sentence the class of prisoners so last defined to said reformatory, and not to a penitentiary." Section 13 provides as follows: "Every sentence to the reformatory of a person hereafter convicted of a felony or other crime shall be a general sentence to imprisonment in the Illinois State Reformatory, and the courts of this state imposing such sentence shall not fix or limit the duration thereof. The term of such imprisonment of any person so convicted and sentenced shall be terminated by the board of managers of the reformatory, as authorized by this act; but such imprisonment shall not exceed the maximum term provided by law for the crime for which the prisoner was convicted and sentenced." Section 16 is as follows: "The said board of managers shall have power to establish rules and regulations under which prisoners within the reformatory may be allowed to go upon parole outside of the reformatory building and enclosure, but to remain while on parole in the legal custody and under control of the board of managers, and subject at any time to be taken back within the enclosure of said reformatory; and full power to enforce such rules and regulations to retake and reimprison any inmate so upon parole is hereby conferred upon said board, whose order, certified by its secretary and signed by its president, with the seal of the reformatory attached thereto, shall be a sufficient warrant for the officer named in it to authorize such officer to return to actual custody any conditionally released or pardoned prisoner, and it is hereby made the duty of all officers to execute said order the same as ordinary criminal process; provided that no prisoner shall

be released on parole until the said board of managers shall have satisfactory evidence that arrangements have been made for his honorable and useful employment, for at least six months while upon parole, in some suitable occupation." Section 17, among other things, makes it the duty of the board of managers to adopt such rules concerning all prisoners committed to their custody as shall prevent them from returning to criminal courses, best secure their self-support, and accomplish their reformation. It also provides that, if any prisoner on parole shall violate the conditions of his parole or conditional release, he shall, by a formal order entered in the manager's proceedings, be declared a delinquent, and shall thereafter be treated as an escaped prisoner owing service to the state, and shall be liable, when arrested, to serve out the unexpired term of his maximum possible imprisonment. It is provided, in substance, in section 18, that when any prisoner has served not less than six months of his parole acceptably, and has given such evidence as is deemed reliable and trustworthy that he will remain at liberty without violating the law, and that his final release is not incompatible with the welfare of society, then the judge of the court that sentenced him to the reformatory shall enter an order for the final discharge of the prisoner from further liability under his sentence, such order to be based upon a record and recommendation made by the board of managers of the reformatory; and it is provided in said section that nothing in the act contained shall be construed as impairing the power of the governor to grant a pardon or commutation in any case. By section 21 the laws that govern the penitentiaries of the state, so far as they relate to the prevention of escapes and several other specified matters, are made applicable to, and declared to be in force in, the reformatory.

That in the enactment of this law it was the humane and benign intention of the general assembly to afford a means for the reformation of youthful criminals is manifest from the fact that the institution is devoted solely to the reception of minors between the ages of ten and twenty-one years, and from the various provisions of the act. At the same time we cannot concur in the suggestion made by the attorney-general that a sentence imposed by virtue of the act is not intended as, and is not in fact, a punishment for crime committed, but that such sentence is for the sole and only purpose of reforming the offender. Only those who have been convicted, before a court of competent jurisdiction, of felony or other crime, can be sentenced to the reformatory; and the act requires that the sentence shall be "to imprisonment," and uses the expression "term of imprisonment," and other like language, and uniformly employs the words "prisoner" and "prisoners" to designate those who have been committed to the reformatory. Without further reference to the various provisions of the act, many of which we have hereinbefore mentioned, we may say that in our opinion the statute is a criminal enactment, and that a sentence under it to the state reformatory

must be regarded as a penalty and punishment for crime of which the party committed has been convicted. It is admitted by the relator that the judgment and sentence of the court was in accordance with the provisions of the statute, since the statute requires that every sentence to the reformatory of a person between the ages of sixteen and twenty-one years, convicted of a felony or other crime, shall be a general sentence to imprisonment in the Illinois State Reformatory, that the courts imposing the sentence shall not fix or limit the duration thereof, and that the term of imprisonment shall be terminated by the board of managers, as authorized by the act. It is insisted, however, that as, by the judgment and warrant of commitment, the imprisonment was not for a specified time, but "to be terminated by the board of managers of the Illinois State Reformatory," the judgment and mittimus were void for uncertainty, and that the statute which makes provisions for such a judgment is unconstitutional and invalid; and in that behalf reliance is placed upon the case of *People v. Pirfenbrink*, 96 Ill. 68, where it was held that all judgments must be specific and certain, and must determine the rights recovered or the penalties imposed. We think that the judgment and mittimus in this case must be read and interpreted in the light of, and under the restrictions imposed by, the statute upon which they are based. That statute provides that although the sentence is a general sentence to imprisonment, yet that "such imprisonment shall not exceed the maximum term provided by law for the crime for which the prisoner was convicted and sentenced." This provision, and others of like import, being read into the judgment and mittimus, we think that it should be regarded that the judgment and commitment in this case was for twenty years, that being the maximum term provided by law for the crime of burglary. The fact that the prisoners might, in accordance with the provisions of the act, be sooner discharged by an order of court, predicated upon the recommendation of the board of managers of the reformatory, or by the pardon or commutation of the governor, would not have the effect of rendering the sentence and commitment uncertain and indefinite. It follows that it is provided by the statute, and by the judgment and commitment herein, for what period of time Joseph Bradley and Harry Justice are to be detained in the reformatory.

It is insisted that, even if this be so, yet the punishment is not proportioned to the offense committed, and that the statute is in violation of that portion of section 11 of article 2 of the Constitution of the state which declares that "all penalties shall be proportioned to the nature of the offense." In 2 Blackstone's Commentaries (bk. 4, § 12), it is said: "The method of inflicting punishment ought always to be proportioned to the particular purpose it is meant to serve, and by no means to exceed it;" and it is there also said: "The quantity of punishment can never be absolutely determined by any standing, invariable rule, but it must be left to the arbitration of the legislature to inflict

such penalties as are warranted by the laws of nature and society, and such as appear to be best calculated to answer the end of prevention against future offenses." In fact, the object of punishment is the prevention of future offenses; and such object is to be attained in three ways,—by the amendment of the offender himself, by deterring others through his example, and by depriving the guilty party of the power to do further mischief. Id. pp. 11, 12; 4 Am. & Eng. Encyclop. Law, 721. Imprisonment is not a cruel and unusual punishment for burglary or larceny, or other crime, and on that ground to be regarded as disproportioned to the nature of the offense. 4 Am. & Eng. Encyclop. Law, p. 722, and authorities cited in notes. The term of the imprisonment, if it does not extend to perpetual imprisonment, is to a great extent, if not altogether, a matter of legislative discretion. For very many years the statute of this state has been such that the punishment for burglary might extend to a term of imprisonment of twenty years, and the validity of such statute has not been, and could not successfully be, called in question. And, even if the statute fixing the punishment for burglary was such as that it imposed an absolute penalty of twenty years' imprisonment upon every conviction for such crime its validity could not, on that ground, be impeached. When the legislature has authorized a designated punishment for a specified crime, it must be regarded that its action represents the general moral ideas of the people, and the courts will not hold the punishment so authorized as either cruel and unusual or not proportioned to the nature of the offense, unless it is a cruel or degrading punishment, not known to the common law, or is a degrading punishment which had become obsolete in the state prior to the adoption of its constitution, or is so wholly disproportioned to the offense committed as to shock the moral sense of the community. See *Re Bayard*, 25 Hun, 546. Neither the infliction of twenty years' imprisonment for the crime of burglary, nor the infliction, for the violation of any provision of the Criminal Code, of the maximum quantity of the usual punishment for such violation, falls within either of these categories. We think that, from the fact that the statute here in question imposes the maximum term of imprisonment provided by law for the crime for which the prisoner is convicted, it does not follow that such statute is in violation of the constitutional requirement that all penalties shall be proportioned to the nature of the offense.

Nor is it true that a prisoner on trial for burglary and larceny, or for any other violation of the criminal law, has a constitutional right to have the quantity of his punishment fixed by a jury. At common law the jury either returned a special verdict, setting forth all the circumstances of the case, and praying the judgment of the court thereon, or a general verdict of guilty or not guilty. The punishment was fixed by the court, and governed by the laws in force. 2 Bl. Com. bk. 4, p. 861. And in this state, and at the present time, the penalties for violations of the Criminal Code are, in many cases, not fixed

by the jury, but by the court. Rev. Stat. §§ 446, 447, p. 584, *et seq.* The constitutional right of trial by jury is limited to the trial of the question of guilt or innocence, and we think there can be no question of the validity of the sections of the statute to which we have made reference in this connection. In the event that a man of adult years commits the crime of burglary, he may be imprisoned in the penitentiary for a term not less than one year, nor more than twenty years, and, if he pleads not guilty, then the jury say in their verdict for what length of time, within the limits fixed by the statute, he shall be confined in the penitentiary. Crim. Code, §§ 36, 444. It is provided, in substance, in sections 10, 12, and 18 of the statute now under consideration, that if a minor between the ages of sixteen and twenty-one years commits such crime, and has not previously been sentenced to a penitentiary, then the jury shall not fix the punishment, but his sentence shall be a general sentence to imprisonment in the state reformatory, the effect of which shall be imprisonment in such reformatory for the maximum term provided by law for the crime, *i. e.* for twenty years, unless such imprisonment is sooner terminated by the board of managers of the reformatory in the manner authorized by the act. In other words, the adult has the statutory right to have the question submitted to the decision of a jury whether his term of imprisonment shall be one year, or some other space of time, to be fixed by them, and not exceeding twenty years, while for the same offense, and under like circumstances, the minor is necessarily sentenced to imprisonment for twenty years, the maximum term provided by law for the offense. Is there such inequality and injustice in this as that it can be regarded that the penalty imposed upon the minor is not proportioned to the nature of the offense of which he is convicted? There is in the law of nature, as well as in the law that governs society, a marked distinction between persons of mature age and those who are minors,—the habits and characters of the latter are presumably, to a large extent, as yet unformed and unsettled. This distinction may well be taken into consideration by the legislative power in fixing the punishment for crime, both in determining the method of inflicting punishment, and in limiting its quantity and duration. An adult convicted of burglary would be sentenced to the penitentiary, and to either solitary confinement or hard labor therein; and the statute which consigns him to such punishment must be regarded as highly penal. A minor, however, instead of being sentenced to solitary confinement or hard labor in a penitentiary, is committed to the state reformatory. The general scope and humane and benign purpose of the statute establishing the reformatory is clearly indicated by the following provisions, found in section 6: "It shall be the duty of the managers to provide for the thorough training of each and every inmate in the common branches of an English education; also in such trade or handicraft as will enable him upon his release to earn his own support.

For this purpose said managers shall establish and maintain common schools and trade schools in said reformatory, and make all needful rules and regulations for the government of the same." And such beneficent purpose is also shown by the provision in section 8, that the general superintendent of the institution shall have charge of its inmates, and shall discipline, govern, instruct, employ, and use his best efforts to reform them; and numerous other provisions of like tendency and effect are to be found in the act, such as those for the releasing of prisoners upon parole, where arrangements have been made for honorable and useful employment in some suitable employment, and for the final discharge of prisoners from further liability under their sentences, etc. It is manifest that the sentences provided for in the statute establishing the reformatory, although to be regarded as punishments for crime, are not of so purely a penal character as those imposed upon adults convicted of like offenses; but that the primary object of the statute is the reformation and amendment of those committed to the reformatory. It follows, therefore, that the case of an adult liable to be sentenced to the penitentiary for the crime of burglary for a term of not less than one, nor more than twenty years, is not parallel to that of a minor required to be sentenced to the state reformatory for a term of twenty years for the like offense, and that no comparison can be instituted between them, and conclusion arrived at therefrom that the penalty imposed upon the minor is not proportioned to the nature of the offense of which he is convicted. Upon full consideration we find no just ground for holding that the act establishing the reformatory is in conflict with section 11 of article 2 of the Constitution of this state.

Some slight degree of reliance seems to be placed by the petitioner upon the claim that the act in question is in conflict with articles 5 and 8 of the Amendments of the Constitution of the United States. Perhaps this claim has been sufficiently answered by that which has been already said; but, however this may be, it is a complete answer to say that said articles of amendment have no application to state governments but are exclusively restrictions upon federal power. *Pervear v. Massachusetts*, 72 U. S. 5 Wall. 475, 18 L. ed. 608; *Com. v. Hitchings*, 5 Gray, 482; *Twitcheil v. Pennsylvania*, 74 U. S. 7 Wall. 321, 19 L. ed. 228; *Rox v. Ohio*, 45 U. S. 5 How. 484, 12 L. ed. 228.

It is urged that the Act establishing the reformatory is invalid, because section 15 of said Act empowers the board of managers of the institution to transfer to the penitentiary of the proper district any prisoner sentenced to the reformatory, who, subsequent to his committal, is shown to have been, at the time of his conviction, more than twenty-one years of age, or to have been previously convicted of crime, or who is apparently incorrigible, and whose presence, therefore, in the reformatory appears to be seriously detrimental to the well-being of the institution, and authorizes the imprisonment in such penitentiary of such prisoner at hard labor, and sub-

ject to all the rules and discipline of such penitentiary, for the full maximum term provided by law for the crime of which he was convicted. It may be difficult to say that the provisions of said section 15 are valid; but that question is not now properly before this court, for it does not appear that either Bradley or Justice has been sent, or is about to be sent, under the provisions of said section, to a penitentiary. Assuming, for the purposes of this decision, that said section 15 is unconstitutional, yet it may be eliminated from the act, and the residue of the act be readily, properly, and intelligently enforced. And the settled law is that, when constitutional and unconstitutional provisions in a statute are distinct and

separable, the valid provisions may stand as though the invalid provisions had not been introduced therein. *Donnersberger v. Frensdergast*, 128 Ill. 229, and authorities therein cited. We are unable to arrive at the conclusion that either Joseph Bradley or Harry Justice is wrongfully, illegally, or without warrant of law imprisoned and deprived of his liberty in the Illinois State Reformatory at Pontiac; and they are therefore remanded to the custody of the constituted authorities of said reformatory, and the writ of habeas corpus herein is dismissed, at the cost of the petitioner.

Writ dismissed.

Shope and Magruder, JJ., dissent.

MICHIGAN SUPREME COURT.

SENATE OF THE HAPPY HOME CLUB OF AMERICA *et al.*

v.

Board of Supervisors of ALPENA COUNTY, *Plff. in Certiorari.*

(.....Mich.....)

The Michigan Act No. 207 of the Laws of 1893, popularly known as the "Jag Cure Act," which authorizes a person convicted of drunkenness to be released on a recognizance conditioned that he will immediately take treatment for the cure of drunkenness of some corporation organized by law to make and file reports in reference thereto, and that he will obey all regulations prescribed by those administering such cure, with the further provision that he may be acquitted and discharged at the end of sixty days on proof that he has conformed to such conditions, is unconstitutional as an attempt to permit unofficial persons to prescribe rules which shall acquit persons charged with crime, while those rules may be as variable as the corporations are numerous.

(February 20, 1894.)

CERTIORARI to the Circuit Court for Alpena County to review an order granting a writ of mandamus to compel the board of supervisors to allow and pay a bill for the treatment and maintenance by the senate of the Happy Home Club of America of one Richard Kelly, who had contracted the liquor habit. *Reversed.*

Upon the filing of the petition for the writ, an order to show cause was issued and the supervisors set up that the sole cause for refusing to pay the bill was that the act of the

legislature under which it was contracted was unconstitutional. The Act in question is:—

Act No. 207, of 1893, which is entitled "An Act to authorize the courts, justices of the peace and police justices of this state to permit those charged and complained against as disorderly persons on account of drunkenness or intoxication to give a special recognizance conditioned for such persons taking the cure for such drunkenness and intoxication, and for the adjournment of such case against such person for a limited time for this purpose and to provide means for carrying out the same." The first section provides "that whenever any person shall be charged or complained against as being a disorderly person on account of drunkenness or intoxication," etc., he may give a recognizance "in the penal sum of one hundred dollars with a good and sufficient surety to be approved by such court or justice of the peace or police justice, conditioned that such person will immediately take treatment for the cure of such drunkenness or intoxication, of some corporation organized under the statutes of this state for the purpose of administering such cure and required by law to make and file reports in reference thereto; to be therein specified for the period of at least thirty days, and that such person will observe and obey all directions and regulations prescribed by those administering such cure, and that such person will not indulge in the use of intoxicating or malt liquors for the period of ninety days, and that such person will, at the end of sixty days from the date of said recognizance, appear before such court, justice of the peace or police justice, and answer the charge or complaint against such person." It is further

NOTE.—Methods of punishment or reformation of criminals and children of criminal tendencies are of the greatest interest at present, in respect to the legal as well as the moral questions involved. The problem of reconciling constitutional rights of convicted persons with such discretionary action or flexible system as it seems can alone be effectual for reformatory work is not easy of solution. In Michigan where the courts deny the constitutionality of a parole or conditional pardon by a board of prison control (see 28 L. R. A.

People v. Cummings (Mich.) 14 L. R. A. 235, and *note*), such an alternative for imprisonment as the taking of a cure for drunkenness and obtaining the certificate of a corporation operating such a cure must be held clearly invalid, and even in other states in which the decisions are less strict in respect to paroles and conditional pardons the decision on the above case would probably be the same. The case is significant of the increasing tendency to consider the treatment of criminals with reference to their reformation.

provided that, upon giving the said recognizance, the cause shall be adjourned for sixty days, "and if at the end of said sixty days mentioned in said recognizance said person shall appear and show that he or she has conformed to the said conditions mentioned in said recognizance up to that time, then such person shall be acquitted and discharged." It is further provided that, if he fails to show that he has complied with the provisions of the recognizance, he shall be prosecuted for the original offense, or, if he fails to appear, his recognizance shall be forfeited according to law. Section 2 provides that the justice shall "make inquiry into the circumstances and financial condition of such person, and if upon such inquiry and investigation such person is found to be in indigent circumstances and unable to pay for his or her said treatment and maintenance during the time of receiving the same, then the cost and expense of administering such cure and maintaining such person shall be a county charge against the respective counties in which such recognizances are given and filed, but said charge shall not exceed seventy dollars," etc. The same section further provides for the payment, by the board of supervisors or board of county auditors, "upon the certificate of said court, justice of the peace, or police justice, that such person is in indigent circumstances and unable to pay for such cure and maintenance, and upon proof that such person has been properly treated and cured of such drunkenness or intoxication." This section further provides that the court shall furnish a certificate of indigency to the corporation at the time the recognizance is given.

Mr. A. A. Ellis, Atty. Gen., for plaintiff in certiorari:

The real object of the law is to allow a man to go to a jag cure and receive treatment in lieu of the statutory penalty provided for drunkards and tipplers: and if he takes the cure it shall be in lieu of any punishment for the offense he has committed.

If it is assumed that the taking of the cure is a punishment for the offense, the act would be in plain violation of the constitution, which provides against "unusual punishments."

Cooley, Const. Lim. 5th ed. p. 404.

If this is not a punishment for drunkenness or for being a drunkard, then the object of the act is not embraced in the title.

The Constitution, article 6, section 28, provides: "In every criminal prosecution the accused shall have the right to a speedy and public trial by an impartial jury."

The act under consideration expressly provides that the cause shall be continued for sixty days for the purpose of curing the person of such "drunkenness or intoxication."

The defendant could not waive the right to a trial by jury.

Hill v. People, 16 Mich. 351.

Ought a defendant who is accused of a criminal offense to be allowed to waive the clause in the Constitution which provides that he shall have a speedy trial?

United States v. Fox, 3 Mont. 517; *Ex parte* 38 I. R. A.

Stanley, 4 Nev. 116; *Klock v. People*, 2 Park. Crim. Rep. 676.

It is not the theory of the law, and never has been, that a man who is charged with an offense which is made a misdemeanor under the law, and which has a tendency to degrade him in the eyes of his fellow men, shall be compelled, or given the right, to excuse himself, or choose between two evils.

The law is unconstitutional because it makes the prosecution for a misdemeanor depend upon rules and regulations which are left entirely to the discretion of unofficial persons.

Whatever regulations are made must operate uniformly under the same conditions.

Re Frazee, 63 Mich. 396.

In *Horn v. People*, 26 Mich. 225, this court, in speaking of the regulations of navigation, said: "The regulations of navigation which he is to enforce, must be such as are valid and binding on all persons. Neither the city nor the legislature could make the rights of navigators dependent upon the private will of any one. They have a right to know their duties and responsibilities, and cannot be punished except when they violate some public statute or valid ordinance."

The legislature has not the authority to delegate to an unofficial body the right to make rules without limit, and to provide that a man may be acquitted or prosecuted conditioned upon his keeping such rules; for would not this be a delegation of legislative power without limit, and in plain violation of the constitution, which vests the legislative power of this state in the legislature?

Mr. L. G. Daffoe, Pros. Atty., also for plaintiff in certiorari.

Mr. J. D. Turnbull for defendant in certiorari.

Per Curiam:

Respondents bring to this court by certiorari the proceedings had in the circuit court for the county of Alpena upon an application for mandamus to compel respondents to audit relator's bill for the cure of one Richard Kelly of the liquor habit, under the provisions of Act No. 207 of the Laws of 1893, popularly known as the "Jag Cure Act," a copy of which is appended. The statute providing for the punishment of disorderly persons allows the justice to cause the arrest, and proceed to try the person charged; and upon conviction upon the trial, or if he pleads guilty, he may punish the offender by fine and costs, or imprisonment in the county jail or Detroit House of Correction, or he may require a recognizance for his good behavior for the period of three months. The act in question permits the justice to accept a different recognizance, viz., one conditioned that the defendant will take the cure within a time specified, and conform to the rules and regulations of the corporation administering such cure, and that he will not drink intoxicating liquor for the period of three months. It further provides that upon appearing before the justice at the end of sixty days, and showing that he has conformed to the conditions of the recognizance up to that time, he "shall be acquitted and discharged."

This, in effect, permits unofficial persons to prescribe rules which shall acquit persons charged with crime. These rules may be lax or stringent; but, whatever they are, the justice has only to acquit if they are shown to be complied with. They may be as variable as the corporations prescribing them are

numerous. It is not within the province of the legislature to delegate to private corporations the power to make laws for the discharge of offenders.

The order of the Circuit Court will be reversed, with costs.

MISSOURI SUPREME COURT (Div. 1).

W. H. HOWSMON, *Appt.*,
v.
TRENTON WATER CO., *Resp.*

(.....Mo.....)

A water company is not liable to the owner of a house destroyed by fire because of failure to furnish water under a contract with a municipality, although a special tax was provided for in the contract to pay part of the consideration to the water company and an express provision made that the company should be liable for all damages occasioned by failure to furnish an adequate supply of water to extinguish any fire.

(December 23, 1893.)

A PPEAL by the plaintiff from a judgment of the Circuit Court for Grundy County in favor of defendant in an action brought to recover damages for injuries sustained by plaintiff by reason of defendant's failure to

keep its contract with the town of Trenton to furnish a water supply to extinguish fire. *Affirmed.*

The facts are stated in the opinion.

Messrs. Harber & Knight and A. W. Mullins, for appellant:

In order to confer upon the plaintiff a right of action in the event of loss as set out in the petition, it was not essentially necessary that he should have been a party to the contract. If it were made, in part, for his benefit, in consideration of the burdens he had to bear by reason of the contract between the town and the defendant, that is sufficient. And the facts alleged in the petition and admitted by the demurrer show that the contract was made for the benefit of plaintiff and other tax-paying citizens of the town as individuals as well as for the town as a municipality, while the compensation—the consideration for the supposed benefits to accrue to the town and its citizens for the water supply and for the extinguishment of fires—was to come from the taxpayers.

Note.—Liability for loss by fire due to the lack of adequate water supply.

- I. Of city or municipality.
- II. Of water company.

I. Liability of the city or municipality.

Municipal corporations have and can exercise only such powers as are expressly granted to them by law, and such incidental ones as are necessary to make those powers available and are essential to effectuate the purposes of the corporation, such powers being strictly construed. *Mott v. Cherryvale Water & Mfg. Co.* 15 L. R. A. 875, 48 Kan. 15; *Albany v. Cunliff*, 2 N. Y. 165; *Clark v. Des Moines*, 19 Iowa, 212, 87 Am. Dec. 423; *McPherson v. Foster*, 43 Iowa, 57, 22 Am. Rep. 215.

A city cannot assume liability for negligence in cases where the law has not already imposed a liability. *Vanhorn v. Des Moines*, 68 Iowa, 447, 50 Am. Rep. 750.

If a city is bound to furnish no particular facilities, there is an end of all question of liability for failure. *Ibid.*

The power of the city over the subject is that of a delegated quasi sovereignty, excluding responsibility to individuals for negligence or nonfeasance of any officer or agent charged with the performance of duties. *Wheeler v. Cincinnati*, 19 Ohio St. 19, 2 Am. Rep. 368.

The power on the part of a municipal corporation to provide for the accomplishment of certain results does not necessarily impose a liability for their imperfect accomplishment. *Vanhorn v. Des Moines*, *supra*.

The provisions which a given city should make in the matter of the extinguishment of fires is one of legislative discretion. *Ibid.*

The power conferred upon a city or corporation to establish a fire department is a legislative or

discretionary power which is within the discretion of the city authorities to exercise or not. *Heller v. Sedalia*, 58 Mo. 159, 14 Am. Rep. 444.

The injury sustained must be something more than the lack of facility or means of accomplishing an ulterior result. *Vanhorn v. Des Moines*, *supra*.

In *Vanhorn v. Des Moines*, *supra*, where the defendant was authorized by law to provide for the supply of water for the extinguishment of fires, and to levy a tax to defray the expense, a water company having contracted to indemnify them against all actions which might be brought against the city for malfeasance or neglect on the part of such company, it was held that the city was not liable for damages occasioned by the inadequate water supply.

The same doctrine is established in *Brinkmeyer v. Evansville*, 29 Ind. 187, where the city was sued for damages occasioned by the failure to extinguish a fire through the non-supply of water and defective fire apparatus. In the above case it is stated that a contrary decision would result in making them insurers against fire, reason and the soundest public policy forbidding such a liability being imposed.

Again, in *Patch v. Covington*, 17 B. Mon. 722, 66 Am. Dec. 186, where the city was sued for neglect in keeping the public water systems in repair, whereby the fire spread to plaintiff's house.

Where the city was sued for damages occasioned by reason of its neglect in maintaining a hydrant by which the fire might have been extinguished, the City Act of 1884, chapter 104, section 3, authorizing the city to make and maintain reservoirs and public hydrants in such places as may be deemed proper, to be maintained and erected by the city for the public benefit without pecuniary compensation or emolument, it was held that the city did

alone. And so, the contract having been made in part for plaintiff's benefit and on his behalf, he has a right of action.

Rogers v. Gosnell, 58 Mo. 589; *Meyer v. Lowdl* 44 Mo. 328; *Fitzgerald v. Barker*, 70 Mo. 685; *Bank of Missouri v. Benoist*, 10 Mo. 519; *Rogers v. Gosnell*, 51 Mo. 586; *State v. Laclede Gaslight Co.* 102 Mo. 472.

One of the ordinances pleaded provided that "should said water company, from lack of water supply or any other cause, except providential or unavoidable accident, fail to furnish a reasonable or adequate supply of water to extinguish any fire, then it shall be liable for all damages occasioned by such fire or neglect." Defendant having failed to fulfill this important provision in the contract, as shown by the allegations of the petition, it became and is liable to the plaintiff for the damages he sustained by reason of defendant's failure and neglect.

Paducah Lumber Co. v. Paducah Water Supply Co. 7 L. R. A. 77, 89 Ky. 340; *Duncan v. Owensboro Water Co.* 12 Ky. L. Rep. 35; *Marckel v. Western U. Teleg. Co.* 19 Mo. App. 80; *Lampert v. Laclede Gaslight Co.* 14 Mo. App. 376.

Mr. R. L. Yeager, for respondent:

The appellant was not a party to the contract sued on and sustained no relation of privity to either of the contracting parties.

Therefore he cannot maintain an action upon the contract, and the judgment of the trial court should be affirmed.

Froman v. Turner, 69 N. Y. 280, 25 Am. Rep. 195; *Woodland v. Newhall*, 8 Fed. Rep. 434; *Kansas City v. O'Connell*, 99 Mo. 357.

not, by accepting the statute and building such works, enter into any contract with, or assume any liability to, the owners of property, to furnish means or water for the extinguishment of fires upon which an action could be maintained. *Talnter v. Worcester*, 123 Mass. 311, 25 Am. Rep. 90. In this case the owner of the property had failed to pay his water rates, and the water had been cut off.

In *Heller v. Sedalia*, 53 Mo. 159, 14 Am. Rep. 444, the defendant by ordinance, established and regulated the fire department and was sued for damages occasioned by a fire, which it was alleged might have been extinguished by proper exertion on the part of the officers of the department. The court held that it was not the intention of the legislature in conferring power on the city to establish a fire department, to render it responsible as an insurer against fire.

The doctrine of *respondet superior* does not apply to such a case. *Heller v. Sedalia*, *supra*.

In *Wheeler v. Cincinnati*, 19 Ohio St. 19, 2 Am. Rep. 363, it was held that the powers conferred by statute upon municipal corporations with respect to the establishment and organization of fire companies were legislative and governmental, and that the extent and manner of their exercise within the sphere prescribed by statute were necessarily to be determined by the judgment and discretion of the proper municipal authorities, and for any defect in the execution of such powers the corporations were not liable to individuals.

The same conclusion was reached by the court in *Springfield Fire & Marine Ins. Co. v. Keeseville*, 6 Me. 233, the court holding that such failure did not give ground of action to either the insurer or insured.

In *Grant v. Erie*, 69 Pa. 420, 8 Am. Rep. 272, power was given to the city to make and establish a sufficient number of reservoirs to supply water in case

The payment of a tax levied by the town of Trenton for the purpose of paying its hydrant rental to the water company does not create a privity of contract, so as to authorize the appellant to sue.

Becker v. Keokuk Water Works, 79 Iowa, 419.

The appellant's right of recovery upon similar contracts to the one pleaded has been denied.

Phoenix Ins. Co. v. Trenton Water Co. 42 Mo. App. 118; *Davis v. Clinton Water Works Co.* 54 Iowa, 59, 37 Am. Rep. 185; *Becker v. Keokuk Water Works*, *supra*; *Nickerson v. Bridgeport Hydraulic Co.* 46 Conn. 24, 38 Am. Rep. 1; *Ferris v. Carson Water Co.* 16 Nev. 44, 40 Am. Rep. 485; *Atkinson v. Newcastle & Gateshead Water Co.* L. R. 2 Exch. Div. 441; *Fowler v. Athens City Water Works Co.* 88 Ga. 219.

Brace, J., delivered the opinion of the court:

This is an appeal from the judgment of the circuit court of Grundy county, sustaining a demurrer to the plaintiff's petition, the material allegations of which are, in substance, as follows: That the plaintiff is a resident citizen and taxpayer of the town of Trenton in said county, and the owner of a large amount of valuable property within the corporate limits of said town, subject to taxation for ordinary purposes, and to a special tax of five mills on the dollar annually for the purpose of discharging the obligations of said town to the defendant on the contract

of fire; the reservoirs established thereunder, having fallen into decay through want of repair, became leaky and insufficient for the purposes for which constructed. The court held in an action against the city to recover damages occasioned by a fire upon the plaintiff's premises, that the city was not liable, its powers being discretionary.

In the above case, however, the court's decision was based upon the fact of the duty imposed being discretionary, and it was intimated that if the duty were an imposed one, the negligence of the city might have constituted a good cause of action.

Where the action was against the corporation for damages occasioned by fire, by reason of the failure to keep the water pipes, hydrants, and fixtures in repair so as to furnish a sufficient supply of water for which the plaintiff paid taxes, the defendant was held not liable, the duty imposed being a discretionary one and not purely ministerial in its character. *Black v. Columbia*, 19 S. C. 412, 45 Am. Rep. 785.

In *Mendel v. Wheeling*, 28 W. Va. 253, 57 Am. Rep. 665, it was stated that no duty was imposed upon the city, even though it imposed a tax for water and owned its own waterworks, public policy forbidding such an action.

The damage must be the direct or the proximate and natural consequence of the defendant's acts. *Patch v. Covington*, 17 B. Mon. 722, 66 Am. Dec. 186; *Oil Creek & A. R. R. Co. v. Kelghron*, 74 Pa. 316.

The damages must be the result of the proximate cause of the injury, and are a question for the jury, and not one of legal knowledge or science. *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 409, 24 L. ed. 266.

II. Liability of the water company.

The general doctrine deducible from all opinions is, that the waterworks company is not liable for

sued on herein, all of which he has regularly and promptly paid. That by a contract entered into, by ordinances, between the town of Trenton and the defendant, the said defendant (in consideration of the franchise granted it, and the privilege of collecting certain water rates from its citizens, and of the sum of \$2,000 to be paid annually by the town, to be raised by an annual tax of five mills, as aforesaid, all of which the defendant has received and enjoyed) promised and agreed with said town to furnish, at all times, an adequate supply of good, clear, and wholesome water, for fire and other purposes, for public and private use, under such a pressure as to have the power to throw, at all times, six streams of water through 50 feet of 2½ inch rubber hose and 1-inch ring nozzle, 80 feet high, in the business portion of the town, and to throw at least two effective streams at any one time in any other part of the town accessible from the mains; and further agreed that, "should said water company, from lack of water supply, or any other cause except providential or unavoidable accident, fail to furnish a reasonable or adequate supply of water to extinguish any fire, then it shall be liable for all damages occasioned by such fire or neglect." That on the 24th of March, 1889, plaintiff's dwelling house in said town, with the household and kitchen furniture and wearing apparel therein contained, all of the value of \$2,700, was destroyed by fire. That said house was close to the main of defendant, and situated at a place where, in the event a fire should

there occur, it was the duty of defendant, under said contract, to furnish an adequate supply of water, with force and power sufficient to extinguish such fire; which the defendant, without any providential or unavoidable accident, failed to do, and by reason of such failure plaintiff's property was destroyed, to his damage in the sum of \$8,700.

It is well-established law in this state, by a line of decisions extending from the year 1847 to the present date, "that a person for whose benefit an express promise is made in a valid contract between others may maintain an action upon it in his own name." *Ellis v. Harrison*, 104 Mo. 270; *State v. Laclede Gas-Light Co.* 103 Mo. 472; *Fitzgerald v. Barker*, 70 Mo. 685; *Rogers v. Gosnell*, 58 Mo. 589, 51 Mo. 486; *Meyer v. Lovell*, 44 Mo. 328; *Robbins v. Ayres*, 10 Mo. 589, 47 Am. Dec. 125; *Bank of Missouri v. Benoit*, 10 Mo. 521. And such is now the prevailing doctrine in America, by the great weight of authority. 8 Am. & Eng. Encyclop. Law, p. 863, note 5.

This doctrine, originally an exception to the rule that no claim can be sued upon contractually unless it is a contract between the parties to the suit, has become so general and far-reaching in its consequences as to have ceased to be simply an exception, but is recognized, within certain limitations, as an affirmative rule. The foregoing cases from this court are in harmony with the rule as laid down in *Laurence v. Fox*, 20 N. Y. 268, that "an action lies on a promise made by

the inadequate supply of water for fire purposes, under a contract with a city or corporation to furnish water for the extinguishment of fire, there being no privity of contract between the company and the property owner.

This has been held to be the case, even though the water company may have agreed with the city or corporation to indemnify it against all claims made by or on behalf of any citizen or resident, and may have stipulated that the action might be brought in the property owner's own name. *Mott v. Cherryvale Water & Mfg. Co. infra*.

If a city is not liable to its citizens or residents, the water company is not liable to such citizens or residents upon a contract between itself and the city, the contract in such a case being between the city and the water company only. *Mott v. Cherryvale Water & Mfg. Co.* 15 L. R. A. 875, 48 Kan. 15.

The mere fact that the plaintiff, a stranger to the contract, may find benefit therefrom for the protection of his property in common with all other persons whose property is similarly situated, does not make him a party to the contract or create privity between himself and such company (*Davis v. Clinton Water Works Co.* 54 Iowa, 59, 37 Am. Rep. 185); no privity or obligation or duty owing to him giving a legal or equitable claim to the promisee, or an equivalent from him personally being shown. *Ferris v. Carson Water Co.* 16 Nev. 44, 40 Am. Rep. 485.

Privity of contract must exist between the parties to an action upon the contract. *Davis v. Clinton Water Works Co. supra*.

One who is not a party to a contract cannot sue in respect to a breach of duty arising out of such contract. *Marvin Safe Co. v. Ward*, 48 N. J. L. 19.

The contracting parties control all interests and are entitled to all rights secured by the contract. *Davis v. Clinton Water Works Co. supra*.

2; L. R. A.

In order to entitle a person to an action against one performing the service or doing work under a contract made with another person, it must be shown that the duty or liability arose independent of contract. *Marvin Safe Co. v. Ward, supra*.

There would be no certain limit to the number and character of actions, if mere strangers might enforce the contract by action. *Davis v. Clinton Water Works Co. supra*.

The mere fact that a city levies and collects a tax to be paid to a water company does not create any privity of interest between the water company and a citizen or resident of the city. *Mott v. Cherryvale Water & Mfg. Co. supra*.

In making such a contract, the city discharges one of its duties for which it was created, and in raising the required money it only provides the consideration due from it by virtue of the contract. *Id.*

The law which authorizes cities to contract with individuals and companies for the building and operating of waterworks confers no powers upon a city to make a contract of indemnity for the individual benefit of a citizen or resident of the city, for the breach of which he can maintain an action in his own name. *Id.*

In *Nickerson v. Bridgeport Hydraulic Co.*, 46 Conn. 24, 38 Am. Rep. 1, it was alleged that the defendants had contracted with the city for the supply of water for domestic use and the extinguishment of fires, and that it was therefore their duty to keep an abundant supply for such purposes, although nothing appeared showing precisely what the contract was, no terms or conditions being stated. The court held that an allegation of duty was not sufficient; facts sufficient to create the duty or obligation must be alleged and that there was no contract relation between the defendants and the plaintiffs, and consequently no duty which could

the defendant upon valid consideration to a third person, although the plaintiff was not privy to the consideration. Such promise is to be deemed made to the plaintiff, if adopted by him, though he was not a party nor cognizant of it when made." *Meyer v. Lowell*, *supra*. "It is not every promise, however, made by one to another from the performance of which a benefit may ensue to a third, which gives a right of action to such third person, he being neither privy to the contract nor to the consideration. The contract must be made for his benefit as its object, and he must be the party intended to be benefited." *Simson v. Brown*, 68 N. Y. 856; *Vrooman v. Turner* (1877), 69 N. Y. 280, 25 Am. Rep. 195; *Wright v. Terry*, 28 Fla. 160; *Austin v. Seligman*, 18 Fed. Rep. 519; *Burton v. Larkin*, 86 Kan. 246, 59 Am. Rep. 541, and cases cited. In other words, "the rule is not so far extended as to give to a third person, who is only indirectly and incidentally benefited by the contract, the right to sue upon it." But "the name of the person to be benefited by the contract need not be given, if he is otherwise sufficiently described or designated. Indeed, he may be one of a class of persons, if the class is sufficiently described or designated." *Burton v. Larkin*, *supra*; *Johannes v. Phenix Ins. Co. of Brooklyn*, N. Y. 66 Wis. 50, 57 Am. Rep. 248.

In the opinion delivered by Allen J., in *Vrooman v. Turner*, *supra*, it was said: "Judges have differed as to the principle upon which *Lawrence v. Fox* and kindred

cases rest, but, in every case in which an action has been sustained, there has been a debt or duty owing by the promisor to the party claiming to sue upon the promise. Whether the decisions rest upon the doctrine of agency, the promisee being regarded as the agent of the third party who, by bringing his action, adopts his acts, or upon the doctrine of a trust, the promisor being regarded as having secured money or other thing for the third party, is not material. In either case there must be a legal right, founded upon some obligation of the promisee, in the third party, to adopt and claim the promise as made for his benefit." An examination of very many cases decided before and since it was so held in that case satisfies us that the rule has been confined to such cases in this state, as well as elsewhere, and upon that principle when this case was before the Kansas City court of appeals in an action by another party. *Phenix Ins. Co. v. Trenton Water Co.* 42 Mo. App. 118. It was, in effect, held that the plaintiff had no cause of action against the water company, because the town of Trenton was under no obligation to the plaintiff to furnish an adequate supply of water and power to extinguish the fire by which the premises were consumed; and in support of its position the following additional cases were cited: *Davis v. Clinton Water Works Co.* 54 Iowa, 59, 87 Am. Rep. 185; *Nickerson v. Bridgeport Hydraulic Co.* 46 Conn. 24, 83 Am. Rep. 1; *Ferris v. Carson Water Co.* 16 Nev. 44, 40 Am. Rep. 485; *Fowler v. Athens City Water Works Co.* 88

be made the basis of a legal claim. In the above case, however, there was an entire absence of allegations going to show a subsisting contract of the defendants with the city, much less with the plaintiffs, out of which a duty could arise.

In *Fowler v. Athens City Water Works Co.*, 88 Ga. 212, a contract entered into between the city and another party for the supply at all times, for valuable consideration, of all the water necessary for fire purposes, and to establish hydrants with a guarantee of sufficient pressure to throw from any of these at all times five streams of water to the height of sixty-five feet, was transferred by the contractor to the defendant who was sued for damages occasioned by a fire on plaintiff's premises, the water supply not being of sufficient pressure to extinguish it whereby the fire spread. The court held, the case not being based upon a statutory duty, but solely upon the failure to comply with the contract made with the municipality, that the defendant was not liable there being no privity between him and the plaintiff, and further that he was not liable in tort, there being no legal command by statute or express law superadded to the contract.

Where the defendant's contract to supply water to be used by the city for the extinguishment of fires, was embodied in an ordinance passed by the city authorizing the establishment of waterworks providing for compensation, the only parties to such contract being the city and the defendant, it was held in an action by the plaintiff to recover damages occasioned by a fire, the necessary supply of water not being furnished through defective machinery, and the negligence of the defendant's servants, that there was no liability, no privity of contract existing. *Davis v. Clinton Water Works Co.* 54 Iowa, 59, 87 Am. Rep. 185.

In *Becker v. Keokuk Waterworks*, 79 Iowa, 412, 23 L. R. A.

the same conclusion is reached, although it was contended that the case differed from that of *Davis v. Clinton Water Works Co.*, *supra*, a special fund being raised by the city to pay for a sufficient supply of water for use in case of fires, to which fund plaintiff contributed, the court holding that the mere fact of the city's levying and collecting a tax to pay the defendant created no privity of interest between the defendant and the taxpayers.

Section 18 of the Ordinance in question provided "that said company shall be liable for all injuries to persons or property caused by the negligence, mismanagement, or fault of itself, or its employees, while engaged in the construction or operation of said works," and in dealing with this section, the court held that the powers of corporations were to be strictly construed, the law which authorizes them to contract for the building and operation of waterworks conferring no power to make a contract of indemnity for the individual benefit of the taxpayer, for the breach of which the latter could maintain action in his own name. *Becker v. Keokuk Waterworks*, *supra*.

In construing the above section, the court held it referred only to injuries for which the city would have been liable if caused by negligence, mismanagement, or fault on its own part. *Ibid*.

Where by the terms of a city ordinance it was the duty of the water company to furnish water of a certain pressure after a fire alarm, and a certain pressure during the fire, sufficient for fire protection, the pressure to be determined by the register in the engine house, and such company undertook by the terms of the ordinance to pay all damages that might accrue to any citizen of the city by reason of a failure to supply a sufficient amount of water, or a failure to supply the same at the proper time, or by reason of any negligence on its part, and the action was brought for a failure to

Ga. 219; and *Atkinson v. Newcastle & Gateshead Water Co.* L. R. 2 Exch. Div. 441.

The last of these cases is not in point, since the action in that case was for the breach of a public statutory duty, and the court held that the action would not lie, because the statute gave no right of action to the plaintiff. The cause of action in each of the other cases was for a breach of duty which it was alleged the defendants owed the plaintiff under a contract with the city, to which the plaintiff was not a party, whereby they agreed to furnish an adequate supply of water and power to extinguish fires in the town or city; to which it was replied in the Connecticut case (decided in 1878): "Whatever benefit the plaintiffs could have derived from the water would have come from the city, through its fire department. The most that can be said is that the defendants were under obligation to the city to supply the

hydrants with water. The city owed a public duty to plaintiffs to extinguish their fire. The hydrants were not supplied with water, and so the city was unable to perform its duty. We think it is clear there was no contract relation between the defendants and the plaintiffs, and consequently no duty which can be the basis of a legal claim." In the Iowa case (decided in 1880) it was replied: "The city, in the exercise of its lawful authority to protect the property of the people, may cause water to be supplied for extinguishing fires, and for other objects demanded by the wants of the people. In the exercise of this authority it contracts with defendant to supply the water demanded for these purposes. . . . It cannot be claimed that the agents or officers of the city employed by the municipal government to supply water, improve the streets, or maintain good order are liable to a citizen for loss

furnish the water of such pressure, whereby the plaintiffs sustained damage, the court held, there being no allegation that the plaintiff was a taxpayer or ever paid taxes, that there was no privity of contract between the citizens, the plaintiff, and such company, as would enable him to maintain an action for the injury sustained through the fire, and caused by the failure of the water company to perform the contract. *Mott v. Cherryvale Water & Mfg. Co.* 15 L. R. A. 875, 48 Kan. 15.

In *Metallic Compression Casting Co. v. Fitchburg R. Co.*, 109 Mass. 277, 12 Am. Rep. 689, the defendants were sued for negligently severing a hose laid across their track, thereby cutting off the supply of water from a fire which was consuming the plaintiff's factory and causing the destruction of the building and its contents. The court held such interference tortious, the firemen having a right at common law to lay the hose over the road, and the mere fact of their being volunteers made no difference, the severance of the hose being a proximate cause of the plaintiff's injury.

In *Eaton v. Fairbury Waterworks Co.* (Neb.) 21 L. R. A. 688, where the defendants, under the provisions of the city ordinance, were to keep all fire hydrants supplied with water for instant service and in good order and efficiency, the payment being provided for by the levying of a tax, the loss by the plaintiff was alleged to be caused by their negligence and failure to so provide the hydrants with water. The court held, no mention of or reference to plaintiff, or any class of citizens or taxpayers being embodied in the contract, that the defendants were not liable by reason of the assumption of certain functions which might properly be assumed by the municipal corporation, inasmuch as the municipality itself could not be liable under the circumstances, and no privity of contract was established.

In *Ferris v. Carson Water Co.*, 16 Nev. 44, 40 Am. Rep. 485, the defendant was held not liable to the plaintiff for the insufficiency of the water supply furnished by it under a contract with the city.

In *Foster v. Lookout Waterworks Co.*, 8 Lea, 42, it was held that neither the company nor the city was liable for an insufficient supply of water, owing to the non-repair of pipes, no privity of contract existing with the plaintiff.

In *Atkinson v. New Castle & Gateshead Water Co.*, L. R. 2 Exch. Div. 441, 46 L. J. Q. B. 775, 36 L. T. N. S. 761, 25 Week. Rep. 794, it was held that a mere breach of a statutory public duty against any cause of action, whether the right of action be or be not given, must depend upon the object and language of the statute.

Where the statute bound the company to maintain

fire plugs to furnish sufficient supply of water to keep pipes charged with water of a certain pressure, for use in case of fire without compensation, and imposed a fine in case of neglect, the court held that the defendants were not liable for the insufficient supply of water at the fire. *Atkinson v. New Castle & Gateshead Water Co. supra.*

A contrary doctrine would seem to be held in *Paducah Lumber Co. v. Paducah Water Supply Co.*, *infra*, but it will be observed that in that case there was an express contract between the lumber company and the water supply company, by which, in consideration for the rent paid for the use of two hydrants upon the lumber company's own lot, the water was agreed to be furnished directly to such company.

A city having power by its charter to contract for the construction of waterworks, and operating of the same, such contract is made for the personal benefit of the inhabitants within the limits of such corporation. *Paducah Lumber Co. v. Paducah Water Supply Co.* 7 L. R. A. 77, 89 Ky. 340.

In *Paducah Lumber Co. v. Paducah Water Supply Co.*, *supra*, it is stated that if the city had power to make the contract as well for the personal benefit of its several inhabitants as for purely municipal purposes, and did so make it, the plaintiff being the real party in interest because owner of the property destroyed, had the right to prosecute in its own name if maintainable at all, and that the city was not a necessary party its interest or injury being distinct if not remote. Section 18 of the Kentucky Civil Code provides that the action must be prosecuted in the name of the real party in interest.

Where the contract to supply the city with water provided that the contractor should be exempt from damages occasioned by the temporary shutting off of the water in case of repairs, it was held that no excuse being provided they were still liable for damages by fire, occasioned by the non-supply of the necessary amount of water; and the insertion of a provision relieving the city from liability for rent was no release so far as the contractor was concerned. *Paducah Lumber Co. v. Paducah Water Supply Co. supra.*

In such cases the inquiry is whether, considering the purpose, character, and capacity of the works, and the attending circumstances and agencies, the fire could and would have been prevented or extinguished if such company had performed its contract. *Ibid.*

In *Duncan v. Owensboro Water Co.* decided in the court of appeals of Kentucky, December 10, 1889, 12 Ky. L. Rep. 35, the doctrine established in the last preceding case was followed. E. W.

or damage sustained by reason of the failure to perform their duties and obligations in this respect. They are employed by the city, and responsible alone to the city. The people must trust to the municipal government to enforce the discharge of duties and obligations by the officers and agents of that government.

In the Nevada case (decided in 1881), after citing 69 N. Y., *supra*, with approval, and quoting therefrom, it was replied: "The board of the trustees of the town, in the exercise of a discretionary power conferred upon them by the legislature, contracted for a supply of water for the extinguishment of fires. The plaintiff, in common with the other residents of the town, enjoyed the advantages of this contract. He had an indirect interest in the performance of the contract by the water company, as had all of the property holders of the town; but such an interest is not sufficient to constitute the privity, either directly or by substitution, which must exist to give him a right of action upon the contract." In the Georgia case (decided in 1889), in an opinion by Bleckley, *Ch. J.*, it was replied: "The present case is not based upon the breach of a statutory duty, but solely upon a failure to comply with a contract made with the municipal government of Athens. To that contract the plaintiff was no party, and the action must fail for the want of the requisite privity between the parties before the court. There being no ground for recovery treating the action as one *ex contractu*, is it better founded treating it as one *ex delicto*? We think not. The violation of a contract entered into with the public, the breach being by mere omission or nonfeasance, is no tort, direct or indirect, to the private property of an individual, though he be a member of the community and a taxpayer to the government. Unless made so by the statute, a city is not liable for failing to protect the inhabitants against the destruction of property by fire. *Wright v. Augusta*, 78 Ga. 241; 7 Am. & Eng. Encyclop. Law, p. 997 *et seq.*"

The case in hand is on the contract made by the water company with the town of Trenton, and the only feature that it presents that can take it out of the principle laid down in these cases is that provision was made in this contract for a special tax to be raised to provide part of the consideration the water company was to, and did, receive, to which the plaintiff contributed, and an express promise contained in the contract that "should said water company, from lack of water supply, or any other cause except providential or unavoidable accident, fail to furnish a reasonable or adequate supply of water to extinguish any fire, then it shall be liable for all damages occasioned by such fire or neglect;" the argument being that here is an express promise of indemnity in a contract, in which the plaintiff is privy to the consideration at least. This argument was met by the supreme court of Iowa in *Becker v. Keokuk Water Works*, 79 Iowa, 419 (decided in 1890; probably not published when this question was before the Kansas City court of appeals), in the following manner: "(1)

The chief question raised by the demurrer was considered in *Davis v. Clinton Water Works Co.*, 54 Iowa, 59, 37 Am. Rep. 185, and decided adversely to the claim now made by plaintiff. But he contends that this case differs from that in several material particulars. In this case a special fund was raised by the city to pay for a sufficient supply of water for use in case of fires and to that fund plaintiff contributed. It is said in making the contract, and in levying and collecting the taxes required by its provisions, the city acted as a mere agent. We do not think the fact that the city levies and collects a tax to be paid to defendant creates any privity of interest between defendant and the taxpayers. In making the contract the city discharged one of the duties for which it was created, and in raising the required money it only provided the consideration due from it by virtue of the contract. It would hardly be claimed that the defendant would proceed against a taxpayer in the first instance for any unpaid money due under the contract from the city. . . . (2) It was decided in *Vanhorn v. Des Moines*, 68 Iowa, 448, 50 Am. Rep. 750, that the city was not liable for the failure of the waterworks company to furnish the water required by the contract to extinguish fires, even though the city had taken a contract from the company to protect it from liability which might arise for malfeasance or neglect on the part of the company. . . . Much stress is placed by appellant upon that part of section 18 which provides 'that said company shall be liable for all injury to persons or property caused by the negligence, mismanagement, or fault of itself or its employes while engaged in the construction or operation of its works.' Municipal corporations have and can exercise only such powers as are expressly granted to them by law, and such incidental ones as are necessary to make those powers available, and are essential to effectuate the purposes of the corporation; and those powers are strictly construed. *Clark v. Des Moines*, 19 Iowa, 212, 87 Am. Dec. 423; *McPherson v. Foster*, 43 Iowa, 57, 23 Am. Rep. 215. The law which authorizes cities to contract with individuals and companies for the building and operating of waterworks confers no power upon a city to make a contract of indemnity for the individual benefit of a taxpayer for a breach of which he could maintain an action in his own name."

The town of Trenton, under its charter, had power to pass ordinances "to prevent and extinguish fires" (Laws 1856, p. 358), and, as incident thereto, power to contract for a supply of water for that purpose. But it would seem, under the authorities cited, the plaintiff cannot maintain this action, for cogent reasons, which have been, and may be, put in several ways: First. Although it was within the power of the town, by contract, to supply water for the purpose of extinguishing fires, it did not owe the duty of extinguishing fires to plaintiff. *Heller v. Sedalia*, 58 Mo. 159, 14 Am. Rep. 444. Consequently, the case is not brought within the line of adjudicated cases which maintain an exception to the rule that suit upon a com-

tract must be brought by a party to the contract in cases where the promisee owed a duty to the third party, which the promisor undertook to perform. Second. A municipal corporation, in making contracts for the benefit of its citizens, acts for them collectively, and for all of them, in every act, and the relation of privity is not, and cannot be, introduced into such contracts by reason of taxpaying or the discharge of any civic duty by any individual citizen. Third. The benefit to be conferred upon the individual citizen by the contract is incidental to the contract, the primary object of which is the benefit of all the citizens in their corporate capacity. Fourth. It does not clearly appear that the benefit was intended for the citizens in their individual capacity, but may have been intended for the protection of the municipality, and, in the absence of express power in the municipality to make contracts for the indemnity of its individual citizens, should be so construed. *City of Kansas v. O'Connell*, 99 Mo. 357. Fifth. The relation that the contractor sustained to the town was that of its agent or servant to carry out the obligations of the contract upon its part for the benefit of all the citizens of the municipality; and for the enforcement of the terms thereof the citizens must look to the authorities of the city, and cannot individually maintain an action for a breach of the contract. Sixth. The town had no authority to make a contract to indemnify the plaintiff for the loss of his property by fire resulting from the neglect of its agents or servants to furnish an adequate supply of water to put it out, and therefore could not make such a contract that would be binding on another. The appellant is, however, not without authority to sustain his

position. In a recent case in Kentucky (decided in 1889) the supreme court of that state held "that when a water company has contracted with a city to furnish, at all times, a supply of water sufficient for the protection of the inhabitants and property of the city against fire, the company must answer in damages for loss by fire resulting from its failure or refusal to perform its contract." *Paducah Lumber Co. v. Paducah Water Supply Co.* 89 Ky. 340, 7 L. R. A. 77, and 89 Ky. 353, 7 L. R. A. 80. The authority for this proposition is not therein cited, and the reasoning upon which the position is rested does not seem to us entirely satisfactory. The plaintiff's contention also receives some support from the reasoning of *Judge Thompson in Lampert v. Lucile Gas-Light Co.*, 14 Mo. App. 376, according to whose views it would seem that the contract declared upon here should raise, on the part of the defendant, a public duty to be performed for the benefit of the inhabitants of the town distributively, and for the negligent nonperformance of that duty an action would lie by the town, "suing upon the contract, or by an individual specially damaged thereby, proceeding as for the nonperformance of a public duty, and setting up the contract by way of inducement." As before stated, the suit here is upon the contract, and not against the water company for the negligent nonperformance of a public duty, and these views have simply persuasive force. At all events, the position of the Kansas City court of appeals, and the ruling of the court below in this case, are sustained by the weight of authority, and the judgment herein will be affirmed.

All concur, except Barclay, J., absent.

LOUISIANA SUPREME COURT.

A. M. ODOM and Wife

ST. LOUIS SOUTHWESTERN R. CO.,
App't.

(45 La. Ann. —.)

*A passenger on a railroad train, when it stops at the station where he is to get off, when he attempts to do so, and is on the steps of the car, and the train moves ahead when he is in this situation, is compelled to adopt a perilous alternative,—to run the risk of being thrown from the train when its speed is accelerated, or to leave the train with less speed. In trying to escape imminent danger brought about by defendant's negligence, he is not guilty of contributory negligence, and the defendant corporation is responsible for its negligence.

(October 11, 1903.)

APPEAL by defendant from a judgment of the District Court for the Parish of Or-

*Headnote by McENERY, J.

NOTE.—The above case presents one of the exceptions to the general rule denying right of recovery to a person injured while leaving a train in motion. See note exhaustively reviewing the de- 23 L. R. A.

leans in favor of plaintiffs in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Modified.*

The facts are stated in the opinion.

Messrs. Alexander & Blanchard and Sam. H. West, for appellant:

In an action for damages for personal injuries, where the plaintiff has, by his own imprudence or negligence, contributed to his own injury, he cannot recover, even though defendant be in fault.

Fleytas v. Pontchartrain R. Co. 18 La. 339, 36 Am. Dec. 658; *Damont v. New Orleans & O. R. Co.* 9 La. 441, 61 Am. Dec. 214; *Laicher v. New Orleans, J. & G. N. R. Co.* 28 La. Ann. 320; *Schwartz v. Crescent City R. Co.* 30 La. Ann. 15; *Murray v. Pontchartrain R. Co.* 31 La. Ann. 490; *Weeks v. New Orleans & O. R. Co.* 32 La. Ann. 615; *Childs v. New York City R. Co.* 33 La. Ann. 154; *Woods v. Jones*, 34 La. Ann. 1086; *Houston v. Vicksburg, S. & P. R. Co.* 39 La. Ann. 796; *Walker v. Vicksburg, S. & P. R.*

Co. on the subject, with *Carr v. Bel River & R. Co.* (Cal.) 21 L. R. A. 355,—especially that portion of the note beginning on page 363.

Co. 7 L. R. A. 111, 41 La. Ann. 795; White v. Vicksburg, S. & P. R. Co. 42 La. Ann. 990; Olivier v. Louisville & N. R. Co. 43 La. Ann. 804; Herliach v. Louisville, N. O. & T. R. Co. 44 La. Ann. 280.

Where a person, in order to avoid being carried beyond his destination, jumps from a train while it is in motion, and sustains an injury, he cannot recover.

Damont v. New Orleans & O. R. Co. 9 La. Ann. 441, 61 Am. Dec. 214; Walker v. Vicksburg, S. & P. R. Co. 7 L. R. A. 111, 41 La. Ann. 795; Olivier v. Louisville & N. R. Co. 43 La. Ann. 804; Fournet v. Morgan's, L. & T. R. & S. S. Co. (La.) July Term, 1891.

Messrs. A. J. Murff and J. A. Snider, for appellees:

In *Lehman v. Louisiana Western R. Co.*, 87 La. Ann. 707, this court said: "Nothing is better settled than that carriers owe to their passengers the duty of exercising a very high degree of diligence, care, skill, and foresight in order to carry them safely. They are bound to the *diligentia diligentiis patrie-familias*—the diligence which a good specialist in that particular line of business would exercise, including all the care, caution, and skill, which common experience shows to be proper in order to secure safety."

In *Turner v. Vicksburg, S. & P. R. Co.*, 87 La. Ann. 648, 55 Am. Rep. 514, is the following language: "We have no hesitation in holding that a railroad company which affords no greater facilities to passengers in boarding their trains than the alternative to step down to the ground from a platform, and thence to climb up the car steps into the proper passenger coach, or to step into a baggage car and thence to walk to the rear, crossing over car platforms while the train is in motion, is guilty of gross negligence."

It is not proper management in a railroad company to require passengers to go through a series of coaches, and to pass over several platforms, in order to reach the particular coach they may desire to occupy.

Moses v. Louisville, N. O. & T. R. Co. 39 La. Ann. 653. See also Hutchinson, Carr. pp. 417, 418; Thomp. Carr. p. 108; Wardle v. New Orleans City R. Co. 35 La. Ann. 204; Beach, Contrib. Neg. p. 174; Peniston v. Chicago, St. L. & N. O. R. Co. 84 La. Ann. 780, 44 Am. Rep. 444.

Contributory negligence, in its legal signification, is such an act or omission on the part of a plaintiff, amounting to a want of ordinary care, as, concurring or co-operating with the negligent act of the defendant, is a proximate cause or occasion of the injury complained of.

Beach, Contrib. Neg. p. 8.

If plaintiff jumped at all it was involuntary and done to save herself and child from being crushed under the wheels of the moving cars. A jump prompted by such motives, when one is placed in such circumstances by defendant's negligence, is not contributory negligence.

Beach, Contrib. Neg. 2d ed. § 40; Damont v. New Orleans & O. R. Co. 9 La. Ann. 441, 61 Am. Dec. 214; 2 Wood, Railway Law, p. 1126; Thomp. Carr. p. 267.

23 L. R. A.

McEnergy, J., delivered the opinion of the court:

The plaintiff sued the defendant company for \$5,000 damages for personal injuries to his wife, alleged to have been received at Mitchell's Mills, in Bossier parish, on July 4, 1892. The petition alleges that the plaintiff "had alighted from the car, and Mrs. Odom, his said wife, was in the act of alighting therefrom; that, when she had reached about the second or third step of defendant company's car, the said train, under the control and management of said company's regular employes, gave a sudden and violent jerk, and began to move off; that, owing to said sudden jerk and violent movement, Emma L. Odom, one of your petitioners, with her infant child, whom she carried in her arms, were violently thrown from said car, her clothing was disarranged, her person exposed, and her body considerably bruised; that she received from said fall a hurt on her thigh, which lasted for several days, and gave her much pain; that in addition to this she received serious internal injuries from said fall, from the effects of which she has not fully recovered, and from which she suffers, and may suffer for an indefinite time; that the shock to her nervous system, resulting from the dangers to which her infant child and herself were exposed, was of such extent as to render her unconscious for a few moments, and to greatly impair her health." The defendant's answer is a general denial, and an averment of contributory negligence on the part of plaintiff. The case was tried by a jury, and a verdict and judgment were rendered in favor of the plaintiffs for \$1,000.

It is now well settled that contributory negligence on the part of the plaintiff is a bar to a recovery, although the defendant be in fault. *Fleytas v. Pontchartrain R. Co. 13 La. 339, 36 Am. Dec. 658; Damont v. New Orleans & O. R. Co. 9 La. 441, 61 Am. Dec. 214; Litcher v. New Orleans & G. N. R. Co. 28 La. Ann. 820; Schwarte v. Crescent City R. Co. 80 La. Ann. 15; Murray v. Pontchartrain R. Co. 81 La. Ann. 490; Weeks v. New Orleans & O. R. Co. 82 La. Ann. 615; Childs v. New York City R. Co. 33 La. Ann. 154; Woods v. Jones, 34 La. Ann. 1086; Houston v. Vicksburg, S. & P. R. Co. 36 La. Ann. 796; Walker v. Vicksburg, S. & P. R. Co. 41 La. Ann. 795, 7 L. R. A. 111; White v. Vicksburg, S. & P. R. Co. 42 La. Ann. 990; Olivier v. Louisville & N. R. Co. 43 La. Ann. 804; Herliach v. Louisville, N. O. & T. R. Co. 44 La. Ann. 280.*

And it is equally well established that when a passenger on a railroad train, in order to avoid being carried beyond his destination, jumps from a moving train, and sustains an injury, he cannot recover. *Damont v. New Orleans & O. R. Co. 9 La. Ann. 441, 61 Am. Dec. 214; Walker v. Vicksburg, S. & P. R. Co. 41 La. Ann. 795, 7 L. R. A. 111; Olivier v. Louisville & N. R. Co. 43 La. Ann. 804.*

It is therefore important to ascertain whether or not Mrs. Odom contributed to her own injury, and whether she voluntarily jumped from the train, while in motion, in

order to avoid being taken beyond her destination. It is alleged that she was on the steps of the car, in the act of leaving the car, when it moved ahead in its regular course, and she was thrown from the car. It is immaterial whether she jumped off or was thrown off, if she was in the act of leaving the car when it had stopped, and the train moved ahead when she was in the act of getting off. Some of the witnesses place her on the platform of the car, and testify that she jumped or stepped from the car platform to the small platform at Mitchells' Mills, which is a flag station. Others place her on the steps, and say that, as she was in the act of getting off, she was thrown to the ground by the movement of the train. On this particular point the evidence is conflicting, and seemingly irreconcilable. We are therefore disposed to apply the rule so often announced by us,—that on questions of fact, when the evidence is conflicting, and the witnesses of credibility, and the testimony almost equally balanced, we will not disturb the verdict of the jury. In this case this rule can be applied with propriety, for, without calling to our aid extraneous circumstances and physical facts, it would be the exercise of intuitive tact and wisdom to unthread the mass of tangled testimony in the record. There is no evidence that Odom and his wife unnecessarily delayed their efforts to leave the train. They had to go some distance, where they could conveniently get to the platform at the depot. The train had signaled for a stop, and when it slowed up they moved forward to get off. This fact is established, and also the fact that Odom got off the train when it had stopped, and had placed his bundles, and turned around to assist his wife. Here the conflict of testimony begins; plaintiff's witnesses placing Mrs. Odom on the steps of the car, and defendant's witnesses on the platform of the car, from which, while the car was in motion, she stepped to the depot platform, two steps, and went beyond it to the ground. Odom says, as he turned to assist his wife from the train, it moved off, separating him from her, and she was carried to the end of the platform, thrown from the steps against the side of the car, and to the ground. We think his testimony is corroborated as to his wife being on the step of the car when it moved off. Sentebl, defendant's witness, places her ten feet beyond the north end of the platform, on the ground, when he saw her. All the witnesses place her north of the platform. This platform faces north and south, and, the car being parallel with it, it is difficult to understand how she stepped to the platform, and was thrown this distance to the north of it. Defendant's witnesses were not, we think, in a position to see any movement of Mrs. Odom; and, when they testify they saw her on the platform, they may have spoken the truth, and at the instant thereafter she may have descended to the step. The witness of defendant nearest to her, in immediate proximity to her, and on whose testimony defendant places great reliance, is confused in his testimony, and makes two separate and distinct statements in the direct and cross-examination. We are of the opinion that the

jury were correct in finding the defendant corporation negligent in moving its train when Mrs. Odom was on the car step, in the act of leaving the train. She was placed in a situation, by the company, where she had no time for deliberation, and had to choose between two modes of escape, both of which were dangerous. Error in judgment on the part of plaintiff in trying to escape imminent danger brought about by defendant's negligence does not constitute contributory negligence, even though the accident might not have happened, had the act not been done. *Lehman v. Louisiana Western R. Co.* 37 La. Ann. 705. She was on the steps of the car by defendant's invitation to her to leave the train. In this situation, with an infant in her arms, the perilous alternative was presented to her, to remain there, and run the risk of being thrown from the train when it accelerated its speed, or to step from the train before it increased its motion. It would have been dangerous for her to attempt to reach the car platform with an infant in her arms. Under these circumstances, we are inclined to the opinion that she chose the less dangerous mode of escape. The defendant corporation is responsible for the consequences of the placing of Mrs. Odom in this situation.

The evidence fails to sustain the allegations in plaintiff's petition as to the personal injury of his wife. The evidence is unsatisfactory, and at the time of the injury there was no examination made by the family physician to ascertain the condition of Mrs. Odom, owing to her modesty, rather, we think, than from any desire to deceive. The examination was therefore superficial, and the family physician only visited her once. Medical experts were appointed by the court to make a personal examination of Mrs. Odom. No objection was made to this unusual application for medical experts to examine the person of the plaintiff. We will not, therefore, comment upon it. Objection was made, and a bill was reserved, to taxing the expense of the expert examination as costs to the defendant. It will not be necessary to discuss this, as the defendant will have to pay the costs. The expert testimony, as it was not objected to by defendants, may be referred to. It shows that there is "no evidence of disease existing, that could not reasonably be assigned to other causes." One of these experts is the physician who first visited Mrs. Odom. Mrs. Odom was undoubtedly injured, however, to some extent.

The judgment appealed from will be amended, and the damages fixed at \$500. It is therefore ordered, adjudged, and decreed that the judgment appealed from be amended by reducing the damages to the sum of \$500, and in other respects it be affirmed.

Response to petition for rehearing:

Without granting a rehearing in this case, we will add to the decree that the plaintiff and appellee pay costs of appeal, although this is unnecessary, as the costs followed the judgment. The amendment to the judgment necessarily cast the costs of appeal on the appellee.

Rehearing refused.

MISSISSIPPI SUPREME COURT.

W. C. JONES, *Appl.*,

v.

R. W. MILLSAPS *et al.*

(.....Miss.....)

1. An implied covenant of a lessor of the lower part of a building to make such repairs on the upper portion not leased as may be necessary for the protection of the enjoyment of the lessees of the lower portion cannot be raised by the fact that the lessee expressly covenants to make certain extraordinary repairs and alterations in the portion leased for the accommodation of his business.
2. The lessor of the lower story of a building, retaining the upper story in his own possession and use, is not bound by an implied covenant to make any repairs on the upper portion of the building, in the absence of deceit, misrepresentation, or fraud.

(October 30, 1893.)

NOTE.—Liability of landlord as to condition of part of premises not controlled by tenant.

The opinion in the main case of JONES v. MILLSAPS fails to clearly show the nature of the repairs sought, or cause of action for damages, and therefore will not be as valuable an authority on particular repairs that are essential and requisite, as if the matters in dispute and the elements of damages claimed had been disclosed and discussed.

Elevators.

A landlord operating and controlling the elevator is liable to a tenant or to a stranger for injuries caused by the door of the elevator well being left open and unprotected. *Gordon v. Cummings*, 9 L. R. A. 640, 152 Mass. 513; *Totten v. Phipps*, 52 N. Y. 354; *Fisher v. Jansen*, 30 Ill. App. 91, 123 Ill. 549.

And the statute requiring a railing protection was properly received in evidence. *Dawson v. Sloan*, 17 Jones & S. 304, 100 N. Y. 630.

And where there was no protecting rail as required by N. Y. Laws 1882, chap. 410, and the hatch was open, the question of negligence was properly submitted to the jury. *Atkinson v. Abraham*, 45 Hun, 238.

And it was properly submitted to the jury whether the landlord had failed to take reasonable precaution, where a boy apparently in charge of the elevator had left the door open. *Tousey v. Roberts*, 21 Jones & S. 446, 1 N. Y. S. R. 780; *People's Bank of Baltimore v. Morgolofski*, 75 Md. 432; *Dawson v. Sloan*, *supra*.

And the question of negligence was properly submitted to the jury, where the boy in charge opened the door when the cage was not at the landing. *Fisher v. Cook*, 23 Ill. App. 621, affirmed, 125 Ill. 280.

But the landlord is not liable if the elevator is kept locked and the key in proper place and a tenant improperly procures another key and leaves it open without consent or knowledge of landlord. *Handyside v. Powers*, 145 Mass. 123.

And Mass. Stat. 1882, chap. 208, requiring safeguards does not impose liability unless the act is accepted by the city.

He is liable to a person delivering beer on an elevator, who was injured by the bottles falling on him as the elevator rose, where the elevator was out of repair. *Ritterman v. Ropes*, 19 Jones & S. 34.

33 L. R. A.

APPEAL by plaintiff from a judgment of the Circuit Court for Hines County in favor of defendants in an action brought to recover damages caused to plaintiffs as tenants of defendants' property by reason of defendants' failure to make necessary repairs. *Affirmed.*

The facts are stated in the opinion.

Mr. E. E. Baldwin for appellant.

Messrs. Brame & Alexander for appellee.

Woods, J., delivered the opinion of the court:

While the declaration, in some of its allegations, is somewhat indefinite or uncertain, yet we do not think it so indefinite or uncertain, as a whole, as that the precise nature of the complaint is not apparent. While parts of the language employed are involved or obscure, the pleading does nevertheless contain a statement of the facts constituting the cause of action, in ordinary language. Our statutes are designed to obviate the necessity for, and the use of, all

And a landlord is liable for death of a boy delivering goods to a tenant, caused by a defective rope on dumb waiter, that would have been easily discovered on inspection. *Krey v. Schlusener*, 16 N. Y. Supp. 695.

And it is a question for the jury whether the landlord had used reasonable care in splicing a defective rope, instead of using a new one. *Blake v. Fox*, 43 N. Y. S. R. 537.

But the landlord is not liable for injuries caused by the rope breaking, if he had no notice of any defects. *Turnier v. Lathers*, 36 N. Y. S. R. 321.

There was no evidence as to the condition of the rope or why it broke in this case.

And a landlord is not liable for injury to a servant of his tenant, who attempted to ride on an elevator knowing that it was for freight only, and not for persons. *McCarthy v. Foster*, 156 Mass. 511.

Nor is he liable for the death of a visitor of a tenant's servant, riding on the servant's elevator, who was killed by sliding through a opening in the wire guard of the cage, while overcome by vertigo, fainting, or loss of consciousness. *Egan v. Berkshire Apartment Assn.* 31 N. Y. S. R. 545.

Common entrance, passway and yard, and access.

A landlord is liable to a tenant or person properly on his premises for injuries caused at common entrances, by openings or excavations left unguarded, or obstructions, which are under the landlord's control. *Camp v. Wood*, 76 N. Y. 92, 33 Am. Rep. 232; *Bunker v. Cummins*, 138 Ind. 443; *Elliott v. Pray*, 10 Allen, 373, 87 Am. Dec. 653; *Toomey v. Sanborn*, 145 Mass. 28.

And is liable for causing and leaving unprotected an excavation near a common passway. *Phillips v. Library Co. of Burlington*, 55 N. J. L. 307; *Curtis v. Kiley*, 153 Mass. 123.

Or dangerous explosives. *Powers v. Harlow*, 53 Mich. 507, 51 Am. Rep. 154.

Or dangerous awning in a defective condition over a common doorway. *Milford v. Holbrook*, 9 Allen, 17, 85 Am. Dec. 735.

And is liable for defective platform at entrance controlled by landlord for common use of all the occupants. *Readman v. Conway*, 126 Mass. 374; *Leydecker v. Brintnall*, 153 Mass. 222.

And a landlord is liable for injury to a tenant caused by ice on piazza and steps used in common,

technicalities in all pleadings, and to enable every litigant to have his complaint entertained and heard on his stating the facts constituting his cause of action in ordinary and concise language. If irrelevant or redundant matter is inserted in the pleading, the opposite party should move to strike out such matter. If the allegations of the pleading are so indefinite or uncertain that the precise nature of the complaint is not apparent, on motion of the opposite party the court will cause the same to be made definite and certain, or, this failing, will strike the pleading from the files. Code 1893, § 704. On this branch of the case, and beyond these general observations, we think it proper only to add two particularizations, viz.: (1) The first special cause of demurrer is not well taken. On examination of the written contract we find that the lessee (the plaintiff below) covenants to make certain specific repairs and alterations in and upon the leased storeroom, and for other repairs that may be necessary, or charges which he may deem requisite. That all the repairs and alterations

covenanted for on the lessee's part are limited to the leased storeroom is quite manifest. (2) The eight special grounds of demurrer are not maintainable. Reference to the transcript before us shows that it is the "cost and carriage and value of the goods,"—damages which the schedule filed with the declaration contains. But this schedule was unnecessary, and this part of the declaration may be treated as surplusage. With this useless matter disregarded, we still find a distinct averment of the pleading that the plaintiff is injured and damaged to the value of \$400.

We come now to the consideration of the real contention between the parties, presented in the last special cause of demurrer, and that is, to state it fairly and fully: Can the lessor, in this particular case of the leasing of the lower story to the plaintiff, with retention of the upper story in his own possession and use, be held liable for necessary repairs, in the absence of any covenants to keep in repair imposed upon him by the written contract of lease, and in the absence

which results from defective pipe controlled by the landlord. *Watkins v. Goodall*, 138 Mass. 533.

Or for dangerous condition of wall on common passway where he had notice, and a child of the tenant was injured. *Schilling v. Abernethy*, 112 Pa. 437.

For other walls, see *infra*, that heading.

So he is liable for injury to a child falling in an open-air shaft in the yard, where a heavy iron cover was removed, but he is not liable to the same boy who also had fallen in the cellar through an open door, as it did not appear to be negligence in having it open. *Canavan v. Stuyvesant*, 7 Misc. 113.

But it was held in *Burns v. Luckett* (Ohio) 8 Cln. L. Bull. 517, that a landlord of two tenement houses that were rented was not liable for the death of a child of one tenant, caused by falling in a vault in the center of the lot used in common by both houses. The question of common use was not discussed and the case seems to have been determined on the ground that the landlord had parted with all control and was not liable for defective condition, and he is not liable to a tenant on account of construction of steps, being made of rough, unheaven granite with no railing, and ice accumulating thereon—as he is not bound to change the construction after renting. He would be liable to strangers for defective construction. *Woods v. Naumkeag Steam Cotton Co.* 134 Mass. 357, 45 Am. Rep. 344.

And is not liable to a tenant for injury from construction of floor of passage made of loose boards, where the tenant rents knowing that it was constructed in that way—as the landlord is not bound to change the mode of construction. *Quinn v. Perham*, 151 Mass. 132.

And a tenant of part of a business house cannot have his lease canceled on account of license to pass through the other part having been denied him, the lease not providing for the same, and he having other access to his part. *Ward v. Robertson*, 77 Iowa, 159.

And it was held in *Williams v. Hayward*, 1 El. & Bl. 1040, 23 L. J. Q. B. 374, in an action for rent for lease of mining privilege with the privilege of using a railroad of the landlord, that an obstruction of such railroad easement is not an eviction; and the court says that "the rent issued out of the thing demised, that is the mines and minerals, and could not have issued out of the easement to use the railway in common with others on the land," 23 L. R. A.

not parcel of the demise; and we think that the preventing the defendant from using or obstructing him in the enjoyment is not such an eviction from the thing demised or any part of it as will amount to an answer to the claim of rent."

Halls and stairways.

A landlord is liable to a tenant or person rightfully using the premises, who is injured by reason of defective covering on the stairs used in common, and over which the landlord has exclusive control. *Henkel v. Murr*, 31 Hun. 28; *Evers v. Well*, 43 N. Y. S. R. 333; *Gillron v. Reilly*, 50 N. J. L. 28; *Neyer v. Miller*, 19 Jones & S. 516; *Monteith v. Finkbeiner*, 50 N. Y. S. R. 453; *McGuire v. Joslyn*, 81 N. Y. S. R. 990; *Pell v. Reinhart*, 12 L. R. A. 843, 127 N. Y. 381.

And is liable under New York Consolidation Act, § 652, requiring stairs in tenement houses to be kept in repair. *Brennan v. Lachat*, 14 Daly, 197.

And a landlord retaining control of a stairway used in common is generally liable to a tenant or party properly thereon, who is injured by reason of the same being dangerous from negligence of the landlord to keep in safe condition. *Marwedel v. Cook*, 154 Mass. 235; *O'Sullivan v. Norwood*, 14 Daly, 238; *Walton v. Kane*, 4 Misc. 238; *Brady v. Valentine*, 3 Misc. 20; *Sawyer v. McGillicuddy*, 3 L. R. A. 458, 81 Me. 313; *Englert v. Kruse*, 14 Daly, 247; *McMartin v. Hannay*, 10 Sess. Cas. 3d Series, 411; *Looney v. McLean*, 123 Mass. 33, 37 Am. Rep. 295; *O'Neill v. Kinken*, 8 N. Y. Supp. 554.

In *Donohue v. Kendall*, 13 Jones & S. 333, affirmed, 98 N. Y. 635, mem. the executors of a landlord of a tenement house were held liable for not keeping in repair a common stairway to a cellar used by several families occupying the building. The court said the executors were not bound to go into control of the property but if they did so they must fulfill duties and obligations grounded on their power of management.

But it was held in *Halpin v. Townsend*, 2 N. Y. City Ct. Rep. 417, affirmed, 107 N. Y. 633, that a visitor of a tenant injured on a common stairway where there was no rail or light, could not recover from the landlord, as the landlord did not light the hall and was not obliged to do so, and the visitor was guilty of contributory negligence.

The same was held in *Hildebrand v. Schenck*, 2 N. Y. City Ct. Rep. 249.

And *Purcell v. English*, 86 Ind. 84, 44 Am. Rep. 255, holds that a landlord is not liable to a tenant

of deceit, misrepresentation, or fraud? The general rule that a landlord, in the absence of express covenants in the contract of lease, and in the absence of deceit or misrepresentation, cannot be held liable on any implied warranty on his part for repairs, is not called in controversy by counsel for appellant, as we understand his argument. The correctness and the universality of the rule as stated are admitted; but the lease of a lower story by a landlord retaining the other parts of the building in his own possession and use presents a case exceptional to the general rule, it is contended. This position rests, as it appears to us, upon one of two grounds: (1) Either upon an implied covenant for repairs on the lessor's part, springing out of the written contract itself; or (2) upon the relationship of the parties to each other and to the leased premises. The subject is not free from difficulty, nor is there wanting eminent authority for both of the grounds just mentioned, of fixing liability upon the lessor. Let us examine these in order, and in the

light of the authorities cited in support of them.

The first proposition is to fix liability for repairs upon the lessor, in the absence of any express covenants in the written contract of lease, on an implied covenant growing out of the lessee's express covenants to repair the leased storeroom. In the case at bar there are two ready answers to the contention: (1) The repairs and alterations covenanted for by the lessee are not to be supposed to refer to repairs of ordinary wear and tear. These were imposed by law, and needed no sanctions of covenant. They are, as is plainly to be seen in the contract, covenants for extraordinary repairs or alterations, to be made for the peculiar accommodation of the lessee's business. And (2) conclusively, to raise this implied covenant to repair by the lessor would be to introduce into the written contract of the parties a most important condition which they did not incorporate in it themselves when they reduced their agreement to writing. It would amount to an essential

injured by reason of ice and snow being left on a common stairs where the tenant had knowledge of danger. *distinguishing* *Looney v. McLean, supra*; as in that case the unsafe condition was permanent and this temporary, and in that case it was not connected directly with plaintiff. Here it was not defective construction or unsafe condition when leased—and the court claims that this stairway by the lease was under control of the tenant as he had the right to use it.

And a landlord was not liable to a tenant injured in using an outside stairway where the evidence tended to show that the injury was caused by a horse pulling it down that was hitched to the same. *Platt v. Farney*, 16 Ill. App. 216.

And a person not entitled to enter the premises, having no business there, cannot recover for injuries caused by defective condition of steps. *Hart v. Cole*, 16 L. R. A. 557, 156 Mass. 475; *Plummer v. Dill*, 156 Mass. 428.

So the landlord is not liable to a subtenant, injured by a hole in the common hall, where the landlord had no notice, and the tenant's lease prohibited subletting. *Cole v. McKey*, 66 Wis. 500, 87 Am. Rep. 293.

And is not liable for injuries to a child of a third-floor tenant, caused by a dark hall, where the child's mother was accustomed to light the hall. *Muller v. Minken*, 5 Misc. 444.

A landlord is not liable to a party injured by reason of opening a wrong door by mistake and falling down stairs at the door. *Kaiser v. Hirth*, 46 How. Pr. 161, 4 Jones & S. 344; *Hilsenbeck v. Guhring*, 131 N. Y. 674.

And the same was held where a tenant had agreed to light the hall and failed to do so. *Jucht v. Behrens*, 26 N. Y. S. R. 690.

And in *Barker v. Baker*, 7 N. Y. S. R. 834, it was held that a landlord of a business block was not liable for injury received by a party falling on a landing between two flights, where the only light was through the glass doors and transoms of the offices, and the day was dark.

And *Humphrey v. Watt*, 22 U. C. C. P. 580, holds that a landlord is not liable to a tenant having knowledge of the construction of the hall with a pipe hole in the floor, injured in attempting to move her goods across the hall to another room.

The court also placed the decision on the ground that as no liability existed if tenant had leased a whole house, still less would there be if he rented only part; but this proposition is not generally accepted as applicable to a tenement or apartment houses, for repairs in common halls.

cepted as applicable to a tenement or apartment houses, for repairs in common halls.

Fire escape.

A landlord failing to provide a fire escape required by statute, will be liable for damages caused thereby. *Willy v. Mulledy*, 78 N. Y. 810, 34 Am. Rep. 536; *McLaughlin v. Arnfield*, 68 Hun. 376.

So where a statute requires all buildings over two stories high to be furnished with fire escapes, or the owner will be liable for damages, he is not relieved although the tenant injured was in the second story. *Rose v. King*, 15 L. R. A. 160, 49 Ohio St. 213.

But he is not liable for injury to a child of a tenant caused by using fire escape platform as a balcony, although the hinge was defective and trap door gave way. *McAlpin v. Powell*, 70 N. Y. 126, 26 Am. Rep. 555.

Sidewalk.

A landlord having control is liable to the party injured in falling down unprotected openings on the street. *Stevenson v. Joy*, 152 Mass. 45; *Jennings v. Van Schaick*, 108 N. Y. 530; *Tomie v. Hampton*, 129 Ill. 376.

In the case of *Tomie v. Hampton, supra*, the opening existed before renting.

And a landlord is liable for injuries received by a person falling in a defective and unprotected coal-hole in the sidewalk although the premises are occupied by a monthly tenant. *Delay v. Savage*, 145 Mass. 88.

But a landlord employing a watchman is not liable for injuries caused by an open coal hole, where the covering is removed while the watchman's back is turned. *Martin v. Pettit*, 5 L. R. A. 794, 117 N. Y. 118, reversing *Wasson v. Pettit*, 49 Hun. 166.

And a landlord occupying one room as a boarder is not liable for neglect to remove snow on sidewalk under a city ordinance requiring it to be "removed by the tenant occupant and in case of no tenant by the owner." *Com. v. Watson*, 97 Mass. 562.

Landlords would be liable to strangers for defects of buildings having control of entrance, and doors in common; but under Mass. Stat. 1850 the city is liable for defects in sidewalks and injuries from snow and ice, and this remedy is exclusive. *Kirby v. Boylston Market Assn.* 14 Gray, 249, 74 Am. Dec. 682.

Walls.

A landlord is liable for injury to a tenant in attempting to raise a building. *Butler v. Cushing*, 46

modification by parol of a written contract. It would be, not the explanation by parol of an obscurity on the face of the contract, but the substitution of one contract for another,—a contract by parol for the written one made by the parties. The case of *Bissell v. Lloyd*, 100 Ill. 214, affords distinct support to the contention of appellant as to the implied covenant of the lessor to repair the portion of the building whose possession he retained, in order that the comfort or security of the tenant of the leased room might be maintained. But there is no attempt to fortify this conclusion of the supreme court of Illinois by reason or authority. It is the naked, dogmatic assertion of a court of last resort, and we decline to yield our assent to it.

The other ground of contention, viz., the liability for repairs on the part of the lessor in cases where a part, only, of the premises are leased, and the remainder retained by the landlord, because of the relationship of the parties to each other and to the property, seems to be clearly recognized in the case of *Toole v. Beckett*, 67 Me. 544, 24 Am. Rep. 54.

The decision and its reasoning are not satisfactory, and the vice of the opinion is that it confounds the passivity of the landlord with affirmative action on his part amounting to negligence. It overlooks the fundamental principle in all leases by which the lessor is made to "hand off" during the continuance of the lease. He may not be required to affirmatively aid the tenant in repairs, and he may not affirmatively act inconsistently with his lessee's right to possession and enjoyment; and, so long as the lessor abstains from all action, he is within the line of his duty. The Maine case confounds negligence with nonintervention, and is unsound.

A critical study of the case of *Priest v. Nichols*, 116 Mass. 401; *Kirby v. Boylston Market Assn.* 14 Gray, 249, 74 Am. Dec. 682, and *Looney v. McLean*, 129 Mass. 33, 37 Am. Rep. 295,—the two former cited, and supposed to have been followed, by the court in 67 Me., and the last relied upon by appellant's counsel,—readily distinguishes them from the Maine case and the case at bar. The case of *Kirby v. Boylston Market Assn.*, 14 Gray,

Hun, 521. This case does not show whether tenant was of whole or part.

And a landlord of a tenement house failing to keep the part of the house under his control in repair is liable to the tenant, injured by the fall of the walls. *Bold v. O'Brien*, 12 Daly, 160.

And the landlord of an apartment house is liable to a lessee injured by a wall falling, caused by excavation of adjoining owner. *Ward v. Fagan*, 28 Mo. App. 116.

This building was controlled by the landlord, and as to this wall the tenant occupied the relation of stranger.

But *Howard v. Doolittle*, 3 Duer, 464, holds that the landlord was not liable for failing to shore up the wall of his tenant's building while an excavation was made by an adjacent owner. In this case the landlord had parted with all control and the question considered was whether he was bound to repair after renting.

And a landlord owning adjacent lot and removing outside wall from part of leased premises exposing goods, is not liable, where it was questionable if the extension exposed had any wall of its own, and also questionable if the tenant was injured. The liability of the landlord in such a case is the same as that of another owner. *Rotter v. Goerlitz*, 16 Daly, 484.

Falling articles.

A landlord in control of a building occupied by several is liable to a person injured from the fall of the cornice, or timbers from the roof, or a stone from the top of the fire-escape. *O'Connor v. Andrews*, 81 Tex. 28; *O'Connor v. Curtis* (Tex.) Feb. 23, 1892; *Hungerford v. Bent*, 55 Hun, 3; *Schachne v. Barnett*, 26 Jones & S. 145.

And a landlord furnishing power in an apartment building is liable to an employé of a tenant injured by defective shafting falling in the stairway. *Poor v. Sears*, 154 Mass. 539.

A landlord having notice is liable to his tenant or person properly on the premises, injured in a common hallway by reason of the same being out of repair, as from fall of plaster. *Dollard v. Roberts*, 14 L. R. A. 236, 130 N. Y. 299.

And is liable to a tenant for injury from a falling sign used by the landlord above the tenant's room. *Payne v. Irvin*, 144 Ill. 483, affirming 44 Ill. App. 105.

And a landlord controlling the roof is liable for injuries caused to a stranger by the fall of accu-

mulated snow and ice from the same. *Shibley v. Fifty Associates*, 101 Mass. 251, 3 Am. Rep. 346.

But a landlord occupying premises and renting bench and power to a tenant in a lumber mill, is not liable to him for injury by timber thrown from the upper door as the tenant was coming out of the lower door, having knowledge of the custom of loading and of this load in particular. *Allen v. Johnson*, 4 L. R. A. 734, 76 Mich. 81.

Light and air.

A tenant of a second floor is entitled to damages for addition built in front of his rooms obstructing his view and access, between the building and the sidewalk. *Brand v. Grace*, 154 Mass. 210.

But it is no eviction of a tenant for the landlord to build on an adjoining lot, obstructing the light, and the statute allowing a surrender when the building is untenable does not apply. *Johnson v. Oppenheim*, 2 Jones & S. 416.

For other cases on light and air, see *note to Case v. Minot* (Mass.) 22 L. R. A. 536.

Nuisances.

A landlord is not liable to one tenant for renting another part of the same premises to another tenant who used gasoline or other dangerous articles, unless the landlord knew it would be so used. *Lewis v. Hughes*, 12 Colo. 206.

And a tenant vacating a stable because the landlord rented the other part as a restaurant cannot claim an eviction on account of smoke, heat, and fumes injuring his horses. *Gray v. Goff*, 3 Mo. App. 829.

This on the ground that there is no implied covenant that premises are tenable.

And a lessee of a storeroom cannot refuse to pay rent on account of operation of elevator and use of stairway necessary for other part, when such tenant renewed his lease after such use. *Benedict v. Barling*, 79 Wis. 551.

A party having a delicate trade should stipulate for protection, and where the landlord used the cellar and heated the first floor to 80 degrees, causing paper stored there to lose weight, the tenant could not recover damages as there was no implied warranty of fitness, and the tenant saw the boiler in the cellar when he rented, and the landlord did not know that the kind of paper stored would be injured. *Robinson v. Kilvert*, 17 Wash. L. Rep. 697, 49 Alb. L. J. 312, 61 L. T. N. S. 60.

249, 74 Am. Dec. 682, determined that "the owner of a building leased in several tenements, who is bound to make all necessary repairs, and has control of the passageways and doors for that purpose, and who keeps the keys, and opens and closes the doors of portions of the building at times fixed by occupants, is not relieved from liability for injuries caused by defects in the building, or by the falling of snow and ice therefrom." The case, on its facts, does not bear the slightest semblance to the case at bar, nor is the opinion of the court authority for the proposition we are considering. The case of *Priest v. Nichols*, 116 Mass. 401, presents a clear case of negligence in affirmative action on the landlord's part. The landlord occupied the upper story, and negligently injured his tenant below by water escaping from a waste pipe and from an engine which the landlord used and had charge of. Here liability was imposed for negligence in affirmative action by the landlord in the use of his engine and waste pipe. The case of *Looney v. McLean*, 129 Mass. 83, 87 Am.

Rep. 295, held that a landlord who lets rooms in a tenement house to different tenants, with a right of way in common over a staircase, is bound to keep such staircase in repair; but that is not the case at bar. If the weight of authority is controlling, it will be ascertained, on examination, that the current is against liability of the lessor in such case as this. See *Walker v. Gilbert*, 2 Robt. 214; *Doupe v. Genin*, 45 N. Y. 119, 6 Am. Rep. 47; *Ward v. Fagin*, 101 Mo. 669, 10 L. R. A. 147; *Cole v. McKey*, 66 Wis. 500, 57 Am. Rep. 293; *Purcell v. English*, 86 Ind. 84, 44 Am. Rep. 255; *Krueger v. Ferrant*, 29 Minn. 385, 43 Am. Rep. 223.

This line of decisions rests upon sound reason. The general rule is firmly established that no implied covenant for repairs can be raised against the lessor. The lessee cannot invoke an implied covenant of the landlord that the leased premises are fit and suitable for the lessee's business or use. The intending tenant must use his own faculties, and judge for himself if the premises he desires to lease are in repair, and are suitable

And a tenant cannot plead an eviction where the other tenant so used his part as a house of prostitution without the knowledge or consent of landlord. *Gilbooley v. Washington*, 4 N. Y. 217.

But a landlord cannot recover rent where the tenant vacated part on account of landlord converting other part into a house of prostitution. *Dyett v. Pendleton*, 8 Cow. 727.

And a landlord of an apartment building is liable to lower tenants for injury caused by fall of upper floor, from overloading the same, where he misrepresented to tenant of upper floor the strength of the same. *Brunswick-Balke Callender Co. v. Bees*, 69 Wis. 442.

For other nuisances, see "Water."

Roof used in common.

A license to use roof as a drying place for clothes does not require the landlord to fence it. *Ivay v. Hedges*, L. R. 9 Q. B. Div. 80.

And the landlord is not liable for injuries caused by breaking of slat on roof used in common for drying clothes, where he had no notice of any defect and was not guilty of any negligence. *Alperin v. Earle*, 55 Hun. 211.

And is not liable, where child of tenant fell out of a window and through a skylight on a roof used in common for drying clothes, as landlords are not required to build protections to catch children that fall out of windows. *Miller v. Woodhead*, 104 N. Y. 471.

Water from roof.

A landlord having control of the roof is generally liable to the tenant below for damages from defective condition of the same, or for negligently leaving the conducting pipe so as to flood premises below, or for exposing goods of tenant by uncovering roof. *McVie v. McNaughton*, 21 N. Y. Week. Dig. 36; *Worthington v. Parker*, 11 Daly, 545; *Rauth v. Davenport*, 45 N. Y. S. R. 326, and 60 Hun. 70; *Sulzbacher v. Dickie*, 6 Daly, 469; *Center v. Davis*, 39 Ga. 210; *Toole v. Beckett*, 67 Me. 544, 24 Am. Rep. 54; *Glückauf v. Maurer*, 75 Ill. 289, 20 Am. Rep. 238; *Bissell v. Lloyd*, 100 Ill. 214.

And under Georgia Code, a landlord is bound to repair a leak after notice, and if the landlord occupied the upper rooms he would be liable to the lower tenant for damages from a leaky roof without notice, but would not be liable for damages resulting from an extraordinary fall of snow. *Guthman v. Castleberry*, 49 Ga. 272.

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Where the landlord examined the roof five days prior and found it all right, he is not liable for injury caused to lower floor tenant, by leak in gutter pipe made by rats gnawing a hole therein. *Carstairs v. Taylor*, L. R. 6 Exch. 217, 40 L. J. Exch. 129, 19 Week. Rep. 723.

And it was held in *Tenant v. Hall*, 27 N. B. 489, that a landlord occupying the upper floor was not liable to the tenant below, injured by water from an insufficient pipe during a severe storm where there was no negligence in the construction of the pipe, or the mode adopted. While the court said that there was no implied warranty the jury found for the defendant on the question of absence of negligence in the construction of the pipe and there was no question made as to the terms on which the question of negligence was submitted to them. So the verdict was not disturbed.

And it was held in *Krueger v. Ferrant*, 29 Minn. 385, 43 Am. Rep. 223, that in the absence of an express covenant to repair, a landlord having control of the roof where there are several tenants is not liable for damages from leak on tenant below as there is no covenant implied to keep in repair, or that the premises are suitable, and shelter from roof does not require landlord to repair, and the risk was assumed.

This case appears to conflict with the weight of authority, although cited with approval by the main case. The cases on which it mainly depends are those of liability of adjoining owners or where tenant has exclusive control.

Water, pipes, and plumbing controlled by landlord.

A landlord occupying the upper floor is liable to tenant below for injury to tenant below for leakage from his room. *Slapenhorst v. American Mfg. Co.* 15 Abb. Pr. N. S. 355; *Jackson v. Eddy*, 12 Mo. 209; *Priest v. Nichols*, 116 Mass. 401.

And is liable to tenant for damages for defective plumbing controlled by the landlord. *Bernaer v. Hartman Steel Co.* 38 Ill. App. 491; *Pike v. Brittan*, 71 Cal. 159, 60 Am. Rep. 527; *Freidenburg v. Jones*, 63 Ga. 612.

A landlord allowing sewerage to flow from his lot adjoining into cellar of his tenant is liable. *Smith v. Faxon*, 156 Mass. 589.

And if he fails to comply with the orders of the board of health as to sewer gas in an apartment building he cannot collect rent from a tenant vacating on account of the same. *Bradley v. De Gols*

for his use. If he wishes to protect himself against the hazards of subsequently accruing accidents or defects requiring repairs, he must do so by proper covenants in his contract of lease. He takes his leased premises for better or for worse, as an ancient authority aptly characterizes his taking. He takes the premises as he finds them, and he must return them, as nearly as possible, in like condition. This necessarily involves his making repairs on the property during the term of his lease. And all this must be true—all this is true—whether he lease one room or six, the whole or a part of the house. If he rents the whole, the wisdom and necessity of his protecting himself in his contract by

stipulating for repairs by his landlord appears to be not less, but greater, than if he rents a part, only. The rule extends to the whole premises, and to every part of the premises. The duty of the tenant to examine the premises, and protect himself by proper stipulations in his contract of lease if danger is suggested by his examination, is the same in case of the leasing of a whole or of part, only. He cannot fix liability upon his lessor by some supposed implied covenant to repair, when he had it in his power to create this covenant expressly in the written contract, and failed to do so.

Affirmed.

Couria, 14 Abb. N. C. 58, 12 Daly, 393, 67 How. Pr. 76.

And if the water pipes controlled by landlord are out of order, and the tenant is injured thereby, rent ceases under New York Act 1880, providing that rent shall cease when property is untenable. *Vann v. Rouse*, 94 N. Y. 401.

And the same was held where the tenant's part was overflowed by filth from vault, which was on that or an adjoining lot. *Fash v. Kavanagh*, 24 How. Pr. 347.

Under New York Act 1880, chap. 345, providing rent shall cease if the building is unfit for occupancy, a tenant is justified in leaving where he is annoyed by explosions, shaking of the building, and cracking of plaster, which the landlord claimed was caused by dynamite placed somewhere to injure him, but probably was from the water pipes and tank. *Tallman v. Murphy*, 120 N. Y. 345.

A verdict for a tenant on his tender of amount due was sustained where he filed a counterclaim for damages from water from pipes above, in a suit for rent, and the record did not show that the pipes were in repair when rented, and it was questionable whether the jury considered the counterclaim. *Coleough v. Niland*, 68 Wis. 309.

But it was held in *Edgerton v. Page*, 20 N. Y. 231, that damages caused to a tenant by water from the landlord above him is not a proper set-off or counterclaim for rent where there is no eviction as the acts of plaintiff are acts of trespass or negligence.

And a landlord is not liable for breach of covenant of quiet enjoyment where the tenant of lower floor was injured by bursting of pipe at the branch on first floor, as the defect existed before the lease was made. But if the water had been disconnected from plaintiff's pipe it would have been different, and injury from escape of water was not pleaded. *Anderson v. Oppenheimer*, L. R. 5 Q. B. Div. 602, 49 L. J. Q. B. 708.

And a landlord is not liable to a tenant injured by water where the record does not show whether the pipes burst on or off the part occupied by tenant. *Simons v. Seward*, 22 Jones & S. 403.

Water, pipes, and plumbing used by other tenants.

A landlord is not liable to one tenant for injuries caused by abuse or misuse of water privileges of tenant above. *White v. Montgomery*, 58 Ga. 204; *Mendel v. Fink*, 8 Ill. App. 378; *Greene v. Hague*, 10 Ill. App. 568; *McCarthy v. York County Sav. Bank*, 74 Me. 315, 43 Am. Rep. 591; *Robbins v. Mount*, 35 How. Pr. 24; *Kenney v. Barna*, 67 Mich. 338.

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And is not liable for leakage from room above the tenant, where the tenant injured has exempted him from all damages by leakage, and the tenant injured neglected to turn off water running to water closet on the floor above that he had the use of. *Taylor v. Bailey*, 74 Ill. 178.

But a landlord is bound to keep in condition pipes used in common by several tenants. *Fitch v. Armour*, 27 Jones & S. 413.

A landlord having notice of misuse of water closet by upper tenants in common is liable, in Georgia, to lower tenants for damages from overflow. *Marshall v. Cohen*, 44 Ga. 489, 9 Am. Rep. 170.

And is liable to his tenant for injuries from defective water pipes of another tenant. *Ingwersen v. Rankin*, 47 N. J. L. 18, 54 Am. Rep. 109.

And under N. Y. Laws 1880, chap. 335, providing that tenancy shall cease if premises are untenable, rent cannot be collected from a tenant who was forced to leave by reason of defective plumbing of other tenant. *St. Michaels Prot. Episcopal Church v. Behrens*, 10 N. Y. Civ. Proc. Rep. 181.

Water supply.

A landlord cannot cut off water supply pipes. *Gans v. Hughes*, 38 N. Y. S. R. 490; *West Side Sav. Bank v. Newton*, 76 N. Y. 613, reversing 8 Daly, 332.

But where no duty rested on the landlord to apportion the water tax, and the tenant of the fourth and fifth floors refused to pay a bill for the whole, and the supply was cut off by the city, and then he had to pay it all and pipe his own part, he was liable for rent as the lease did not guarantee a supply of water. *Reynolds v. Meldrum*, 33 N. Y. S. R. 664.

And where the water supply was cut off, but the answer did not show that it was on account of a leak in another part of the building, and might have been cut off by some tenant without the landlord's knowledge, the tenant was liable for rent. *Coddington v. Dunham*, 8 Jones & S. 412.

A landlord leasing a house and land, with a license to use a pump on another tract, is not liable in an action of covenant for nonrepair of the pump. If an action would lie it would be an action of case. *Pomfret v. Ricroft*, 1 Wms. Saund. 4th ed. 322.

For rights of tenants on condemnation, see *note* to *Corrigan v. Chicago (Ill.)* 21 L. R. A. 212.

For liability in case of fire see *note* to *Porter v. Tull (Wash.)* 23 L. R. A. 613.

L. T.

MARYLAND COURT OF APPEALS.

Richard A. TYSON *et al.*, Appts.,
v.
WESTERN NATIONAL BANK
OF BALTIMORE.

(77 Md. 412.)

1. An indorsement "for collection" will not pass the title to commercial paper to the bank in which it is deposited.
2. Entering the amount of commercial paper deposited with a bank "for collection" as cash in the pass-book of the depositor and to his credit on the books of the bank will not pass to the bank the title to the paper if it was not to be an absolute credit but was to be charged back if not collected.
3. The collection of paper deposited with a bank indorsed "for collection" after the bank has ceased to do business because of insolvency will not vest the title to the paper in the bank.
4. A third person can acquire from the bank no title to commercial paper deposited with an indorsement "for collection."
5. No judgment can be rendered in a case submitted to the court for its opinion upon an agreed statement of facts, unless a request for judgment is distinctly made in the agreed case.

(March 16, 1898.)

APPPEAL by plaintiffs from a judgment of the Court of Common Pleas in favor of defendant in an action brought to recover damages for the alleged wrongful conversion of the proceeds of a draft and check which belonged to plaintiff. *Reversed.*

The case sufficiently appears in the opinion.

Messrs. Miller & Bonnal, for appellants:

When a draft, check, or note is indorsed "for collection" for account of "such indorsement is known in law as a restrictive indorsement, and the effect of it is to retain the title to the paper in the indorser.

1 Dan. Neg. Inst. §§ 336, 337; *Morse, Banks & Banking*, § 593; *Cecil Bank v. Farmers Bank*, 23 Md. 148; *National Butchers & Drovers Bank v. Hubbell*, 7 L. R. A. 853, 117 N. Y. 384; *Fifth Nat. Bank v. Armstrong*, 40 Fed. Rep. 46; *Manufacturers Nat. Bank v. Continental Bank*, 2 L. R. A. 699, 148 Mass. 553; *Levi v. National Bank of Missouri*, 5 Dill. 107; *Bulbach v. Frelinghuysen*, 15 Fed. Rep. 683; 2 *Morse, Banks & Banking*, §§ 583, 586; *First Nat. Bank of Trinidad v. First Nat. Bank of Denver*, 4 Dill. 290; *First Nat. Bank of Circleville v. Bank of Monroe*, 33 Fed. Rep. 408; *St. Louis & S. F. R. Co. v. Johnston*,

183 U. S. 556, 33 L. ed. 688; *Scott v. Ocean Bank*, 23 N. Y. 289.

The language of the indorsement is without ambiguity, and needs no explanation, either by parol proof or by resort to usage. It does not purport to transfer the title of the paper or the ownership of the money when received. Both these remain, by the reasonable and almost necessary meaning of the language, in the indorser.

White v. Miners Nat. Bank of Georgetown, Colo. 103 U. S. 660, 26 L. ed. 253.

Nor is the effect of the written contracts between the parties made by indorsements and letters, to be altered by the fact that Tyson & Rawls were entitled to check against the credits given them, before the proceeds of the paper actually came into the hands of J. J. Nicholson & Sons.

St. Louis & S. F. R. Co. v. Johnston, 183 U. S. 574, 33 L. ed. 686; *Bulbach v. Frelinghuysen*, *supra*; *Giles v. Perkins*, 9 East, 12, approved in *St. Louis & S. F. R. Co. v. Johnston*, *supra*; *Fifth Nat. Bank v. Armstrong*, and *Levi v. National Bank of Missouri*, *supra*.

The indorsement upon the draft and check gave notice to the appellee that the appellants were the owners, and J. J. Nicholson & Sons merely agents for collection, and therefore the appellee acquired the paper with notice of and subject to the rights of the appellants.

Cecil Bank v. Farmers Bank, First Nat. Bank of Circleville v. Bank of Monroe, and *Manufacturers Nat. Bank v. Continental Bank*, *supra*; *Merchants Nat. Bank of St. Paul v. Hanson*, 33 Minn. 40; *Bank of the Metropolis v. First Nat. Bank of Jersey City*, 19 Fed. Rep. 301; *First Nat. Bank of Chicago v. Reno County Bank*, 3 Fed. Rep. 257; *Blaine v. Bourne*, 11 R. I. 119, 28 Am. Rep. 429, and *Clafin v. Wilson*, 51 Iowa, 15.

If appellee was the sub-agent for collection, Tyson & Rawls could recover.

Cecil Bank v. Farmers Bank, First Nat. Bank of Circleville v. Bank of Monroe, and *Fifth Nat. Bank v. Armstrong*, *supra*; *Morse, Banks & Banking*, § 591.

The insolvency of an agent revokes the agency; and when J. J. Nicholson & Sons made an assignment for the benefit of creditors, their agency to collect money for Tyson & Rawls terminated, and the money afterwards coming into the hands of the assignees, from this check and draft, would be held by the assignees in trust for Tyson & Rawls.

See *Morse, Banks & Banking*, § 248; *Levi v. National Bank of Missouri*, 5 Dill. 104; *First Nat. Bank of Croton Point v. First Nat. Bank of Richmond*, 76 Ind. 561; *Re Havens' Petition*,

NOTE.—The effect of the indorsement of paper "for collection" to prevent the passing of title on a deposit of such paper in a bank, is a question on which the above case fairly represents the current of decisions.

On this subject in harmony with the present case, see *National Butchers & Drovers Bank v. Hubbell* (N. Y.) 7 L. R. A. 852, and *note*; *Freeman's Nat. Bank v. National Tube Works Co.* (Mass.) 8 L. R. A. 42, and *note*; also *Armstrong v. Boyertown* 23 L. R. A.

Nat. Bank (Ky.) 9 L. R. A. 558; *Manufacturers Nat. Bank of Boston v. Continental Bank of St. Louis* (Mass.) 2 L. R. A. 699.

On the more difficult question of the effect of an indorsement of a check "for deposit," on which there has been but little authority, although the custom of making such indorsements is quite general, see *Ditch v. Western Nat. Bank of Baltimore*, *post*, 164, and *note*.

8 Ben. 809; *First Nat. Bank of Circleville v. Bank of Monroe*, 38 Fed. Rep. 408; *Manufacturers Nat. Bank v. Continental Bank*, 2 L. R. A. 699, 148 Mass. 559.

Messrs. Schmucker & Whitelock for appellee.

Bryan, J., delivered the opinion of the court:

Tyson & Rawls brought suit against the Western Bank of Baltimore. The facts, so far as they are material, are as follows: The plaintiffs who were bankers in Greenville, North Carolina, for two years before the transactions now in question kept an account with Nicholson & Sons, bankers in the city of Baltimore. They from time to time forwarded by mail to Nicholson & Sons drafts, checks, and notes of different persons, and they were indorsed in this manner: "For collection for account of Tyson and Rawls, Greenville, N. C." Nicholson & Sons would at once pass to the credit of Tyson & Rawls upon their ledger account, as cash, all checks and sight drafts, and would promptly inform them by mail of the amount of such credit. Tyson & Rawls were entitled to check against such credits as soon as they were entered, and Nicholson & Sons treated and used as their own property the sight drafts and checks so credited, in the same manner as if they had been deposited over their counter in the ordinary way; but Tyson & Rawls did not know and did not inquire how Nicholson & Sons treated and dealt with such drafts and checks. If any of the sight drafts or checks which were credited as cash were dishonored by the parties on whom they were drawn, Nicholson & Sons would charge the account of Tyson & Rawls with them and give them notice by mail. When promissory notes or time drafts were mailed to Nicholson & Sons, they were not entered to the credit of Tyson & Rawls until they had been collected. There was no special agreement between these parties in regard to their relations with each other except such as arose from their course of dealing.

On the 9th of January, 1892, Tyson & Rawls forwarded to Nicholson & Sons a check of P. E. Braswell on the State Bank of Commerce, Hendersonville, North Carolina, for \$400 payable to the order of Jarvis & Blow. They had discounted this check, and they indorsed it for collection for their account. Nicholson & Sons credited it to them as cash, and so informed them by mail, and indorsed it for value to the Western National Bank of Baltimore. The bank collected the check on or about the 24th of February, 1892, and it retains the proceeds as its own property. On the 11th of January, 1892, Tyson & Rawls forwarded to Nicholson & Sons a sight draft of J. C. Cobb & Brothers on Cobb Brothers & Gillian of Norfolk Virginia for \$800. They had discounted this check, and they indorsed it to Nicholson & Sons for collection for their account. Nicholson & Sons credited it to them as cash, and so informed them by mail, and indorsed it for value to the Western National Bank of Baltimore. The bank collected the draft on the 14th of January, 1892, and it holds the proceeds as

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its own. Nicholson & Sons failed on the 14th of January, 1892, subsequently to their indorsement of the check and draft to the Western National Bank; but they were insolvent at the time they received the check and draft from Tyson & Rawls, and upon a proper investigation of the business, this fact would have been apparent to the surviving partner, who had charge of the affairs of the firm; but it was not known to Tyson & Rawls nor to the Western Bank. Nicholson & Sons had an account with the Western Bank in which the check and draft were credited as cash; they overdraw their account and have never made it good. Tyson & Rawls never checked to the full extent of their credit with Nicholson & Sons, but always kept a balance in their favor, and at the time of the failure had a balance greater than the amount of the proceeds of the check and draft in question. It is admitted that both parties to this suit have acted in good faith in all of their dealings in the matters now in issue. It is well settled that when a customer of a bank deposits money to the credit of his account, the money becomes the property of the bank. The customer is creditor and the bank is debtor, with all the ordinary incidents belonging to that legal relation. There is no fiduciary connection between them. The depositor parts with his money, and the bank contracts an obligation to pay such checks as he may draw to an amount not exceeding the sum deposited. The consideration which the depositor receives for his money is the absolute and unconditional contract by the bank to pay his checks to the extent of his deposit. And the same rule obtains in the case of checks, drafts, and promissory notes, wherever, under the circumstances of the case, it is applicable; that is to say, wherever the bank becomes the owner of the commercial paper, and the customer acquires the unconditional right to draw for the proceeds. When a check, draft, or promissory note is indorsed in blank, or to the order of the bank, and the proceeds credited to the depositor as cash, the bank becomes the owner of the paper by virtue of the indorsement. And, in case it is not paid at maturity, it has the ordinary remedies which belong to the indorsee of instruments of this character which have been dishonored. In the present case the check and draft were deposited with Nicholson & Sons with an indorsement in these words: "For collection for account of Tyson & Rawls." This indorsement was not adequate to pass to Nicholson & Sons the title to these papers. It has been so held by this court, and the Supreme Court of the United States, and other courts. In *Sweeney v. Easter*, 68 U. S. 1 Wall. 166, 17 L. ed. 681, it was said: "The words 'for collection' evidently had a meaning. That meaning was intended to limit the effect which would have been given to the indorsement without them and warned the party that contrary to the purpose of a general or blank indorsement, this was not intended to transfer the ownership of the note, or its proceeds." In *White v. Miners Nat. Bank of Georgetown, Colo.*, 102 U. S. 660, 26 L. ed. 257, where the indorsement-

was "Pay S. V. W. order for account of Miners Nat. Bk. of Georgetown" it was said: "The plain meaning of it [the indorsement] is, that the acceptor of the draft is to pay it to the indorsee for the use of the indorser. The indorsee is to receive it on account of the indorser. It does not purport to transfer the title of the paper or the ownership of the money when received. Both these remain, by the reasonable and almost necessary meaning of the language, in the indorser." The same meaning was attributed to such an indorsement in *Cecil Bank v. Farmers Bank*, 22 Md. 148.

It would be superfluous to make further citations on this point. The indorsement did not pass the title, and no other way has been shown in this case, by which it could have been passed. Entering the amounts represented by these papers as cash to the credit of Tyson & Rawls is very far from having such an effect. It was the clear understanding that this was not an absolute and unconditional credit; but that it was to be charged back to the depositors in case the paper should not be paid at maturity. The paper was not sent to Nicholson & Sons to be discounted, or to be purchased by them, but it was intrusted to them as agents to collect it; and Nicholson & Sons could not treat it as a discount or purchase except by making an agreement to that effect with their correspondents. It probably suited their mutual interest and convenience to make these qualified entries. The depositaries probably had sufficient confidence in the pecuniary ability of these depositors to give them a credit for the short time that would intervene before the maturity of sight drafts. It is a very common practice with bankers to deal in this manner with their customers who are in good credit. In the argument this entry was likened to a collection of the commercial paper by the depositary. It was not in point of fact a collection. Nor was it similar in its effects and consequences. When a collection is made the proceeds are placed absolutely and unconditionally to the credit of the depositor and he is no longer under any responsibility on account of the paper deposited; as that question has been irrevocably settled by payment. In point of fact when collected the paper has lost its vitality by the settlement; and satisfaction of all rights which can arise from it. It would have been perfectly competent for Nicholson & Sons to agree with Tyson & Rawls that they would consider this paper as collected, pay them the amount of it, and relieve them from all responsibility on account of it. But no such agreement was made; their contract was entirely different. If the paper had not been paid at maturity, it would have been charged back to Tyson & Rawls. It would be very unjust to hold Tyson & Rawls responsible for the contingency of payment of these instruments and at the same time to hold that they had lost the title to them by a sort of constructive and metaphysical collection. It may be objected that as the check and draft were actually paid at maturity the contingent responsibility of the depositors has not accrued. But we must judge of legal rights

by the state of the facts which exist at the time they arise, and not by events which occur afterwards. One circumstance existing at the time will show the value of the cash entry as a consideration for the transfer of the check and draft. Nicholson & Sons were insolvent when the deposit was made, and they knew or ought to have known their pecuniary condition; and as a matter of course that the credit entry of cash was a mere delusion. Upon the whole it appears to us that the title to these papers did not pass to Nicholson & Sons. There has been much apparent conflict between the authorities on the questions which we have discussed. But the conflict is more in appearance than in reality. In most, if not all, of the cases which have held that when checks, drafts, and promissory notes have been deposited with a bank, and credited as cash to the depositor, the title to the negotiable paper has passed, it will be found that it was either indorsed in blank, or made payable to the banker. On the face of the paper he was owner, and in case it was dishonored, he had his remedy against the depositor, as indorser. The opinion in *National Butchers & Drovers Bank v. Hubbell*, 117 N. Y. 384, 7 L. R. A. 852, contains a very clear and convincing exposition of the difference between the rights of the banker in case of such deposit, and one where the paper is indorsed for collection. And even in case where a sight draft was deposited, payable to the order of the bank, and was credited as cash, it was held by the Supreme Court of the United States that the title to the draft did not pass, because the accompanying circumstance showed that it was not so intended; and the court said that "the property in notes or bills transmitted to a banker by his customer to be credited to the latter, vests in the banker only when he has become absolutely responsible for the amount to the depositor," and that "such an obligation previous to the collection of the bill can only be established by a contract to be expressly proved, or inferred from an unequivocal course of dealing." *St. Louis & S. P. R. Co. v. Johnston*, 133 U. S. 566, 33 L. ed. 688. The terms of the indorsement of the check and draft in this case gave legal notice to all persons receiving them that Tyson & Rawls were owners of the papers, and that Nicholson & Sons were merely agents for collection. *Cecil Bank v. Farmers Bank*, 22 Md. 148. The Western Bank could therefore acquire no title by the indorsement, made to it, and is responsible to Tyson & Rawls for the proceeds collected.

This case was submitted to the trial court upon an agreement signed by counsel which begins in the following terms: "It is agreed by the plaintiffs and defendant that this case be tried before the court without a jury, and upon the following statement of facts, hereby agreed upon." If this is the substitution of the court for a jury, as the language seems to indicate, the rulings of the court ought to be brought before us by a bill of exceptions, just as they would be in a jury trial. This point has often been decided. Many of the cases on this question are collected in *Trustees of Methodist Episcopal Church v. Brown*,

89 Md. 160. More recent decisions are *McQuilough v. Biedler*, 68 Md. 283, and *Jackson v. Salisbury Comrs.* Id. 459. When the court takes the place of a jury, the circumstance that the facts were admitted can make no difference; because facts may be admitted before a jury, as well as before a court, and in either case the law requires that the specific point or question to which objection is made must be shown by a bill of exceptions. But parties may make a case stated for the opinion of the court. This is a very old practice, and is quite distinct from the right given by the constitution to try a case by consent before the court without a jury. In the former case the court is in the exercise of its inherent functions to decide questions of law submitted to it; all the facts must be stated, and the court cannot draw inferences from them, unless there is an agreement to that effect. In a trial before the court sitting by consent without a jury, it deals with the facts in all respects as a jury would do. In a case stated, it ought affirmatively to appear that it is submitted to the court for its opinion on the law, and that it is requested to render a judgment in accordance therewith. An examination of the numerous cases of this kind which appear in our Reports will show that this is the approved practice in civil cases. We are not now concerned with criminal procedure. In a comparatively recent case in this court (*Brinkley v. Hambleton*, 67 Md. 169), the printed volume does not show that this practice was followed; but the transcript of the record shows distinctly that the case was submitted to the court for its opinion, and that it was requested to enter judgment for plaintiff or defendant according as its opinion might be. And there are other cases in which the printed volume omits this portion of the case, stated although contained in the transcript of the record. It has been adjudged so important that this court in *Marine Bank of Baltimore v. Merchants Bank of Baltimore*, 12 Gill & J. 498, held that it was error in the trial court to render judgment without this provision. They say "There being no provision in the case stated, as to judgment to be entered, after the court's opinion is expressed on the question submitted, the court can give no judgment, and the cause must be remanded." It is also customary to state that a right to appeal is reserved to each party where an appeal is contemplated. From the peculiar form of the statement of facts in this case, we were in some doubt whether we could consider the questions presented. But as the counsel on both sides regarded it as a case stated, and so argued it; and as, although we feel the necessity of maintaining the established methods of procedure, we are always very unwilling to permit justice to be impeded by matters of form, when it can be properly avoided,—we have thought that it was appropriate to express our opinion on the matters in controversy according to the wish of counsel on both sides. Following the precedent in *Marine Bank of Baltimore v. Merchants Bank of Baltimore*, we will reverse the judgment, and remand the case. As the parties now know our opinion, they can settle L. R. A.

tle this controversy without further litigation, if they elect to do so.

Reversed and remanded.

Alvey, Ch. J., concurred:

As the judgment appealed from must be reversed, and the case remanded for a new trial, because of the omission in the case stated to provide for the judgment to be entered, in accordance with the opinion of the court on the facts (*Marine Bank of Baltimore v. Merchants Bank of Baltimore*, 12 Gill & J. 498; *Burgess v. Poe*, 2 Gill & J. 254, 291,) I prefer to express no opinion upon the facts contained in the defective statement. A proper decision of the case may depend essentially upon facts that can only be arrived at inferentially, as the case is now presented (*St. Louis & S. F. R. Co. v. Johnston*, 133 U. S. 566, 33 L. ed. 683), and the court is not at liberty to make inferences of fact upon a case stated. The court can only declare the law arising upon the facts contained in the statement, as in the case of a special verdict. *Stewart v. Stute*, 2 Harr. & G. 114; *Keenide v. Fischer*, Id. 320; *Miller v. Negro Charles*, 1 Gill & J. 890; *Hyringer v. Baltzell*, 3 Gill & J. 158; *Lewis v. Hoblitzell*, 6 Gill & J. 259.

McSherry, J., dissents.

J. S. DITCH *et al.*, *Appts.*,
v.

WESTERN NATIONAL BANK OF BALTIMORE.

(.....Md.....)

1. On indorsement "for deposit" of a check, which is credited as cash by the bank which receives it, and thereafter by indorsement in the same form is transferred to another bank, which in good faith credits it as cash and pays the proceeds to the former bank, which afterwards makes an assignment for creditors, the title to the check must be held to be in the bank which holds it and has paid for it.

NOTE.—*Indorsement of check "for deposit."*

Notwithstanding the very general practice of indorsing checks "for deposit," the effect of such indorsement has been brought to adjudication in surprisingly few cases.

While these cases do not entirely agree in holding such an indorsement to constitute a retention of title in the depositor, it may be said that they sufficiently establish the rule that such is the effect of the indorsement in the absence of any agreement or practice to the contrary.

Thus in *Beal v. Somerville* (C. C. App. 1st C.) 17 L. R. A. 291, a deposit by a city treasurer of checks on another bank, indorsed "for deposit," was held not to pass the title to the checks to the bank in which they were deposited, although the depositor was immediately given credit therefor on his pass-book, where there was no agreement with him for such credit and no practice or custom which was equivalent to such agreement. Therefore, on the insolvency of the bank in which the checks were deposited, before collecting the checks, the title to the proceeds did not belong to the bank, or its receiver.

The discussion of this case by both the prevailing and dissenting opinions in the above case of *DIXON*

2. Testimony of a depositor that he regarded a check as deposited for collection is incompetent as a conclusion, where the indorsement was "for deposit."

(*Robinson, Ch. J., and Fowler and Roberts, JJ., dissent.*)

(March 15, 1894.)

APPEAL by plaintiffs from a judgment of the Circuit Court, No. 2, of Baltimore City in favor of defendant in an action brought to recover the value of a certain check which was alleged to be the property of the plaintiffs. *Affirmed.*

The facts are stated in the opinion.

Messrs. Richard Bernard and Alfred D. Bernard, for appellants:

Nicholson knew when he accepted the check in controversy that he was hopelessly insolvent, which fact was then unknown to the appellants. Therefore the acceptance of said check was a fraud upon them, and they are entitled to recover it unless the holder thereof shows itself to be a bona fide purchaser for value without notice of the rights of the appellants.

Boone, Banking, § 297; *St. Louis & S. F. R. Co. v. Johnston*, 133 U. S. 566, 33 L. ed. 683; *Somerville v. Beal*, 49 Fed. Rep. 790.

Apart from the question of the insolvency of Nicholson, the appellants are the owners of the check in question,—Nicholson never being the owner thereof, but merely their agent to collect the same, the title thereto remaining in the appellants until collected.

Beal v. Somerville, 17 L. R. A. 291, 15 U. S. App. 14, 50 Fed. Rep. 647; *Manufacturer's Nat. Bank v. Continental Bank*, 3 L. R. A. 669, 148 Mass. 553; *St. Louis & S. F. R. Co. v. Johnston*, *supra*; 2 Morse, Banks & Banking, §§ 584, 586; *National Commercial Bank v. Miller*, 77 Ala. 173, 54 Am. Rep. 50; *Bulbach v. Frelinghuysen*, 15 Fed. Rep. 675. See also Dan. Neg. Inst. ed. 1891, § 340a, b, c.

If, upon the facts in the record, Nicholson was Ditch & Bro.'s agent, it follows that the Western Bank was the agent of Nicholson and the relation of the Western Bank to Ditch

& Bro. was that of sub agent, therefore Ditch & Bro. are as much entitled to recover the check from one as the other.

There is a plain duty imposed upon the two banks by the transaction, to collect the check if good, to promptly return it if not good. The character of the transaction is shown by both indorsements.

Miller v. Farmers & M. Bank of Carroll County, 30 Md. 400; *Wilson v. Smith*, 44 U. S. 8 How. 763, 11 L. ed. 820; *Freeman v. Exchange Bank of Macon*, 87 Ga. 45.

The restrictive indorsement, "For deposit to the credit of J. S. Ditch & Bro." disclosed the conditions upon which they parted with the check in question and therefore no one can be a bona fide holder thereof for value, without full notice of all the facts growing out of the relation arising from that indorsement.

Freeman v. Exchange Bank of Macon, *supra*; *Beal v. Somerville*, *supra*; *White v. Miners Nat. Bank of Georgetown, Colo.* 102 U. S. 658, 26 L. ed. 250; *Blaine v. Bourne*, 11 R. I. 119, 23 Am. Rep. 429; *Lee v. Chillicothe Branch of State Bank of Ohio*, 1 Bond, C. C. 887.

Any indorsement which shows that the holder of the check did not purchase and pay for it is a restrictive indorsement.

White v. Miners Nat. Bank of Georgetown, Colo., *supra*; *Power v. Finnie*, 4 Call (Va.) 411; *Wilson v. Holmes*, 5 Mass. 543, 4 Am. Dec. 75; *First Nat. Bank of Chicago v. Reno County Bank*, 3 Fed. Rep. 261; *Lee v. Chillicothe Branch of State Bank of Ohio*, *Beal v. Somerville*, and *Freeman v. Exchange Bank of Macon*, *supra*; *Lawrence v. Fussell*, 77 Pa. 460.

A non-restrictive indorsement alone gives the right to assume that the indorsee was a purchaser for value; that on the face of the paper he is the owner thereof.

Tyson v. Western Nat. Bank of Baltimore, ante, 161, 77 Md. 412; *Sweeney v. Easter*, 68 U. S. 1 Wall. 166, 17 L. ed. 681.

The account between Nicholson and the Western Bank showed, when the failure was announced, a balance in favor of Nicholson

V. WESTERN NAT. BANK OF BALTIMORE, seems sufficiently to show that it is to be accepted as correct, where no rights of a bona fide purchaser or transferee for value have intervened.

In *Freeman v. Exchange Bank of Macon*, 87 Ga. 45, the same indorsement was held legally to import an intention of ownership, in the absence of any extrinsic facts to show a different intent. Therefore, expert testimony to show the meaning of such indorsement was held inadmissible in that case as well as in the above case of *DITCH V. WESTERN NAT. BANK OF BALTIMORE*.

Neither of these cases excludes the right to consider a custom or course of dealing as bearing on the intention of the parties in respect to such an indorsement, and in the case of *National Commercial Bank v. Miller*, 77 Ala. 168, 54 Am. Rep. 50, it is expressly held that such an indorsement must be considered in the light of the attendant circumstances and previous dealings, and the court says: "Where a depositor has for some time previously kept a deposit account with the banker, on which he was accustomed to deposit checks payable to him, entries of which were made in his pass-book, and to draw against such deposit, an indorsement, 23 L. R. A.

in the absence of a different understanding, is presumptive of more than a mere agency or authority to collect." Here, plainly, the custom of making credits in the depositor's pass-book, and his drawing against such deposits, is a significant fact in respect to his intention to pass title by the depositor. But in this case the bank in which the deposit was made had obtained a certification of the checks, which was held to create a new contract by which the checks were in effect paid, so far as the drawer and indorser were concerned.

These three cases, all of which are discussed in the opinions in the main case, are all that have been found in which an indorsement "for deposit" has been considered, although millions of such indorsements are undoubtedly made every year. The fact that in the present case of *DITCH V. WESTERN NAT. BANK OF BALTIMORE* the check thus indorsed had been transferred by the bank in which it was deposited with a similar indorsement, to another bank, the latter of which had not only given credit to the other in good faith, but had actually paid to it the proceeds, is a very important feature, which fairly distinguishes this case from the others.

B. A. R.

of \$3,500. Down to that time the plaintiff believed Nicholson to be solvent and would have paid and certified all it did pay and certify and \$1,000 besides, if Nicholson had not made the last deposit. Therefore there was no special credit given or risk incurred by the plaintiff on the faith of the check in question and there is no equity in the plaintiff's contention.

Miller v. Farmers & M. Bank of Carroll County, 80 Md. 401.

The property in notes or bills transmitted to a banker by his customer to be credited to the latter vest in the banker only when it has become absolutely responsible for the amount to the depositor, and such an obligation previous to the collection of the bill, can only be established by a contract to be expressly proved or inferred from an unequivocal course of dealing.

Balbach v. Frelinghuysen, 15 Fed. Rep. 675; *Newmark Bank Deposits*, § 209; *St. Louis & S. F. R. Co. v. Johnston*, 133 U. S. 566, 83 L. ed. 683; *Scott v. Ocean Bank*, 23 N. Y. 289; *Freemans Nat. Bank v. National Tube Works Co.* 8 L. R. A. 42, 151 Mass. 413.

When the bank is insolvent, the matter is still clearer. It is then a fraud upon the depositor for the bank to receive a check, and if a check indorsed in blank be deposited by a customer ignorant of the bank's condition, and the bank immediately goes into the hands of a receiver, no title whatever passes from the depositor to the bank.

Horwitz v. Ellinger, 31 Md. 492; *Tyson v. Western Nat. Bank of Baltimore*, ante, 161, 77 Md. 412; *St. Louis & S. F. R. Co. v. Johnston*, *supra*.

Indorsement "for deposit" gives notice that the check is held subject to the rights of depositor against the bank.

Dan. Neg. Inst. § 1595.

It gives notice of the agency title of the bank.

Freeman v. Exchange Bank of Macon, 87 Ga. 45; *Beal v. Somerville*, 17 L. R. A. 291, 5 U. S. App. 14, 50 Fed. Rep. 647.

It gives notice of the want of consideration between the depositor and the bank.

Cecil Bank v. Farmers Bank, 22 Md. 156; *Miller v. Farmers & M. Bank of Carroll County*, 80 Md. 397.

Messrs. Schmucker & Whitelock for appellee.

Bryan, J., delivered the opinion of the court:

This case involves a question of considerable importance. Thomas J. Shyrock & Co. drew their check for \$187.55 on the Third National Bank of Baltimore, payable to the order of John E. Reese. Reese indorsed it in these words: "Pay to the order of J. S. Ditch & Brother." The next indorsement was in these words: "For deposit to the credit of J. S. Ditch & Brother," signed "per T. F. Cassidy." It was admitted that Cassidy had due authority from Ditch & Brother to make and sign this indorsement. Luther Ditch, a member of the firm of Ditch & Brother, in person deposited this check, together with others, in the bank of J. J. Nicholson & Sons, and they at the same time entered a

credit of cash to the amount of all these checks in the deposit books of Ditch & Brother, and also in their own books. Ditch's testimony on this point is as follows: "That he handed his deposit to John R. Nicholson in person. That his firm kept another pass-book with Nicholson & Sons, in which accounts were left for collection, on which promissory notes only were entered. That when these promissory notes were paid credit was entered on the regular deposit book. All checks, whether out of town or city checks, were entered on the regular deposit books as cash; on a few occasions checks dated ahead were entered as cash. If necessary, or if they were short of funds, they checked immediately after the deposit was made. They made no special arrangement about checking on deposit. That the paper left for collection, consisting of promissory notes, was not carried to the deposit books until the collection had been made, but all checks were entered in the deposit book when deposited as cash, as if they were so much currency, and they were at liberty to check against such deposits as soon as made, if they desired." Mathew Aiken, general book-keeper for Nicholson & Sons, testified: "that he knew J. S. Ditch & Bro.; that they had two accounts with his bank and a separate pass-book for each account—one a deposit account and the other an account for collection. The collection went to their credit when collected, and were then marked off their collection book and credited on the deposit book. The deposits made by Ditch & Bro. went to their credit on the books of Nicholson & Sons on the same day the deposit was made, and they were credited on the deposit book of Ditch & Bro. at the time the deposit was made;" and also "that the check in question forms a part of a credit of cash of \$929.75 to Ditch & Bro. in their deposit book with Nicholson & Sons on January 14, 1892, and that the amount of the credit was so entered on the deposit book at the time the deposit was made, and was carried to their credit on the books of Nicholson & Sons;" and also "that all checks deposited by Ditch & Bro. were entered on their deposit book as cash and subject to immediate withdrawal in currency or anything else."

When Ditch deposited this check it is evident that he did not wish to have the money for it paid into his hands, because if he had wished the money it would have been as easy to obtain it from the Third National Bank as to deposit the check; and secondly, because, according to his own testimony and Aiken's, he could have drawn the money immediately if he had chosen to do so. Instead of the money he preferred a credit with Nicholson & Sons subject to his check; this was in all respects more convenient to him than the possession in hand of currency or coin. And this is what the indorsement plainly meant; the check was to be deposited, and the amount of it was to be placed to the credit of Ditch & Bro. The indorsement was in blank, so far as the name of the indorsee is concerned; but when Ditch handed the check to Nicholson & Sons with the book in which his deposits were entered as cash, he

evidently intended that the deposit should be entered in that book, and that he should receive credit for the amount of the check as cash, and that Nicholson & Sons should be the holders of the check as indorsees in blank. No form of words could have made his meaning plainer. And this meaning is in exact accordance with the indorsement. The indorsement showed that it was to be deposited in a banking house, and that Ditch & Bro. were to receive credit for it; but the name of the banking house was not mentioned; it was left blank. By delivery Ditch designated the bankers with whom it was to give credit. If Nicholson & Sons had paid to Ditch & Bro. the full amount of the check in coin or currency when it was delivered to them, it is supposed that there would have been no question about the nature and effect of the transaction. But they gave Ditch & Bro. what was preferred to the coin or currency; they gave them the unconditional right to get the coin or currency at any time they might see fit to call for it, thus relieving them from the trouble and risk attending the care and custody of it. Now it is extremely difficult to see on what principle or by what process Ditch & Bro. could retain any interest in this check after they had delivered it to a blank indorsee and had received full and valuable consideration for it. It will not be alleged by any one that the banker did not give a consideration, valuable in the eye of the law, and sufficient to maintain the transfer of the check, when he made an absolute and unconditional contract with the depositor to pay his checks to the amount of the deposit. This point was decided in *Tyson v. Western Nat. Bank of Baltimore*, 77 Md. 412, ante, 161. It has been asked what would be the condition of the bank in case this check should be dishonored when presented for payment. The answer is not difficult. In *Tyson v. Western Nat. Bank of Baltimore* the court thought that the bank would have against the depositor the ordinary remedies which belong to the indorsee of dishonored instruments of this character. It could certainly recover from him the amount of the check. And here we may notice a portion of the testimony which has been made the subject of a good deal of comment.

Aiken testified as follows: "It was not the custom of Nicholson & Sons to charge back to the depositors the checks which had been deposited with them and were dishonored. The custom was to have returned the checks to the party and to get the money refunded." John Ditch testified "should any check be returned they (Ditch & Bro.) had always to make them good. That the Nicholsons never bothered themselves about the unpaid checks." This testimony merely shows that the bank was aware of its legal rights and that depositors paid voluntarily what they could have been compelled to pay by suit at law. Persons engaged in mercantile pursuits would lose all commercial credit and standing if they did not promptly perform their plain and well understood obligations.

In *Tyson v. Western Nat. Bank of Baltimore* the draft deposited was indorsed in these words: "For collection for account of Tyson and Rawls, Greenville, N. C." This court

held that this indorsement was not adequate to pass to the holders the title to the draft; and that the evidence in the case did not show any other way by which it could have been passed. The court also held that it was the clear understanding between the parties that Tyson & Rawls (the depositors) should not obtain an absolute and unconditional credit in consequence of the deposit. It being our opinion that Nicholson & Sons acquired title to this check, we must declare our carefully considered judgment. If other tribunals for whose learning and ability we entertain the greatest respect have arrived at conclusions different from our own, we do not feel called upon to abandon the deliberate convictions which we entertain. But we do not assume that there is a great contrariety in the opinions of the courts on this question. A great many cases have been brought to judgment; but their facts have been diversified in great variety. It has always been held that the bank and the depositors could make their own contracts. Sometimes they have been made in express terms; and sometimes they have been inferred from the acts and conduct of the parties and the regular and established course of dealing between them. It can readily be seen how broad a field of inquiry has been spread out before the courts and what diversities of facts and combinations of facts would probably be presented for their consideration. Among the great number of cases which have been earnestly pressed upon us, we will cite three in which the effect of an indorsement for deposit was considered. The first is *National Commercial Bank v. Miller*, 77 Ala. 168, 54 Am. Rep. 50. In this case the bank brought an action against Proskaner, and sued out a garnishment, which was served on Miller & Co., private bankers, who were alleged to be the debtors of Proskaner. We will state the court's opinion in its own words: "The defendant, in the name of A. Proskaner & Co., agents, opened in January, 1883, a deposit account with the garnishees, who were bankers. On this account the defendant deposited checks payable to A. Proskaner & Co., agents, which were entered in the pass book, and drew checks in the same name 'on funds so deposited.' The check in question was indorsed 'For deposit, A. Proskaner & Co., Agents.' The import and effect of such indorsement must be considered in the right of the attendant circumstances, and of the previous dealings between the parties. Where a depositor has for some time previously kept a deposit account with a banker, on which he was accustomed to deposit checks payable to him, entries of which were made in his pass-book and to draw against such deposits, such an indorsement, in the absence of a different understanding, is presumptive of more than a mere agency or authority to collect. The special purposes for which an indorsement for deposit is made, under such circumstances, may be readily inferred. It was a request and direction to the garnishees to deposit the same to the credit of the defendant, and conferred on them, not only authority to collect, but also authority to put the check in such form, and use it in such manner, as in their judgment and discretion, hav-

ing reference to the condition and necessities of their business, would make it most available to their protection. The effect of the indorsement for the consummation of this purpose is to vest the garnishees with the title to and control of the check. If in such case the check is not paid the banker depends for safety and indemnity on the liability of the drawer, and the security of the indorsement. It appeared that Miller & Co., the garnishees, had presented the check for certification to the bank on which it was drawn, and that it was certified by that bank in these words: "Good for eight thousand dollars." The court says that the certification made a new and distinct contract between the holder and the certifying bank, which thereby became the debtor of the holder; and that the drawer and indorser of the check were released from all liability on it, and that as to them it was paid. The significance of the certification was a question in the case, because after it had been made and after service of the garnishment, the defendant gave notice to Miller & Co., the garnishees, that he revoked their authority to collect it, and that they were forbidden to present it for payment. But as it was already paid in legal effect to Miller & Co., they were the debtors of the defendant, and the notice was not efficacious to change the rights of the attaching creditor or to displace the lien on the debt which he had acquired by service of the garnishment. We have mentioned the certification of the check and its consequences, because these matters were zealously urged in the discussion of this case. But we do not see how they bear any analogy to the facts on which the rights of the parties in the present case depend. The other two cases were thought to be still more decisive.

In one of them, *Freeman v. Exchange Bank of Macon*, 87 Ga. 45, the court used this language: "There being in evidence no facts extrinsic to the bill itself and its indorsement to throw light upon the question of title, we are not to be understood as holding that such facts might not exert a controlling influence on the question. Indeed, there is authority for giving them such effect when duly proved." A deposit of paper in bank by a customer, he indorsing it "for deposit," may operate to clothe the bank with title under certain circumstances. *National Commercial Bank v. Miller*, 77 Ala. 168, 54 Am. Rep. 50. The other case is *Beal v. Somerville*, 50 Fed. Rep. 647, 17 L. R. A. 291, 5 U. S. App. 14.

Checks were deposited in the Maverick National Bank by the treasurer of the city of Somerville; each of them was indorsed "for deposit." The deposit was made about 15 minutes before 3 o'clock in the afternoon; at 3 o'clock of the same day the bank closed its doors and never opened them again for business. At the time of the deposit it was irretrievably insolvent. Beal was appointed its receiver and a bill in equity was filed against him by the city of Somerville. In the bill the facts just mentioned were alleged, and also the following: "The treasurer had for several years made deposits with the bank without any special agreement

in regard thereto; there was no agreement that checks deposited should be considered as cash, or that the treasurer could draw against them before collection. The treasurer never drew a check for which his deposit was not sufficient without counting the proceeds of uncollected checks, except in a few instances, on a few occasions, by special arrangement with the bank. There was no express understanding that the checks should be credited to the city immediately on deposit, but they were always so credited on the pass-book at the time of the deposit. . . . It was the practice of the Maverick and the other banks in Boston, in some cases, to allow depositors to draw against checks deposited before such checks were collected, and in some cases not, depending on the bank's opinion of the reliability of the depositors and the makers of the checks." A demurrer was filed, admitting, of course, the facts stated. The court, in its opinion, said, among other things, Beal "fails to show that the city had an absolute right to check against the deposit as soon as made irrevocable by notice from the bank; and that such right did not exist must be received by this court as a matter of judicial knowledge." The decree determined that the checks were the property of the city. We have not made these citations for the purpose of criticising these decisions, nor for the purpose of inquiring whether they sustain or oppose the judgment which we have formed in the case before us. Our object has been to show the great variety in the facts and details of the cases which have been adjudged; and to illustrate a sound juridical principle,—that differing facts may justly lead to differing conclusions of law.

John Ditch testified that he regarded all the checks deposited by him as having been deposited for collection; otherwise, why should they have to make good those which might be returned. The legal character and attributes of the deposit depend upon the indorsement and upon what was said and done at the time the deposit was made, and upon the regular and uniform course of dealing between the parties. The testimony of the witness was his opinion on a question of law. An exception was filed to it and it was undoubtedly incompetent. The check, on the day it was received by Nicholson & Sons, was indorsed by them "for deposit" and deposited in the Western Bank, where they kept an account. It was passed to their credit, subject to their check, and on the same day they largely overdraw their account. Later in the day they made an assignment for the benefit of their creditors, and it became known that they were totally insolvent. Although Nicholson & Sons acquired title to the check in the manner which we have stated, it is quite true that, in a controversy with their trustee, Ditch & Bro. might successfully impeach the transfer for fraud and set it aside. But the question with the Western Bank stands on different grounds. It is a bona fide holder of a negotiable instrument for value without notice of any facts which would invalidate the title of the indorsers from whom they obtained it. All commer-

cial principles and usages require that such a title should be protected.

At the request of Ditch & Bro. the payment of this check was stopped by the order of Shyroek & Co., the drawers. Shyroek & Co. filed a bill of interpleader in Circuit Court No. 2 of the City of Baltimore, and the court required the Western Bank and Ditch & Bro. to litigate between them their respective claims to the ownership of the check. The decree established the title of the Western Bank, and we affirm it.

Decree affirmed with costs.

Fowler, J., dissenting:

While the amount involved in this appeal is not large, yet the questions presented are of some importance. The controversy here, as in the case of *Tyson v. Western Nat. Bank of Baltimore*, ante, 161, 77 Md. 412, grows out of the conflicting claims of the Western National Bank of Baltimore, and one of the depositors of Nicholson & Sons, bankers, in that city, who failed several years ago.

The check which is the subject of this litigation, was dated January 18, 1892, and was drawn by Thomas J. Shyroek & Co. on the Third National Bank of Baltimore to the order of John E. Reese, who, on the day of its date, indorsed it to J. S. Ditch & Bro., who on the following day indorsed it as follows: "For deposit to the credit of J. S. Ditch & Bro., per Cassidy." Cassidy is a clerk of Ditch & Bro., and there is no question as to his authority to indorse. So indorsed, this check, with several others, amounting in the aggregate to \$929.75, was deposited by one of the firm of Ditch & Bro. in the bank of Nicholson & Sons a short time before noon on January 14, 1892. The deposit was at once credited by the Nicholson in the pass-book of Ditch & Bro., and a similar credit was made upon the books of the former, who at once indorsed the check in question thus: "For deposit, J. J. Nicholson & Sons," and deposited it in the Western Bank, receiving credit for the amount of the deposit as cash, both on their pass-book and also on the books of the Western Bank. It is conceded, of course, that Ditch & Bro. believed the Nicholson to be solvent when the deposit was made in the latter's bank, and it would seem that the Nicholson themselves must have been aware that they were not in the solvent condition the appellants believed them to be, for within an hour, or perhaps two, after these deposits were made they had placed on record a deed of trust for the benefit of their creditors, and closed the doors of their bank. On the day of the failure of the Nicholson, Ditch & Bro. heard of it, and immediately requested Shyroek & Co., the makers of the check, to stop payment. This request was complied with, and the check having been duly protested, the Western Bank sued the makers. Whereupon a bill of interpleader, setting forth the respective claims of the Western Bank and Ditch & Bro. was filed by Shyroek & Co., and a decree was passed by Circuit Court No. 2 of Baltimore City requiring the Western Bank and Ditch & Bro. to interplead—the former as plaintiff and the latter as defendants. In accordance with this

decree the Western Bank filed its bill, and Ditch & Bro. answered it. The bank alleged substantially that Ditch & Bro. indorsed the check in question to the Nicholson, and deposited it with them as cash, and received credit therefor in their account with the Nicholson, and that the Nicholson thereby became the owners of the check, and having indorsed it to the Western Bank "for deposit," and having deposited it with and received credit for it as cash by said bank, it became and is the bona fide holder of said check by reason of the facts above mentioned and because the Nicholson were permitted to draw from the Western Bank the funds represented by said check. The defense which Ditch & Bro. set up in their answer is that they indorsed the check "for deposit to the credit of J. S. Ditch & Bro." to enable the Nicholson to collect the same in the usual course of business, and receive that character of credit usual to receive when checks are deposited by a customer with a bank for collection. They deny, however, that by such deposit for collection the Nicholson thereby became the owners of said check or that they had a right to indorse the same to the Western Bank or to any one.

Upon the bill, answer, and testimony the court below decreed that the property in the check in question passed from Ditch & Bro. and vested in the Nicholson, and that the latter conferred a perfect title upon the Western Bank. From this decree Ditch & Bro. have appealed, and the question is whether the Western Bank has a valid legal title.

The general question of the relations between depositors and banks as regards their respective rights in and title to negotiable paper deposited by the former with the latter, is much embarrassed by a conflict of authority. But after all, as we said in *Tyson v. Western Nat. Bank of Baltimore*, the conflict is more apparent than real. It will be found that the views expressed by the highest tribunals in this country and in England, when carefully examined, differ not so much in the principles announced as in the facts to which these general principles have been from time to time applied. In most of the cases in which it has been held that the title to negotiable paper passed to the bank from a depositor it will be found that such paper was indorsed in blank or made payable to the bank. After stating the general rule that when a customer deposits money to the credit of his account, the bank becomes debtor and he is creditor, we said in the case just cited: "The consideration which a depositor receives for his money is the absolute and unconditional contract of the bank to pay his checks to the extent of his deposit. And the same rule obtains in the case of checks . . . whenever, under the circumstances of the case, it is applicable, that is to say, whenever the bank becomes the owner of the commercial paper, and the customer acquires the unconditional right to draw for the proceeds. When a check . . . is indorsed in blank, or to the order of the bank, and the proceeds credited to the depositor as cash, the bank becomes the owner of the paper by virtue of the indorsement."

These quotations from such a recent case are sufficient to indicate our views in regard to the character of paper and the forms of indorsement there considered. But the indorsement in this case is neither an indorsement in blank nor to the bank. It is of a very different character, both in form and effect. Its terms are "For deposit to the credit of J. S. Ditch & Bro." It was contended by Ditch & Bro. that this is a restrictive indorsement, and by the Western Bank that it is partly restrictive and partly absolute—restrictive as to all the world except the Nicholsons, and as to them, absolute as soon as it reached their hands.

If such an indorsement as this can be held to pass title to commercial paper, it must be so either because such is the clear meaning of the words used, or because of some artificial or technical, but well known and settled meaning given to the language of the indorsement by the customs and usage of banks and their customers, which indicates a transfer of title was intended, though not expressed. Of course, it is not, and could not be contended in this case, that there is any such custom, for there is no evidence to sustain any such contention. What, then, is the fair and legal construction of this indorsement? In the first place, we start with the presumption that the depositor does not intend to part with title to his paper, subject to be rebutted only by evidence of an express contract to the contrary, or of facts from which such contracts must be inferred. 1 Dan. Neg. Inst. § 340.

We shall presently consider the effect of the credit given to Ditch & Bro. in anticipation of the collection of the proceeds of the check by the Nicholsons, but before doing so we wish to ascertain the purport of the language of the indorsement itself. It is apparent no words are used to indicate a transfer of title; on the contrary, it is conceded the indorsement here used is for the purpose of destroying negotiability in case of loss or miscarriage of the check. If that be its object, it is difficult to understand how such an indorsement, without something added thereto by special agreement, can be relied upon to establish title either in the Nicholsons or the Western Bank. The plain import of the indorsement would seem to be that the check was deposited for collection. What else could have been the object of the deposit? Certainly not for the purpose of getting an immediate credit, for it is in evidence that Ditch & Bro. not only had no agreement allowing them to draw on uncollected checks, but that in point of fact their deposited checks were always collected before they were actually drawn on, and were not considered cash until collected by the Nicholsons. In the case of *Beal v. Somerville*, 50 Fed. Rep. 647, 17 L. R. A. 291, 5 U. S. App. 14, a case strikingly like the one at bar, and in which the indorsement was "For deposit, John F. Cole, Treasurer," the following facts appeared: Cole, the treasurer of the city of Somerville, indorsed the checks as above and handed them to the receiving teller of the Maverick National Bank with a deposit ticket and also his pass-book,

and the teller at once credited therein and on the books of the bank the total amount of the checks. When the checks were received by the bank it was irretrievably insolvent, and closed its doors the same day of the deposit at three o'clock.

There was no agreement to allow the customer to draw at once on the proceeds of deposited checks. It was held, irrespective of the question of insolvency, that title to the checks so indorsed did not pass. "The transaction," says the court, Putnam, J., delivering the opinion, "was primarily a deposit of the checks with, secondarily, a duty to be performed concerning them by the Maverick Bank." After stating the general principle that a deposit of money creates the relation of debtor and creditor between the depositor and the bank, the opinion of the court continues: "But with reference to the checks claimed by the city of Somerville, the word by which the transaction is ordinarily described may conveniently have, and therefore should have, its full natural force and meaning. A mere deposit would only require a bank to keep; but a usage requiring the Maverick Bank to do in this case something more has continued so long, and is so notorious and universal, that the law can take judicial notice of it, and it happens that its terms and limitations cannot be mistaken. The bank must use due diligence to collect; and, as collections are completed, the bank no longer holds the avails as bailee, but is authorized to mingle them with its other funds, and thus constitute itself a debtor."

And again "aside from the right of the bank to constitute itself a debtor from the time the checks are converted into cash or its equivalent, instead of a mere trustee or agent, no qualification of the strict legal relations created by a bailment is deducible from the general nature of the transaction, the terms in which it is expressed or the settled custom, or is shown by" the bank. The case just cited is one of much interest and importance and the opinion of the court bears the impress of the most careful consideration and research.

In *Freeman v. Exchange Bank of Macon*, 87 Ga. 45, an indorsement precisely like the one we are considering was held to be restrictive. The indorsement was, "For deposit to the credit of S. A. Brown & Co." The indorsers deposited the draft so indorsed in the National Bank of Kansas City, which bank by its cashier indorsed the draft "Pay Exchange Bank or order for collection, account of National Bank of Kansas City." The draft was paid to the Exchange Bank, where the money was attached as the property of S. A. Brown & Co., and it was so held.

The supreme court of Georgia says: "The agency created by the owners of the bill by means of their indorsement had not been fully executed. The Kansas City Bank was still the immediate agent under them, and the Macon (that is the Exchange) Bank was a subagent under it. The latter held the money as a bailee for the ultimate use and benefit of the owners." Again quoting from the same opinion, "The maker of a restricted

indorsement can follow the bill or its proceeds over any number of subsequent indorsements, the terms of his indorsement being notice of his title." And, as we have said, it was held that notwithstanding the depositors S. A. Brown & Co. had indorsed their paper, precisely as the paper in this case was indorsed, title did not pass, and the money attached in the hands of the Exchange Bank was condemned as the property of S. A. Brown & Co.

It would too greatly prolong this opinion if we should examine the many cases in which various forms of indorsements have been held restrictive, and we shall only cite a few of them.

"Pay S. V. W. or order for account of Miners' National Bank of Georgetown;" *White v. Miners Nat. Bank of Georgetown, Colo.*, 102 U. S. 658, 26 L. ed. 250; "Pay to P. or order only,"—*Power v. Finnie*, 4 Call (Va.) 411; "Pay T. W. or order for our use, value received in account,"—*Wilson v. Holmes*, 5 Mass. 543, 4 Am. Dec. 75; "Pay to the order of W. H. & Co. account,"—*First Nat. Bank of Chicago v. Reno County Bank*, 3 Fed. Rep. 261; "Credit my account. J. B. S., Cashier,"—*Lee v. Chillicothe Branch of State Bank of Ohio*, 1 Bond, C. C. 887.

We think, therefore, that looking at the indorsement itself without regard to any course of dealing between the parties, the language of the indorsement cannot be held to transfer title to the check in question, but, on the contrary, must be held to be restrictive, at least, until the bank has performed its duty and has collected the proceeds of the check.

And this is the view very clearly expressed by Mr. Daniel in his work on Negotiable Instruments, even when the paper is so indorsed as prima facie to transfer title, as, for instance, in blank or to the order of the bank. He says that the collection of checks is generally attended with so little delay that banks are willing to treat them as cash deposits, and allow their customers to draw against them in anticipation of collection—reserving the right to charge back the paper to the customer, if returned unpaid. "Out of this practice," says the author, "has grown the erroneous idea that the bank, without more, becomes the owner of the deposited paper before collection." Exemplified in *Metropolitan Nat. Bank v. Loyd*, 90 N. Y. 530. "Later cases," continues the author, "hold, and correctly, as we conceive, that the checks deposited in bank by its customers do not at once become the property of the bank, but that it continues to be the agent of the customer until actual collection—the check in the meantime remaining the property of the depositor." And in *Balbach v. Prelinghuysen*, 15 Fed. Rep. 675, one of the cases to which reference is made in the note to the section just cited, it was held that even when the check is indorsed to the bank and credit is given for it as cash on the customer's pass-book and the books of the bank, these facts are not conclusive evidence that title passes to the bank, for two reasons, says the court, (1) Because such credit was only conditional, and if the check should be dis-

honored, it would be charged back to the customer, which is inconsistent with ownership in the bank; and (2) because this practice of banks to credit such deposits at once and to allow the depositor to draw against them is reckoned by the ablest text-writers as a mere gratuitous privilege. See also *St. Louis & S. F. R. Co. v. Johnston*, 183 U. S. 566, 33 L. ed. 688. It would seem to follow that whether we consider the indorsement alone or in connection with the credit given in this case to Ditch & Bro. by the Nicholsons, the result would be the same. For it is conceded here that no absolute credit was given, the Nicholsons always reserving to themselves the right to charge back or return unpaid paper. As between Ditch & Bro. and the Nicholsons, without regard to the restrictive character of the indorsement, no title to the check passed to the latter. No consideration was paid by them and they were, and they knew they were, insolvent when the check was deposited. "The acceptance of a deposit by a bank irretrievably insolvent constituted such a fraud as entitled the depositor to reclaim his draft or the proceeds." Fuller, *Ch. J.*, *St. Louis & S. F. R. Co. v. Johnston*, *supra*.

We have neither found nor been referred to any authority which sustains the contention of the appellee, unless the section in Morse on Banks & Banking (sec. 577) cited in the opinion of the learned judge below, can be so considered. But when this section is examined, and especially when it is ascertained that the sole authority (*National Commercial Bank v. Miller*, 77 Ala. 168, 54 Am. Rep. 50), which Mr. Morse cites to sustain it, does not seem to support the contention of the appellee, we may well hesitate before adopting the construction which has been placed upon Mr. Morse's language. It would seem more reasonable to construe this section (577) to mean that when a check is indorsed "for deposit," under the circumstances therein set forth, the bank may have the check certified, instead of actually collecting the money. And so the author says in his last clause of the section. In the case just cited (*National Commercial Bank v. Miller*) it was held that title passed to the bank for the consummation of the purpose for which the indorsement was made, that is to say, to enable the bank to deposit the proceeds to the credit of the indorser. It is nowhere said in that case that absolute title passed to the bank by virtue of the indorsement alone. But on the contrary the question under consideration was the effect of the indorsement together with the certification of the checks. And having determined that the bank by virtue of the indorsement had the right to have the check certified and that when certified the check was, in contemplation of law, paid, the bank thereupon became the owner of the check and was the debtor of the depositor. In other words the indorsement "for deposit," like the indorsement "for collection," gives the bank the right to collect the proceeds and credit them to the depositor, but in neither case can the bank appropriate to its own use paper so indorsed. Nor does the court, in *National Com-*

mercial Bank v. Miller, intimate such a view. On the contrary it held that the bank, "by accepting a certification of the check made it their own, and the relation of debtor and creditor was created." The indorsement "for deposit" passed title for the purpose of certification, and the certification being, in contemplation of law, payment, the depositor's title to the check was transferred to the bank. Without adopting these views, we have referred to them for the purpose of showing that they do not seem to support the contention of the appellee, nor the construction it gives to section 577 of *Morse on Banks & Banking*.

There is a wide distinction between *National Commercial Bank v. Miller* and the case under consideration. There the check was indorsed, deposited, and collected; but here there has been no collection—no payment of the check either in cash or its equivalent. If, however, the section (577) we have just referred to is to have the construction given to it by the appellee, there would be a striking conflict between it and section 584 of the same book, where it is said that when checks are deposited they are taken generally for collection by the bank as agent, and the bank does not owe the amount until the collection is accomplished. The bank may permit, as matter of favor, checks to be drawn before collection and payment, the depositor in the event of non-payment being responsible for the sums so drawn, not by reason of his indorsement, the checks not having ceased to be his property, but for money paid. 2 *Morse, Banks & Banking*, § 584. In *Bolles on Bank Collections*, ed. 1893, § 8c, the author cites the case of *Somerville v. Beal*, 49 Fed. Rep. 790, to sustain the view that an indorsement "for deposit" with credit and conditional right to draw, transfers title; but this case was taken by appeal to the United States circuit court of appeals, and is reported in 50 Fed. Rep. 647, 17 L. R. A. 291, 5 U. S. App. 14. And in the court last named the contrary doctrine was held and ably maintained by an elaborate opinion from which we have already quoted to show that such an indorsement is restrictive and does not pass title. And in the case of *Metropolitan Nat. Bank v. Loyd*, *supra*, cited by the appellee to sustain its contention, the credit given by the bank to the depositor was an absolute one. "Admitted circumstances," says the court, "show it was the intention of the parties to make the transfer absolute," and "the bank charged itself with a debt absolutely due to Murray," the depositor. But here, as we have seen, there is not only no absolute credit, but "the credit entry of cash was a mere delusion." And, as was said in *Beal v. Somerville*, *supra*, if the appellee bank had shown that the depositor had a legal right to draw against the checks from the moment of the deposit, so absolute that the bank could not lawfully suspend it by notice or otherwise, pending the collection, this would tend to support its position throughout. But on the contrary the provisional or mere pretense of a credit, such as shown in this case, is inconsistent with the notion of ownership of the check in the bank. If,

however, the check in question had been indorsed in blank, or to the order of Nicholson's a very different question would have been presented. There the legal effect of such indorsements to pass title to bona fide holders for value, according to the settled rules of commercial law, and the rights of innocent third parties, if any had intervened, would be properly considered, as was done in *Metropolitan Nat. Bank v. Loyd*, and in many other cases since. "The views of the Supreme Court of the United States," says Mr. Daniel, 1 *Nog. Inst.*, § 340, "seem to embody the true logic of the question." The bank transmitting the paper indorsed in blank is ostensibly the owner. It has agreed by implied contract arising from usage that the avails shall be applied to balances against it. With this understanding its correspondent undertakes the collection and applies the avails. And then when the contract has been executed it would seem to be in contravention of the universally recognized principle which controls the negotiation of commercial paper to permit a third party who had declared by his indorsement that he had parted with his title to come in and assert it. The same view is expressed by us in *Tyson v. Western Nat. Bank of Baltimore*, and constitutes what Putnam, J., in *Beal v. Somerville*, calls the doctrine of "reputed ownership," which he says is recognized by the Supreme Court of the United States in *St. Louis & S. F. R. Co. v. Johnston*, *supra*. If, therefore the depositor does not intend to pass title he should not use the forms of indorsement which are universally used for that purpose, but should adopt some other form, such as "for collection," which we held in *Tyson v. Western Nat. Bank of Baltimore*, *supra*, does not, without more, pass title, or "for deposit to credit of," which we think, as used in this case, is equally restrictive. Of course if the depositor is awarded even the gratuitous privilege of drawing in anticipation of collection, and he should avail himself of that privilege, then without regard to the form of his indorsement, he should not be allowed to claim the proceeds of any deposited check. With the proceeds in his pocket he would be estopped. But, as we have seen, that is not this case. It has been suggested it was against public policy and contrary to the interests of commerce to hold this indorsement to be restrictive. But we do not think so. On the contrary, in our opinion, it would be for the best interests of the public, the banks and commerce, if all indorsements except those which are in full or in blank should be declared restrictive. And such was the opinion of Lord Tenterden in the case of *Sigourney v. Lloyd*, 8 *Barn. & C.* 622.

In the case just cited, the indorsement was "Pay to Williams, or order, for my use." "I cannot see," says Lord Tenterden, "that the interests of commerce will be prejudiced by our holding that such an indorsement is restrictive. On the contrary, I think the interests of commerce will be thereby advanced."

When this case was taken up on appeal, Lord Chief Justice Best said: "No incon-

venience can possibly arise to the commercial interests of the country by limiting the operation of an indorsement so expressed. The only effect will be to make persons more cautious in transactions of this nature in the future. Unless the words 'for my use' have no meaning, it is obvious, upon looking at the indorsement, that inquiry was necessary to have been made, and if a meaning can be found for these words, the court must apply them so as to meet the object and intention of the indorser." *Lloyd v. Sigourney*, 8 Moore & P. 229. The commercial world is well acquainted with the forms of indorsement universally used to transfer paper, and when these forms are not used, the owner of the paper ought not to be deprived of his interest therein by any course of reasoning, however ingenious it may be.

Our conclusion is, that the legal effect of this indorsement was to give notice to the Western Bank that J. S. Ditch & Brother were the owners of the check, and that the Nicholsons were only agents to collect the proceeds of the same and deposit them to the credit of J. S. Ditch & Brother.

Robinson, Ch. J., and Roberts, J., concurred.

EXCHANGE BANK OF WHEELING,
Appl.,
v.
SUTTON BANK.

(.....Md.....)

1. The completion of a transfer of credit to the payee of a check indorsed "for collection and credit" by the assignee for creditors of an insolvent bank which just before assignment had charged the check to the maker but had not given credit to the payee will not constitute a payment of the demand for which the check was given.

NOTE.—The nature of drafts by one bank on another.

When a bank draft is made payable at some particular time, or includes some other particular provision which cannot be included in a check, as illustrated by *Harrison v. Nicolle*, Nat. Bank (Minn.) 5 L. R. A. 746, it is unquestionably to be regarded as a bill of exchange; but when one bank makes an absolute order on another to pay a specified sum to the payee, including no provision which would prevent the instrument from being considered a check, if drawn on the bank by an ordinary depositor, the question whether it is to be considered a check or a bill of exchange is one of much importance. Considering the very different rules which apply to checks and ordinary bills of exchange in respect to presentment, notice, and protest, as well as in other particulars, and considering the almost innumerable drafts made every year by banks on each other, it is astonishing that the question whether they are bills of exchange or checks has been considered in so small a number of cases, and that the question seems to be almost absolutely untouched in legal text books and treatises.

In *Roberts v. Corbin*, 20 Iowa, 315, 96 Am. Dec. 146, such drafts by one bank on another bank in another state were involved, and the court says that counsel agreed that they should be regarded merely as bankers' checks and not foreign bills of exchange. The question decided was that an assignment for creditors by the bank which drew them, made after they were issued but before they were presented, would not defeat the right of the holder to the money as against the assignee for creditors.

So in *German Sav. Inst. v. Adas*, 1 McCrary, 501, 23 L. R. A.

lection and credit" by the assignee for creditors of an insolvent bank which just before assignment had charged the check to the maker but had not given credit to the payee will not constitute a payment of the demand for which the check was given.

2. An instrument must be treated as a check which is headed by the name of a bank and a date and over the signature of the cashier directs the payment to the order of a third person of a certain amount of cash while at the bottom of the paper it is directed to a banking firm.

3. Failure of the bank on which a check is drawn and with which it is deposited "for collection and credit" to notify the drawer of its neglect to transfer the credit will discharge him from further liability in case he is injured thereby.

4. The fact that when a bank received a check upon itself "for collection and credit" to another account it was hopelessly insolvent and the same day placed its assets in the hands of trustees for creditors shows that its failure to notify the drawer of its neglect to transfer the credit worked no injury to him which would discharge him from liability for the debt for which the check was given.

(February 8, 1894.)

APPEAL by plaintiff from a judgment of Superior Court of Baltimore City in favor of defendant in an action brought to recover the amount alleged to be due from defendant to plaintiff for certain collections and for which a draft had been sent to plaintiff, the collection of which failed because of the insolvency of the drawee. *Reversed.*

The facts sufficiently appear in the opinion.

Messrs. Miller & Bonsal, for appellant:

If the bank is on the point of failure the

such an order by a bank on another bank in another state was held, on interpleader between the holder and the assignee for creditors of the drawer, under an assignment made after the draft was drawn but before it was presented, to constitute an equitable assignment of the fund. In this case, however, there is no discussion of the question whether the instrument is to be regarded as a check or as a draft.

In harmony also with the above cases is that of *First Nat. Bank of Cincinnati v. Coates*, 3 McCrary, 9, in which Mr. Justice Miller in an oral opinion held that a draft by one bank on another in another state, which is a mere order to pay absolutely, is a check, and that as against an assignee for creditors of the drawer the check constitutes an equitable assignment of the fund, although notice of the assignment for creditors, which was made after the draft was drawn, was given to the drawee before the draft was presented.

Directly to the contrary of this are other decisions growing out of the same bank failure that was involved in the above case.

Thus in *Rosenthal v. Mastin Bank*, 17 Blatchf. 318, and *Dickinson v. Coates*, 79 Mo. 250, 49 Am. Rep. 228, such drafts or checks on banks in other states are denied effect as against a subsequent assignment for creditors by the drawer, of which notice to the drawee is given before the presentment of the drafts. These cases do not, however, discuss the question of the difference between checks and bills of exchange. The draft is spoken of in *Dickinson v. Coates* as a check, and in *Rosenthal v. Mastin Bank* it is called a "draft or check," and it is the law of checks which is chiefly discussed.

The case of *Dickinson v. Coates*, *supra*, was one of

credit which the drawer of the check has at the bank is worthless.

Tyson v. Western Nat. Bank of Baltimore, ante, 161, 77 Md. 412.

And even suppose the defendant's credit had been transferred to the plaintiff on the books of J. J. Nicholson & Sons before the failure, how could the defendant make valid payment by a transfer of such credit?

Upon broad principles of justice it would seem that a man should not be allowed to pay a debt with worthless paper, though both parties supposed it to be good.

Thomas v. Westchester County Suprs. 4 L. R. A. 477, 115 N. Y. 47.

When the deed of trust was executed the right of Nicholson as a going concern to constitute itself a debtor of the plaintiff at once ceased.

First Nat. Bank of Circleville v. Bank of Monro, 38 Fed. Rep. 408; *First Nat. Bank of Crown Point v. First Nat. Bank of Richmond*, 76 Ind. 561; *Levi v. National Bank of Missouri*, 5 Dill. 104; *Morse, Banks & Banking*, § 248a.

A check given for an antecedent debt is not an extinguishment of the debt, but only a means of payment. A check is not payment until paid.

Morse, Banks & Banking, §§ 544, 546; *Dan. Neg. Inst.* § 1623; *Burkhalter v. Second Nat. Bank of Erie, Pa.* 42 N. Y. 538; *Blair v. Wilson*, 28 Gratt. 165; *Woodville v. Reed*, 26 Md. 179.

If the check be not paid and the payee is not negligent, his right of action against the drawer for the debt, which has been merely suspended by the giving of the check, revives, and he may have recourse to the drawer either upon the debt or upon the check, at his option.

a suit against an assignee for creditors, to whom the funds had been turned over by the bank in another state, while in *Rosenthal v. Mastin Bank*, supra, the suit was in a federal court against the drawer and the drawer's assignee for creditors, as well as the drawee.

In *Grammel v. Carmer*, 55 Mich. 201, 54 Am. Rep. 363, the court in respect to such bank drafts says it is "not the case of a check, but of bills of exchange," but held that whether or not a check would constitute an equitable assignment without such a draft, in case of the drawer's subsequent insolvency and assignment for creditors before its presentment, such a draft by one bank on another would not give the holder, as against a receiver of the drawer, a right to the funds, except *pro rata* with other creditors.

In *Harrison v. Wright*, 100 Ind. 515, 58 Am. Rep. 806, such drafts by a bank on banks in other states were held to be merely checks, and not to constitute an equitable assignment of funds which would be effectual on the subsequent suspension of the drawer bank made before presentment of the drafts, and it was therefore held that a receiver of the drawer should not pay such drafts from the assets of the bank except *pro rata* with other debts due to general creditors. Among the holders of these drafts or checks were some who had paid for them by checks on their deposits in the bank, and others who bought the drafts of the bank by paying cash for them, but all were alike held to be entitled merely to their *pro rata* share of the assets in the receiver's hands.

In *Merchants Nat. Bank v. Ritzinger*, 118 Ill. 484, an order marked "original" by one bank upon an-

other bank in another state to "pay this our first check (second unpaid) to the order of," etc., was held to be merely a check, and not a foreign bill of exchange requiring acceptance notwithstanding the reference to the duplicate order.

That an absolute order drawn by one bank on another in another state is merely a check, so that delay in presenting it will release the liability of an indorser only when the delay causes him injury, is decided in *Bull v. First Nat. Bank of Kasson*, 123 U. S. 105, 31 L. ed. 97; *Planter's Bank v. Merritt*, 7 Heisk. 177; *Planter's Bank v. Keesee*, Id. 200.

But such a draft is a "bill of exchange" within the meaning of the Act of Congress of March 3, 1875, respecting the jurisdiction of federal courts in actions on bills of exchange. *Bull v. First Nat. Bank of Kasson*, supra.

That a bank draft on another bank is a check is also decided in *State v. Vincent*, 91 Mo. 662, deciding that such a draft is properly described as a "check" in an indictment for forging a check. The court says: "It is none the less a check because drawn by a bank."

These are all the cases in which we have found the question touched upon whether or not a bank draft on another bank in the form of check is to be considered a check. Probably there are other cases in which such drafts have been involved, but it would seem that if so the courts have not had this question raised in respect to them. As the decisions stand, they may be regarded as substantially settling the matter in favor of the doctrine that a draft or order on a bank in the form of a check is not the less a check because it is drawn by a bank.

B. A. R.

change is not necessary where the drawer at the time when presentment should be made had no effects in the hands of the drawee, or no reason to expect that the draft would be honored; because he could not be in any way injured under such circumstances.

Eichelberger v. Finley, 7 Harr. & J. 881, 16 Am. Dec. 812; *Orear v. McDonald*, 9 Gill, 350, 52 Am. Dec. 709; *Schuchardt v. Hall*, 86 Md. 590, 11 Am. Rep. 514; *Cathell v. Goodwin*, 1 Harr. & G. 468.

A person who acts within the strict rules of law in the handling of commercial paper will not be held responsible for any loss which may thereby occur.

Syracuse, B. & N. Y. R. Co. v. Collins, 3 Lana. 29, affirmed in 57 N. Y. 641; *Burkhalter v. Second Nat. Bank of Erie*, Pa. 43 N. Y. 538; *Graham v. Morstadt*, 40 Mo. App. 833.

It is proper for a bank holding a check, drawn upon another bank, to send it to the drawee bank for collection.

Indy v. National City Bank of Brooklyn, 80 N. Y. 100; *Thomas v. Westchester County Supra*, 4 L. R. A. 477, 115 N. Y. 47.

Mr. Frank Woods, for appellee:

The case under discussion turns in favor of appellee upon the important exception to the general rule that, if the creditor parts with the bill received as conditional payment, or is guilty of laches, to the prejudice of the debtor, in not presenting it for acceptance or payment in due time, or in failing to give the debtor due notice of its dishonor, the debtor is discharged.

Glenn v. Smith, 2 Gill & J. 493, 20 Am. Dec. 452; *Lewis v. Brahme*, 83 Md. 430, 3 Am. Rep. 190.

The drawer of the draft in question had ample funds in the hands of its drawee and a reasonable expectation that its draft would be honored when presented for payment. Such a drawer is everywhere entitled to all the defenses afforded by commercial law to the indorser of negotiable paper.

Tiedeman, Com. Paper, § 810; 2 Dan. Neg. Inst. §§ 1050, 1276; *Orear v. McDonald*, 9 Gill, 356, 52 Am. Dec. 703; *Schuchardt v. Hall*, 36 Md. 602, 11 Am. Rep. 514; *Brant v. Mickle*, 28 Md. 437.

Due presentment and notice of dishonor are necessary in order to charge the appellee.

Tiedeman, Com. Paper, § 334; 2 Dan. Neg. Inst. §§ 970, 971, 1076; 1 Dan. Neg. Inst. § 452; 3 Randolph, Com. Paper, § 1201.

Neither the fact that the draft in question was drawn as a conditional payment of a pre-existent debt, nor the fact that on the day it was received by mail by the drawees they were insolvent, affords any valid excuse for appellant's failure to make a legal demand on the drawees for payment, and to protest the draft and give appellee due notice of its dishonor, if it was dishonored.

3 Randolph, Com. Paper, § 1329; 3 Kent, Com. 110; Wood's Byles, Bills & Notes, *206; Story, Bills of Exchange, §§ 326, 347; 2 Dan. Neg. Inst. §§ 1171, 1172; *Tiedeman, Com. Paper*, § 860; *Orear v. McDonald*, 9 Gill, 351, 52 Am. Dec. 703.

The only evidence of presentment for payment is that the draft was by mail forwarded to the drawees by appellant, and that it was received by the drawees and charged on their

books to the debit of appellee's account. To say nothing of the manifest tendency of this evidence to prove that the draft was duly honored and paid, it is not sufficient, upon the supposition that the draft was dishonored, to prove such presentment for payment as the law requires, in order to charge appellee as its drawer.

Halls v. Howell, 1 Harp. L. 426; *Gillespie v. Hannahan*, 4 McCord, L. 504.

A presentment or demand of payment must be made personally upon the acceptor, at his place of business, or at his dwelling house, when his residence is known, or may be ascertained by reasonable inquiry; and cannot be made by a written demand, sent to him through the postoffice.

Story, Bills of Exchange, § 325; *Stuckert v. Anderson*, 8 Whart. 116; *McGrader v. Bank of Washington*, 22 U. S. 9 Wheat. 601, 6 L. ed. 171; 1 Parsons, Bills & Notes, § 871; 1 Dan. Neg. Inst. § 654; *Phillips v. McCurdy*, 1 Harr. & J. 187.

Page, J., delivered the opinion of the court:

This is an action of assumpsit, upon a case stated for the opinion of the court with a request to render a judgment in accordance therewith.

The defendant below, being indebted to the plaintiff for certain collections made by the former, on account of the latter, on the 9th day of January, 1892, mailed to the plaintiff the following instrument of writing, viz.:

The Sutton Bank,

Sutton, W. Va., Jan. 9, 1892.

Pay to the order of J. J. Jones, Esq., cash \$936.50 (nine hundred and thirty-six dollars and fifty cents).

T. M. Berry,
Cashier.

To J. J. Nicholson & Sons,
Baltimore, Md.

The plaintiff received it on the 18th following and on the same day forwarded it by mail to the Nicholsonsons (with whom both parties kept accounts) indorsed as follows: "For collection and credit account of Exchange Bank, Jan. 18th, 1892, of Wheeling, West Va., John J. Jones, Cashier." On the morning of the 14th the paper was received by the Nicholsonsons, and was stuck upon a file where were generally placed the various checks drawn upon the house in the ordinary course of business. The defendant then had on deposit to its credit with the banking house a sum in excess of \$936.50. Later in the day, it was taken from the file and entered to the debit of the defendant's account, but was not then entered as a credit to the account of the plaintiff. On the morning of the 14th, Nicholson & Sons were hopelessly insolvent, and about 1 o'clock of that day made an assignment to the trustees, who, after they had taken possession, entered the check to the credit of the plaintiff; but at the time of the receipt, the Nicholsonsons did not have in their banking house the amount of the plaintiff's claim in actual cash. The paper is now lost, and it is not known whether it was protested or not; but if it was, no

notice thereof, or of the non-payment was sent to, or received by, either the plaintiff or defendant. A demand was made by the plaintiff on the defendant for payment, on the 7th of June, 1898, and until that day the defendant had no knowledge that it had not been paid. This was the only demand ever made on the defendant by any one.

It is not contended that the treatment of the paper by the Nicholsons, or their trustees, was tantamount to a payment. There was no credit given to the payees for the amount; and, under the circumstances of the case, until this was done, there was no evidence that it had been accepted. Whether it be regarded as a bill of exchange or a check, it did not operate as an assignment, *pro tanto*, of the drawer's funds in the hands of the Nicholsons, until it was accepted. *Moses v. Franklin Bank of Baltimore*, 34 Md. 590.

So far as the plaintiff was concerned, there was no evidence that the Nicholsons had accepted the order upon them, and thereby agreed to become responsible to it for the amount. And, apart from this, at the time the paper was drawn, and when received by the Nicholsons, they were hopelessly insolvent; and, under such circumstances, a transfer of credit from the defendant to the plaintiff would have been a mere delusion.

After the assignment they ceased to be a going concern, and neither the firm nor their trustees had the right to make a transfer of credit which was wholly worthless. *Manufacturers Nat. Bank v. Continental Bank*, 148 Mass. 558, 2 L. R. A. 699. A check or bill is not a payment until paid—*Morse on Banks and Banking*, secs. 544, 546; *Lewis v. Brehme*, 33 Md. 412, 3 Am. Rep. 190; *Patapasco Ins. Co. v. Smith*, 6 Harr. & J. 166—or unless it is accepted as such, or the creditor parts with it, or is guilty of some laches by which injury inures to the drawer. *Glenn v. Smith*, 2 Gill & J. 509, 20 Am. Dec. 452.

In this case therefore, unless it can be shown that the plaintiff had been guilty of some negligence, whereby the defendant has been either actually or constructively injured, the paper having been lost, it was not improper to resort to the original cause of action. *Myers v. Smith*, 27 Md. 50.

What was the character of the paper offered in evidence? The appellee contends it is a bill of exchange. This court has stated in *Moses v. Franklin Bank of Baltimore*, 34 Md. 579, that "a check is denominated a species of inland bill of exchange, not with all the incidents of an ordinary bill of exchange, it is true, but still it belongs to that class and character of commercial paper." And in *Bull v. First Nat. Bank of Kasson*, 123 U. S. 105, 31 L. ed. 97, in which an instrument of writing exactly similar to the one in this case was declared by the court to be a check, Judge Field, speaking for the whole court, says: "When an instrument is drawn upon a bank, or a person engaged in banking business, and simply directs the payment to a party of a specified sum of money, which is at the time on deposit with the drawee, without designating a future day of payment, the instrument is to be treated as a check. The chief points of difference are, that a

check is always drawn on a bank or banks. No days of grace are allowed. The drawer is not discharged by the laches of the holder in presenting it for payment, unless he can show that he has sustained some injury by the default. It is not due until payment is demanded, etc." *Merchants Nat. Bank of Boston v. State Nat. Bank of Boston*, 77 U. S. 10 Wall. 647, 19 L. ed. 1019; *Harker v. Anderson*, 21 Wend. 875; *Merchants Nat. Bank v. Ritzinger*, 118 Ill. 484; *Harrison v. Wright*, 100 Ind. 515, 58 Am. Rep. 805; *First Nat. Bank of Cincinnati v. Coates*, 8 McCrary, 9; Dan. Neg. Inst. § 1566; Story, Prom. Notes, § 487; Morse, Banks & Banking, § 362.

We do not think what was said by this court in *Hawthorn v. State*, 56 Md. 594, is in conflict with the views here expressed. There, as well as in *Moses v. Franklin Bank of Baltimore*, *supra*, they hold that a check was a species of bill of exchange, not with all the incidents of an ordinary bill of exchange, but belonging to that class and character of commercial paper; or in other words, as was said by Cowen, J., in *Harker v. Anderson*, *supra*, the "bill is the genus and the check is the species;" and therefore Hawthorn was within the terms of the statute, which made it a felony to forge an indorsement on a bill of exchange. The instrument of writing in question in this case must therefore be treated as a check.

On receipt of the check, the plaintiff, with reasonable promptness, forwarded it to the Nicholsons, indorsed "For collection and credit account of Exchange Bank, Jan. 13, 1892, of Wheeling, W. Va.," Such an indorsement constituted them the agents of the plaintiff to collect and credit, and at the same time, as drawees of the check, they were also the agents of the drawers to pay. The plaintiff was therefore responsible for any omission of duty on the part of the Nicholsons in their capacity as collectors. As collecting agents of the plaintiff, it was their duty to do whatever was necessary in respect to demand and notice to the drawer, and for any negligence in regard to this, they would be liable to the plaintiff, and not to the defendant, for such damages as might be occasioned by reason of their neglect. *Montgomery County Bank v. Albany City Bank*, 7 N. Y. 459. The evidence is clear that they did not transfer the credit for the amount of the note from the defendants to the plaintiff. If they had done this, other questions would have to be considered here, upon which we are not now called to decide and do not intimate our opinion; and the failure to make such transfer was equivalent to a refusal to accept and pay. Under such circumstances, it was their clear duty to give notice of the non-payment, to the drawer, in order that the drawee might take any necessary steps to protect its interest; and if they failed to do so, and loss ensued by reason of such want of notice, it falls on the plaintiff, and not upon the drawer. A failure, however, to notify the drawer of the non-payment of a check does not always discharge him from liability; it must also be shown that he has either actually or pre-

sumptively suffered some loss or injury therefrom. Dan. Neg. Inst. § 1587, and authorities cited. *Bull v. First Nat. Bank of Kason*, *supra*. In the case of *Norris v. Despard*, 88 Md. 491, it is true this court said, "If the notice be not given, it is a presumption of law that he is injured by the omission," but they explain this remark by adding that "in the application of the principle, courts must inquire into the liabilities of the respective parties to the check for the purpose of ascertaining whether this injury, either actual or presumptive, could take place." And further on, in the same opinion, "it was but just that they should give the defendant notice of the non-payment in reasonable time before they brought their action, or to have shown that the defendant sustained no injury in consequence." *Rhett v. Poe*, 43 U. S. 2 How. 457, 11 L. ed. 388;

Richelberger v. Finley, 7 Harr. & J. 385, 16 Am. Dec. 812; *Schuhardt v. Hall*, 36 Md. 602, 11 Am. Rep. 514.

Here it is clear, that at the time the check reached the Nicholsons they were hopelessly insolvent, and did not have in their banking house the amount of the check in actual cash. Their assignment on the same day placed all their assets in the hands of trustees, and definitely fixed the status of any claim the defendant had, or could have upon them. Under these circumstances, we can perceive no way by which, on account of the want of notice, injury to the defendant either "actual or presumptive" could take place.

The judgment below must be reversed.

Judgment reversed and judgment for the appellant for the sum of \$1,053.56 with interest from this date until paid and costs.

ALABAMA SUPREME COURT.

Katie CREED *et al.*, *Appts.*,

v.

SUN FIRE OFFICE OF LONDON.

(.....Ala.....)

1. An insurance company cannot avoid a policy stipulated to be void if the interest of the insured be other than the unconditional and sole ownership of the property because such interest was not truly stated and the interest of the insured was not that of unconditional and sole ownership, where its agent knowingly and intentionally wrote down the answers differently from those made by the insured and the latter made true and full statements of his interest to such agent.
2. A simple contract creditor has an insurable interest in a building belonging to the estate of his deceased debtor which may be subjected to his debt because the personal property is insufficient to pay the debts of the estate.
3. Plaintiffs in a suit upon an insurance policy are shown to have an insurable interest by a plea showing that the building and lot insured belonged to the estate of a decedent and that neither of the assured are his legal heirs, and a replication averring that one of the plaintiffs was the widow of the decedent and that he owned no other real estate, followed by the conclusion that she owned a dower and homestead interest, and further averring that the other plaintiff was a creditor of the decedent, stating the amount of her claim, the insufficiency of personal assets to pay the debts, and that there was no other real property belonging to the estate, as such replication shows a remainder interest in the real estate liable for the debts.

(December 19, 1898.)

A PPEAL by plaintiffs from a judgment of the Circuit Court for Montgomery County in favor of defendant in an action brought to

NOTE.—While the above decision is well within established principles of insurance law the application seems to be a new one.

33 L. R. A.

recover the amount alleged to be due on a policy of fire insurance. *Reversed.*

The defendant pleaded that by the terms of said policy it was provided that the entire policy was to be void if the insured concealed or misrepresented any material fact concerning the insurance, or the subject thereof; and further averred that the insured had concealed a material fact concerning the subject of the insurance, in that the plaintiffs applied for and took out said insurance upon the house described in the complaint as their property, whereas in truth it was, at the time of the taking out of said policy, and at the time of said fire, the property of the estate of one T. W. Creed, who died intestate before the taking out of said insurance policy; and that the said T. W. Creed left surviving him brothers and sisters, heirs-at-law, and that neither of the plaintiffs was a sister of the deceased; and that the plaintiffs concealed from the defendant the fact that said house was the property of the said T. W. Creed, deceased; that in and by the terms of the policy sued on in this case it is expressly provided, among other things, that the entire policy, unless otherwise provided by agreement indorsed thereon or added thereto, shall be void if the interest of the insured be other than the unconditional and sole ownership of the property insured; and defendant avers that the said insured took out the said policy upon the said house described in said complaint as their property, and that at the time the said insurance occurred, and at the time the said building was destroyed by fire, the said house was not the property of the said plaintiffs; and defendant further avers that the said policy contains no agreement indorsed thereon or added thereto that the plaintiffs might insure the said property although they were not the sole and unconditional owners of the said property; that in and by the terms of the policy sued on in said complaint it is expressly provided that the entire policy shall be void if the interest of the insured in the

property be not truly stated therein, and defendant avers that the interest of the said insured is not truly stated in the said policy, that the said property is insured as the property of the said plaintiffs, whereas in truth and in fact the said property was not the property of the said plaintiffs; that the said Mattie Flinn had no interest in the said property; that the said house insured formerly belonged to one T. W. Creed, who had died intestate, leaving certain brothers and sisters as his heirs-at-law; that the only interest that the said plaintiff Katie Creed had in and to the said property was the interest which she as the widow of the said T. W. Creed might acquire therein, and the said Mattie Flinn had no interest therein; wherefore this defendant avers that the interest of the said plaintiffs, the insured, was not truly stated in the said policy, and that the same is void; that in and by the terms of said policy it is expressly provided that, unless it is provided by agreement indorsed thereon or added thereto, the said policy shall be void if the subject of the insurance be a building on ground not owned by the insured in fee simple; and defendant avers that the subject of insurance in this instance was a building on a certain lot of land near the city of Montgomery, Alabama; that the said lot of land was not at the time of taking out said policy, or at the time of said loss, nor at any time after the taking out of the said policy, owned by said plaintiffs in fee simple, but that, on the contrary, the said ground was owned by the heirs-at-law of one T. W. Creed, then lately deceased; and that plaintiffs were not the heirs-at-law of said T. W. Creed. And defendant further avers that no agreement was indorsed on the said policy, or added thereto, providing that the subject of insurance might be on ground not owned by the insured in fee simple; and that the defendant had no notice at the time of the issuance of said policy, nor at any time prior to the burning of said building, that the plaintiffs did not own the ground upon which the said building was situate. The plaintiffs filed the following replication: "That at the time of taking out the policy of insurance sued on in this cause, Katie Creed, one of the plaintiffs, was the widow of T. W. Creed, then lately deceased, who died seised in fee of the property insured, and that she is still such widow; that as such widow she had and has an interest by way of dower and homestead in the property covered by said insurance; that she had such interest at the time of the application for and the issuance of said policy by defendant; that at the time of the application for and the issuance of said policy, Mattie Flinn, the other plaintiff in this cause, was a large creditor of the estate of T. W. Creed in the amount of, to wit, about two thousand dollars, and that she was such creditor at the time of the burning of said house insured and described in the complaint in this cause, and such claim of said Mattie Flinn has been ever since the taking out of the policy of insurance sued on, and is now, a valid and subsisting demand against the estate of T. W. Creed, deceased; that there is not and was not at the time of the application for and the issuance

of the policy sued on in this cause, enough personal property belonging to the estate of said T. W. Creed to pay the debts due and outstanding against said estate. And plaintiffs aver that they applied to one J. B. Trimble, who was at the time of said application the regularly constituted agent of defendant corporation, for said policy on said building; that said J. B. Trimble well knew at the time plaintiffs applied for said policy, and at the time of the issuance and delivery to them by him as such agent of defendant corporation, that the said property so insured was the property of the estate of T. W. Creed, deceased, and that he was at the time of the application for said policy informed of this fact by plaintiffs; that said Trimble, as agent of defendant, well knew at the time of the application for said policy and its issuance, and was then and there informed by plaintiffs, that their only interests in the property so insured was that plaintiff Mattie Flinn was a creditor, as above described, of the estate of T. W. Creed, and that plaintiff Katie Creed was the widow of said T. W. Creed, and as such had a dower and homestead interest in said property; that, so knowing, said J. B. Trimble himself drew up the application for said insurance, received the premium therefor, and turned the policy over to plaintiffs; and that plaintiffs never in any way misrepresented the title to said property to the defendant, or any of its agents, but that the defendant, with full knowledge as aforesaid, issued said policy to plaintiff." This replication was afterwards amended by averring that the property insured in said policy was the only real property of the estate of said T. W. Creed, deceased. To the replication as amended the defendant demurred on the following grounds: "(1) It is averred in the second plea, and not denied by the replication, that the policy sued on contains a clause and stipulation that it should be void, unless otherwise provided by agreement indorsed thereon, if the interest of the insured should be other than the unconditional and sole ownership of the property insured; and it is shown by the allegations of said replication that the insured were not the unconditional and sole owners of such property, and it is not averred therein that there is any agreement indorsed on said policy that plaintiffs might insure such property although they were not such owners. (2) It is averred in the fourth plea, and not denied by said replication, that one of the terms of the policy sued on is that the same should be void if the interest of the insured in the property be not truly stated in the policy; and it is not shown by said replication that such interest was truly stated. (3) It is shown by said replication that the interest of the insured was not truly stated in the policy. (4) It is not denied that the policy sued on provides that it should be void if the buildings insured were not situate on ground owned by the insured in fee simple, and it is shown by the allegations of said replication they were not such owners. (5) It is shown by the allegations of said replication that plaintiffs had no insurable interest in the property covered by the policy sued on. (6) It is shown by

the allegations of said replication that plaintiff Flinn had no insurable interest in the property covered by the policy sued on. (7) It is shown by the allegations of said replication that the contract sued upon was and is a wagering or gambling contract. (8) It is shown by the allegations of said replication that plaintiff Flinn had no interest in the property covered by the policy sued on, and that the alleged contract insuring the same was and is against public policy, and void. (9) It is not shown by the allegations of said replication that plaintiff Creed had any homestead right in the property covered by the policy sued on. (10) It is shown by the allegations that the property was not subject to the debt of Mattie Flinn."

Further facts appear in the opinion.

Mr. A. A. Wiley, for appellants:

If plaintiffs had an insurable interest in said property, the replication, when properly interpreted, "shows a waiver of the condition and constitutes a full answer to the plea."

Brown v. Commercial F. Ins. Co. 86 Ala. 194.

The agent, Trimble, knowing the character of the interest which each of the plaintiffs had in or to the property covered by the policy, "himself drew up the application for said insurance, received the premium therefor, and turned the policy over to plaintiffs," and the replication particularly avers that plaintiffs "never in any way misrepresented the title to said property to the defendant, or any of its agents, but that the defendant, with full knowledge, as aforesaid, issued said policy to plaintiffs."

In such case "the defendant will not be permitted to take advantage of the wrongful act, or misconstruction or mistake of its own agent and avoid the policy, the insured being without fault."

Williamson v. New Orleans Ins. Assn. 84 Ala. 108; *Alabama Gold L. Ins. Co. v. Garner*, 77 Ala. 210; *German Ins. Co. v. Miller*, 39 Ill. App. 633; *Herndon v. Triple Alliance*, 45 Mo. App. 426; *Follette v. United States Mut. Acc. Assn.* 15 L. R. A. 663, 110 N. C. 377; *Gristock v. Royal Ins. Co.* 37 Mich. 428.

The term "interest" does not necessarily imply property. The contract of insurance being one of indemnity against losses and disadvantages, an insurable interest may be proved in the insured, without the evidence of any legal or equitable title to the property.

Putnam v. Mercantile Marine Ins. Co. 5 Met. 386; *Lazarus v. Commonwealth Ins. Co.* 19 Pick. 81; *Hancoz v. Fishing Ins. Co.* 3 Sumo. 182; *Fenn v. New Orleans Mut. L. Ins. Co.* 53 Ga. 579; *Depaba v. Ludlow*, 1 Comyn, Rep. 361; *Shannon v. Nugent*, Hayes. 536; *Schweiger v. Magee*, Cooke & Al. 182; *Keith v. Protection Marine Ins. Co. of Paris*, L. R. Ir. 10 Exch. 51.

The objections that the plaintiffs have no insurable interest comes with bad grace from a company that has received premiums on a policy issued with knowledge of the very facts it objects to, now, as insufficient to create an insurable interest.

Currier v. Continental L. Ins. Co. 57 Vt. 496, 52 Am. Rep. 134.

Mattie Flinn had an insurable interest in

the property. T. W. Creed was dead, and the personal property was insufficient to pay the debts outstanding against the estate. She was his largest creditor, and looked to the property covered by the insurance as her only means of payment, as her indemnity against loss.

Fenn v. New Orleans Mut. L. Ins. Co. supra. See also *Ellicott v. United States Ins. Co.* 8 Gill & J. 166.

Mrs. Katie Creed, as the widow of the decedent, being in possession of the property at the time the contract was made, and entitled to dower and homestead, had such an interest as was insurable.

Harris v. York Mut. Ins. Co. 50 Pa. 841, and cases cited above.

If she alone had an insurable interest, the policy was good as to her interest therein.

1 May, Ins. 3d ed. § 74.

A general creditor of the estate of one deceased, whose personal property left is insufficient for the payment of his debts, has an insurable interest in the sole real estate of the deceased debtor, when it is plain that if it is damaged by fire a pecuniary loss must ensue to the creditor thereby.

1 Arnould, Marine Ins. 229; Bunyan, Life Ins. 16; Hughes, Ins. 80; 1 Marshall, Marine Ins. 115; 1 Phillips, Ins. 2, 107; Sherman, Marine Ins. 93; Parsons, Mercantile Law, 507; Parsons, Cont. 438; Angell, Fire & Life Ins. § 56; Flanders, Fire Ins. 342; May, Ins. 76; *Hancoz v. Fishing Ins. Co.* 3 Sumo. 182; *Putnam v. Mercantile Marine Ins. Co.* 5 Met. 386; *Wilson v. Jones*, L. R. 3 Exch. 189; *Buck v. Chesapeake Ins. Co.* 26 U. S. 1 Pet. 151, 7 L. ed. 90; *Mapes v. Coffin*, 5 Paige, 296, 3 L. ed. 725; *Mickles v. Rochester City Bank*, 11 Paige, 118, 5 L. ed. 77, 42 Am. Dec. 108; *Springfield F. & M. Ins. Co. v. Allen*, 43 N. Y. 839, 3 Am. Rep. 711; *Herkimer v. Rice*, 27 N. Y. 163; *Savage v. Howard Ins. Co.* 52 N. Y. 502, 11 Am. Rep. 741; *Clinton v. Hope Ins. Co.* 45 N. Y. 454; *Waring v. Loder*, 53 N. Y. 581, distinguishing *Greenmeyer v. Southern Mut. F. Ins. Co.* 63 Pa. 340, 1 Am. Rep. 420; *Conrad v. Atlantic Ins. Co. of N. Y.* 26 U. S. 1 Pet. 336, 7 L. ed. 189; *Cover v. Black*, 1 Pa. 493; *Rohrbach v. Germania F. Ins. Co.* 62 N. Y. 47, 20 Am. Rep. 451; 4 Ins. L. J. 737.

Coleman, J., delivered the opinion of the court:

This is an action by appellants upon a policy of insurance issued for the benefit of plaintiffs, insuring a certain dwelling against loss or destruction by fire. The suit is in the joint name of Katie Creed and Mattie Flinn, the assured. The defendant pleaded several special pleas, upon some of which issue was joined, and to the others a replication was filed by plaintiffs. The court sustained a demurrer to the replication, and the plaintiffs declining to plead further, judgment was rendered for the defendant.

Several questions have been argued, but the rulings of the court upon the demurrers to the replications present the material questions involved on this appeal. The first is whether, when a policy of fire insurance contains a stipulation that the policy shall be void if the interest of the insured be other

than "the unconditional and sole ownership of the property insured," and the plea avers a state of facts which, if true, shows that the interest of the insured was not truly stated in the policy, and that the interest of the insured was not that of "unconditional and sole ownership," a replication to such plea is good which avers that the policy was procured from an agent of the defendant, authorized to issue policies of fire insurance, to whom the insured, at the time the policy was applied for and received, truly and fully stated their interest in the property to the agent; and that the agent, being fully informed, himself drew up the application for the insurance, received the premium therefor, and, with full knowledge of the facts, turned the policy over to plaintiffs. We have held that if the applicant make full and true answers to the questions contained in the application, and suppresses no material fact which it is his duty to make known, the company will not be permitted to take advantage of the carelessness, inadvertence, or misunderstanding of its agent; the insured being without fault. *Alabama Gold L. Ins. Co. v. Garner*, 77 Ala. 210; *Williams v. New Orleans Ins. Asso.* 84 Ala. 106; *Pelican Ins. Co. of New Orleans v. Smith*, 93 Ala. 428; *Equitable F. Ins. Co. v. Alexander* (Miss.) 12 So. Rep. 25.

Upon the same principle, and for stronger reasons, the company cannot avoid its obligation if its own agent knowingly and intentionally writes down the answers differently from those made by the insured. We think the replication a full answer to the plea on this question.

The next proposition involves a question new in this state. Has a creditor an insurable interest in a building, the property of the estate of his deceased debtor which may be subjected to his debt, the personal property being insufficient to pay the debts of the estate? After much deliberation, our conclusion is that he has an interest which may be insured. We concede and affirm that a simple contract creditor, without a lien either statutory or contract, without a *jus in re* or a *jus in rem*, owning a mere personal claim against his debtor, has not an insurable interest in the property of his debtor. Such contracts are void, as being against public policy. We do not think the principle applies after the death of the debtor, as to property liable for the debt, and which, if destroyed, will result in the loss of the debt. The real estate as well as personal property of a deceased debtor is liable for his debts, but the real estate cannot be subjected to the payment of his debts until after the personality has been exhausted. After the death of the debtor the debt is no longer enforceable *in personam*. The proceedings to reach the property of the estate of the deceased debtor are *in rem*. The property of the debtor takes the place of the debtor, and becomes, as it were, the debtor. Whoever knowingly receives the property of a deceased debtor, and wrongfully converts it, is answerable to the creditor. 8 Brickell, Dig. p. 464, § 148; Id. p. 465, § 162. The relation of creditor and debtor invests the creditor with an insurable interest in the life of his debtor to the extent

of his debt. *Alexander v. Sanders*, 93 Ala. 345; 11 Am. & Eng. Encyclop. Law, § 119. It would seem upon like principles that, when the property becomes directly subject to proceedings *in rem* for the satisfaction of the debt, the creditor should become invested with an insurable interest in the property. Certainly, if a creditor cannot obtain satisfaction of his debt from the personal property of his deceased debtor, and has a legal right, which cannot be defeated, to enforce its collection by proceedings *in rem* against a building belonging to the estate of the deceased debtor, and if it be true that the destruction of the building by fire would immediately and necessarily result in pecuniary loss, the loss being the direct consequence of the fire, the creditor has an interest in the protection of the building. He has no lien as in the case of a mortgagee nor such lien as the statute may confer on an attaching or execution creditor; but his right to subject the specific property to his debt invests him with an interest but little less, if any, than that of the attaching or execution creditor or mortgagee. In the case of *Herkimer v. Rice*, 27 N. Y. 168, the question arose as to whether an administrator of an insolvent estate held an insurable interest in the real estate of the deceased debtor. The court (Denio, Ch. J., rendering the opinion) held that he did, and the conclusion was based in great part upon the proposition, that the creditors had such an interest which the administrator could protect by insurance for them. We think whatever could be done by an administrator for the creditor in this respect could be done directly by the creditor for himself. *Rohrbach v. Germania F. Ins. Co.* 62 N. Y. 47, 20 Am. Rep. 451. Other reasons might be given, but we are of opinion these are sufficient to show that the creditor of a deceased debtor, whose estate is insufficient to pay the debts, has an insurable interest in the property of the estate, which by law may be subjected by proceedings *in rem* to the payment of the debts. The recovery cannot exceed the amount of the insurable interest.

The next question is whether the pleadings show such an insurable interest. The pleas and the replication appear to have been drawn with technical caution, so far as the rights of Mattie Flinn, the creditor, are affected. The plea shows that the building and lot upon which it is located belonged to the estate of Thomas Creed, deceased, and that neither of the assured are his legal heirs. Upon the death of Thomas Creed the land descended to his legal heirs. Prima facie, upon the fact of the plea, the insured owned no insurable interest. The replication avers that Katie Creed was the widow of Thomas Creed, and that he owned no other real estate, and this statement of facts is followed with the conclusion that she owned a dower and homestead interest. Hers was clearly an insurable interest. Its value is a fact to be ascertained by proof. The replication then further averred that Mattie Flinn was a creditor of Thomas Creed, stating the amount of her claim, the insufficiency of personal assets to pay the debts, and that there was no other real property belonging to his estate. The

interest shown by the plea to be in Katie Creed (dower and homestead) does not include the entire estate. Under the replication there is a remainder interest in the real estate liable for the debts of the estate. The pleadings inform us that the lot and building were in the city of Montgomery. Whether it exceeded in value \$2,000, the constitutional limit of the value of the homestead exempt from debts during the lifetime of the

widow, does not appear. We are not unmindful of the statutory provision by which, under some circumstances, the fee to the homestead may become vested in the widow and minor children or widow or minor child. The consideration of these questions does not arise upon the pleadings. The court erred in sustaining the demurrer to the replication.

Reversed and remanded.

IOWA SUPREME COURT.

C. SLATER

v.

CAPITAL INSURANCE CO., *Appt.*

(.....Iowa.....)

1. **A waiver of proofs of loss under a policy upon a building**, made by an adjuster sent by the same company to adjust a loss upon the contents of such building, under a policy held by a firm of which the holder of the former policy was a member, is binding upon the company, in the absence of notice to the insured of any limitation upon the authority of such adjuster.
2. **In an action upon a policy of insurance, evidence as to a loss and adjustment under a policy held by a firm of which the plaintiff was a member**, upon the contents of the building covered by the policy sued on is admissible to show the connection of the two losses and the relation of the parties to the suit in the two transactions, upon the question whether an adjuster who adjusted the loss of the firm had authority to waive proofs of loss under the policy in question.
3. **Upon the trial of an action upon an insurance policy, instructions that authority from the defendant to a certain adjuster to adjust and settle the loss of a firm of which the plaintiff was a member, would not give him authority to bind the defendant as to the loss of the plaintiff under the policy in question, and that the fact that authority was given him to settle the firm loss is proper to be considered as a circumstance to show the relation existing between defendant and such adjuster, and that from that and from other facts and circumstances shown by the evidence, the jury must say whether such adjuster was authorized to adjust and settle plaintiff's loss or not, are not conflicting or erroneous as regards the defendant.**

(January 18, 1894.)

APPEAL by defendant from a judgment of the District Court for Cass County in favor of plaintiff in an action brought to recover the amount alleged to be due on a policy of fire insurance. *Affirmed.*

The facts are stated in the opinion.

Meers. Read & Read, for appellant:

An agent's authority cannot be shown by

evidence of his own declarations and statements.

Sax v. Davis, 81 Iowa, 692.

It is the duty of a party who deals with an agent to inquire into the nature and extent of his authority and to deal with him accordingly.

Toule v. Leavitt, 23 N. H. 360, 55 Am. Dec. 195; *Brown v. Johnson*, 12 Smedes & M. 398, 51 Am. Dec. 118; *Baxter v. Lamont*, 60 Ill. 237.

Persons dealing with an assumed agent are bound at their peril to ascertain, not only the fact of agency but the extent of authority.

Mechem, Ag. §§ 276-284; Dickinson County v. Mississippi Valley Ins. Co. 41 Iowa, 286; *Davies v. Lyon*, 86 Minn. 427.

Several instances of appointment as special agent are not admissible to prove general agency.

Winch v. Baldwin, 68 Iowa, 764; *Green v. Hinkley*, 52 Iowa, 638; *Mathews v. Gillies*, 1 Iowa, 242.

Where a person is authorized to sign the name of another to a note for a specified sum, the payee will be charged with knowledge of the extent of such authority and the principal will not be bound beyond it.

Blackwell v. Ketcham, 53 Ind. 185; *Stovall v. Com.* 84 Va. 246.

Whoever deals with an agent is put on his guard by that very fact and does so at his risk. It is his right and duty to inquire into and ascertain the nature and extent of the powers of the agent.

Chaffe v. Stubbs, 87 La. Ann. 656; *Buzard v. Jolly* (Tex.) Dec. 20, 1887; *Mechem, Ag. §§ 393, 706-716*, pp. 288-392; 1 Parsons, Cont. p. 41; *Edwards v. Dooley*, 120 N. Y. 540.

An agent to adjust a particular loss cannot bind his principal by acting with reference to another loss.

Hartford F. Ins. Co. v. Smith, 8 Colo. 422. *Mr. L. L. DeLano* for appellee.

Granger, Ch. J., delivered the opinion of the court:

The plaintiff was the owner of a livery barn at Atlantic, Iowa, on which the policy in suit issued, which is numbered 2,241. The policy issued to the plaintiff. The defendant also issued a policy on the contents

NOTE.—The above case is a somewhat novel application of the doctrine that one who holds another out as his agent with certain powers will be stopped to deny his authority when strangers have dealt with him in reliance upon such repre-

sentations, which doctrine will be found in cases collected in *notes* to *Wheeler v. McGuire* (Ala.) 2 L. R. A. 308, and *Hubbard v. Tenbrook* (Pa.) 2 L. R. A. 823.

of the barn to Slater & Eller, the Slater of the firm being the same person as the plaintiff. The Western Home Insurance Company also issued separate policies on the same property to the same persons. Other companies also issued policies in the same way. On the 3d day of May, 1888, and while the policies were in force, the building and contents were destroyed by fire. The policy issued to Slater & Eller by defendant was numbered 2,239. Notice of loss was given to the company under the two policies. Under the policy in suit, No. 2,241, no proofs of loss were made, and the defense to the suit is based on that fact, so far as concerns this appeal. In avoidance of the failure to make such proofs the plaintiff pleaded a waiver by the defendant.

One E. F. Philbrook was the adjusting agent for the Western Home Insurance Company, and visited Slater & Eller for the purpose of adjusting the loss of that company. On his way he called at the office of the defendant company at Des Moines, and was by its secretary, H. E. Teachout, asked to act for the defendant company with reference to its loss; but there is some conflict as to the extent of his authority to so act. It is the claim of the plaintiff that, under his authority, he could legally bind the defendant as to adjustments under both policies, while it is that of the defendant that he was merely authorized to "adjust or take proofs of loss," under policy 2,239. At the close of plaintiff's direct testimony, and again at the close of the testimony in the case, the defendant moved the court to instruct for a verdict in its favor on the ground that there was no testimony from which the jury could properly find that Philbrook had authority to act for defendant with reference to the loss under the policy in suit. In each case the motion was overruled, of which rulings complaint is here made, and the consideration of the questions thus presented will largely dispose of the questions in the case. It will only be necessary to consider the ruling upon the second motion, because if, in the further progress of the trial, after ruling upon the first motion, the state of the evidence was so changed that such a motion was properly overruled, the first ruling, even if erroneous, was without prejudice.

1. Under the authority granted to Philbrook by defendant's secretary, he so acted that the loss of Slater & Eller was adjusted and paid. His own report to the defendant shows that he not only took proofs of loss, but that he also exercised the authority of adjusting values by agreement, and the company acted upon his report. This fact, with the statement in argument by appellant that he was authorized to "adjust or take proofs of loss," warrants the conclusion with us that he was before Slater & Eller as the company's authorized adjuster. With this relationship fixed, we can more easily apply the evidence as to Philbrook's authority to bind defendant as to the loss under the policy in suit. It will be remembered that other companies than the defendant and the Western Home Company, for which Philbrook acted under the Slater & Eller loss, carried risks

on the livery barn; and these other companies and Slater, at the time of this adjustment by Philbrook of the Slater & Eller loss, had agreed upon terms of arbitration, and there were at that time no adjustments under the policy in suit. The facts upon which plaintiff relies to support his plea of waiver are that at the time of the adjustment of the Slater & Eller loss he and Philbrook agreed that no proofs of loss under the policy in suit need be made, and that the claim should abide the result of the arbitration with the other companies, the defendant to pay its proportion of the loss as thus ascertained; and that, relying upon such agreement, no proofs of loss were made; and this suit is for the proportion as fixed by the arbitration. The evidence is conflicting, but the state of it is such that the jury could, as it must, have found that such an agreement was made, and with its finding we should not interfere if, in making such agreement, he could legally bind the defendant. What, then, as between plaintiff and defendant, is the legal effect of the authority granted to Philbrook? The company had sent him to Slater & Eller as their adjuster. Neither the company nor Philbrook intimated that his authority as an adjuster was limited, but, on the contrary, he in the one case authoritatively exercised the usual powers of such an agent. The company had said to both Slater and Eller: "This is my authorized agent. Deal with him as such." In view of the finding of the jury, we may say that Philbrook assumed the same authority for adjustment under one policy as under another. The rule of appellant's contention would require us to hold that Slater, after dealing with him as an authorized adjuster with him and Eller in regard to the loss on the contents of the barn on one policy, could not recognize him as an adjuster on a loss on another policy from the same company to him resulting from the same fire. We think that such a rule should not obtain. Looking to the manner in which the insurance business of the country is transacted, through agents, distant from the home offices of the companies, by which patrons neither see nor know any other than the soliciting agent, who, upon a written application, either issues or procures and delivers the policy, and, after loss, the adjuster, through whom the business of adjustment is carried on, and the consequences of the rule contended for will be apparent. The rules of law are designed to be in harmony with the natural and reasonable conduct of parties in their business intercourse, and with the changed condition in the business intercourse of the country from time to time must come such changes in the laws governing legal rights as will maintain such harmony. Philbrook had been sent to Slater as an adjuster. It is the law that Slater must, at his peril, know of Philbrook's authority to act as such; but with his knowledge that he was an adjuster came the legal right to assume that his power was commensurate with the duties of adjustment between the persons to whom he was sent and the company as to all matters that should reasonably be considered as intended by the company. We think that,

after the adjustment of the Slater & Eller loss by Philbrook, no reasonable person would have doubted his pretended authority to adjust the loss on the barn, particularly in view of the close identity of the losses as to parties and circumstances. It was the act of the company that gave rise to this reasonable belief on the part of Slater by sending Philbrook as adjuster. If an insurance company does not wish to be bound up by so broad a presumption as to the authority of an adjuster, a reasonable and very just rule, as applied to the present method of insurance business, would require that it should impart to the assured the limitations upon his authority, by which means the parties could act upon an equality,—a condition absolutely forbidden by the rule contended for.

The general importance of the rule we are considering will justify a somewhat extended quotation from *Union Mut. L. Ins. Co. of Maine v. Wilkinson*, in 80 U. S. 18 Wall. 223, 20 L. ed. 617, where the United States Supreme Court has adopted reasoning somewhat similar to ours with like conclusions. We quote therefrom as follows: "It is well known," said the court "(so well that no court would be justified in shutting its eyes to it), that insurance companies organized under the law of one state, and having in that state their principal business office, send these agents all over the land, with directions to solicit and procure applications for policies, furnishing them with printed arguments in favor of the value and necessity of life insurance, and of the special advantages of the corporation which the agents represent. They pay these agents large commissions on the premiums thus obtained, and the policies are delivered at their hand to the assured. The agents are stimulated by letters and instructions to activity in procuring contracts, and the party who is in this manner induced to take out a policy rarely sees or knows anything about the company or its officers by whom it is issued, but looks to and relies upon the agent who has persuaded him to effect insurance as the full and complete representative of the company in all that is said or done in making the contract. Has he no right to so regard him? It is quite true that the reports of judicial decisions are filled with the efforts of these companies, by their counsel, to establish the doctrine that they can do all this, and yet limit their responsibility for the acts of these agents to the simple receipt of the premium and delivery of the policy; the argument being that, as to all other acts of the agent, he is the agent of the assured. The proposition is not without a support in some of the earlier decisions on the subject; and at a time when insurance companies waited for parties to come to them to seek assurance, or to forward applications on their own motion, the doctrine had a reasonable foundation to rest upon. But to apply such a doctrine, in its full force, to a system of selling policies through agents, which we have described, would be a snare and a delusion, leading, as it has done in numerous instances, to the grossest frauds, of which the insurance corporations receive the

benefits, and the parties supposing themselves insured are the victims. The tendency of the modern decisions in this country is steadily in the opposite direction. The powers of the agent are *prima facie* coextensive with the business intrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals. An insurance company establishing a local agency must be held responsible to the parties with whom they transact business for the acts and declarations of the agent within the scope of his employment as if they proceeded from the principal." The arguments in that case apply with strong, if not with equal, force to the business of fire insurance, and to the duties and authority of agents acting for companies after losses occur. In view of the business zeal and competition of the times, with insurance companies we may say "no stone is left unturned" to secure applications, and to this end agents wait upon desired customers in field and shop and home, to urge their superior claims for patronage. After a loss occurs, agents are promptly on the ground for investigation, conference, and adjustment. Under the business education of the times they are factors by and through which patrons may know and deal with the companies. The agent is the representative of the company. Now, it is certainly a reasonable rule that when an agent approaches a patron who has met with a loss, he may know to what extent he can safely act or deal with him as such agent. The company has that knowledge. If they are to do business upon equal terms, the patron should also have it. It is hardly to be expected that the business of adjustment must await a correspondence between the assured and the company to know the fact. But two other methods are open: First, that the company shall give notice of the authority possessed by its agent; or, second, that the assured may lawfully assume that the agent has authority to transact the business in hand as if possessing general powers for that purpose. Such a rule has full support in *Union Mut. L. Ins. Co. of Maine v. Wilkinson*, *supra*, and also in considerations of both public and private good. See, also, as bearing on this question, *Siloberberg v. Phenix Ins. Co.*, 67 Cal. 36, and to some extent, *American Ins. Co. v. Gallatin*, 48 Wis. 36.

There are very many cases in which other, but somewhat kindred, subjects are discussed, wherein, from the reasoning, this position receives support. Of those, see *Morrison v. Insurance Co. of North America*, 69 Tex. 853; *Cleaver v. Traders Ins. Co.* 71 Mich. 414; *Schomer v. Hekla F. Ins. Co.* 50 Wis. 575; *Alexander v. Continental Ins. Co. of New York*, 67 Wis. 422, and cases therein cited.

It should be stated that the state of Wisconsin has a general statute on the subject, which controls the decisions of that state to some extent. We think the facts of this case justify the application of such a rule, and that the company is responsible for failure to make the proofs of loss. The evidence and admissions were such that, under the law as

we have expressed it, it was not error to refuse the motion to instruct the jury to return a verdict for the defendant.

2. There is a complaint that the court admitted evidence as to the Slater & Eller loss and adjustment, and it will be seen that we think such testimony was proper, as showing the connection of the two losses, and the relation of the parties to this suit in the two transactions. The court told the jury that "authority from the defendant to Philbrook to adjust and settle the Slater & Eller loss would not give authority to bind the defendant as to the loss of the plaintiff under the policy in question," and of this appellant does not complain; but the court further says: "Still the fact that authority was given him to settle the Slater & Eller loss is proper to be considered by you as a circumstance to show the relations existing at the time between defendant and said Philbrook, and from these and every other fact and circumstance shown by the evidence you must say whether said Philbrook was authorized to adjust and settle plaintiff's loss or not." We

see no error in the instruction. The two statements are not in conflict. The first deals with the legal effect, only, of a particular fact, and the latter permits its use with other facts to reach a conclusion. It may be said that the theory on which the court submitted the case differs from the rule announced by us in this: that it required the jury to find as a fact that Teachout authorized Philbrook to act for the company in adjusting the Slater loss, without stating the presumption arising from the fact of his being sent to Slater as the company's adjuster. But appellant cannot complain of the neglect to state a presumption of law against it. We think the effect of the instructions, taken together, was to permit the jury to assume from the manner in which Philbrook was sent, in view of the entire surroundings, the authority to act in the Slater case. While the court did not, in terms, state the rule as to presumptions, it was inferable from the instructions given.

There is no error in the record, and *the judgment is affirmed.*

NEW JERSEY COURT OF ERRORS AND APPEALS.

LILLIE A. KEEPERS, *Plff. in Err.*,

v.

FIDELITY TITLE & DEPOSIT CO.

(Two Cases.)

(.....N. J.....)

***1. The plaintiff's sister, on her death-bed, delivered to the plaintiff the key of a box, saying: "I give you the box and all it contains." The box was in another room of the house, locked in a closet, the key of which was in possession of the plaintiff's mother, with whom the sister lived. The plaintiff lived elsewhere, and during her sister's life, made no attempt to take possession of the box. Held, that there was no such delivery of securities contained in the box as is essential to a valid *donatio mortis causa*.**

2. A will directed that testator's property be divided equally between his daughters, each to come into possession of her share on arriving at the age of twenty-three years, and that, in case of the death of either before arriving at that age, her children should inherit the parent's share, but, if no issue, then the survivor of the daughters should take the other's share. Held, that the will gave the survivor no right to the share of her sister, dying after she had reached the age of twenty-three years.

(*Abbott, J., dissents.*)

(February 26, 1894.)

ERROR to the Circuit Court for Essex County to review a judgment in favor of defendant in actions brought to recover the amount of a savings bank deposit and certain securities and certificates of stock. *Affirmed.*

*Headnotes by DIXON, J.

NOTE. As to sufficiency of constructive delivery to sustain gift *causa mortis*, see Page v. Lewis (Va.) 18 L. R. A. 170, and note.
23 L. R. A.

Statement by DIXON, J.:

The plaintiff, Lillie A. Keepers, brought two suits in the supreme court against the Fidelity Title & Deposit Company,—one, an action on contract, to recover \$418.22, the balance of \$970 which had been deposited in the Howard Savings Institution by and in the name of Minnie I. Munn; and the other, an action of replevin, to obtain possession of stock certificate No. 2,459, for forty-one shares of the capital stock of the American Insurance Company, a bond made by the plaintiff to Minnie I. Munn for \$1,000, and a bond made by John Bernreuther to James T. Van Ness for \$400, which had been assigned to Minnie I. Munn. On the trial of these suits, in the Essex circuit, it appeared that all the things in controversy had belonged to the plaintiff's sister, Minnie I. Munn; and the plaintiff testified that her sister, while upon her death-bed, at home, a few hours before she lapsed into final unconsciousness, sent for the plaintiff, who lived elsewhere, and, on the plaintiff's coming into the room, the following incident took place: "My sister turned to my mother, and said 'to get those things for her.' My mother asked, 'What things?' and she replied, 'My things in the bureau.' My mother then brought to her from the bureau drawer a handkerchief, containing some things, and then she asked my mother to leave the room, which she did. My sister then opened the handkerchief, and it contained some jewelry and a little bag. From the bag she took a tiny key, and said to me, 'You see that key.' I said, 'Yes;' and she handed it to me, and said: 'There, that key I have carried in my bosom until it is rusty. It is the key of the box, and that I give to you, and all it contains.' Then she took the handkerchief, with the jewelry in it, and held the four corners

of it up, and passed it over to me, saying: 'There, I give you these. I have no more use for them.' " It further appears that, at that time, the box which this key fitted was in another room of the same house, locked in a closet of which Miss Munn's mother had the key, and that the box contained the savings bank book showing Miss Munn's deposit in the Howard Savings Institution, the stock certificate, and the two bonds, besides many other papers, some of which did not belong to Miss Munn. During Miss Munn's life the plaintiff did not ask her mother for the key of the closet, or make any attempt to assume control over or take possession of the box or its contents, nor did the box and contents ever come into her possession, but they were taken by the defendant company, as the administrator of Miss Munn. On these facts the trial justice ruled that there was not such a delivery of the things in controversy as was necessary to make a valid *donatio mortis causa*. The plaintiff also claimed that the stock of the American Insurance Company and the Bernreuther bond had been the property of her father, and, on the death of her sister, had become hers, by force of the following provision in her father's will: "Item 5. Subject to the foregoing uses and exceptions, I give, devise, and bequeath all my estate to my two daughters, Lillie Alma and Minnie Ida, to be divided between them equally, share and share alike, each one to come into possession of her respective share upon arriving at the age of twenty-three years, not before; and, in case of the decease of said Lillie or Minnie before they are twenty-three years of age, the children of said deceased shall inherit the parent's share; but, if there be no issue, then the survivor of the two last mentioned sisters shall take the other's share, and upon each respectively arriving at the age of twenty-one years, the interest of her share shall be paid to her direct." Both sisters had passed the age of twenty-three years, and, in the division of their father's estate, the stock and bond had been transferred to Minnie, as part of her share. She died unmarried. The trial justice overruled this claim of the plaintiff. Upon exception taken to these decisions, the present assignments of error are founded.

Mr. Robert H. McCarter, for plaintiff in error:

Choses in action belonging to the donor, though unindorsed, or unassigned save by delivery, are the subjects of a *donatio causa mortis*.

Duffield v. Elwes, 1 Bligh, N. S. 497; *Ran-kin v. Wegetin*, 27 Beav. 309; *Austin v. Mead*, L. R. 15 Ch. Div. 651; *Clement v. Cheesman*, L. R. 27 Ch. Div. 631; *Duffin v. Duffin*, L. R. 44 Ch. Div. 76; *Ridden v. Thrall*, 11 L. R. A. 684, 125 N. Y. 672; *Pierce v. Boston Five Cents Sav. Bank*, 129 Mass. 430, 37 Am. Rep. 371; *Hill v. Stevenson*, 63 Me. 364, 18 Am. Rep. 231; *Camp's App.* 86 Conn. 88, 4 Am. Rep. 39; *Hewitt v. Kaye*, L. R. 6 Eq. 198; *Mattiers v. Hoagland*, 48 N. J. Eq. 485; *Grimes v. Hone*, 49 N. Y. 17, 10 Am. Rep. 313; *notes to Ellison v. Ellison and Ward v. Turner*, 1 Lead. Cas. in Eq. 199.

The practical question therefore is, What is 23 L. R. A.

a sufficient delivery? It may be actual—a manual possession of the article itself by the donee or his agent—or constructive. If constructive, it must be more than mere words, and more than any symbolic act. A constructive delivery must be something which completely terminates the donor's custody and control of the article donated, and which places it wholly under the donee's power, and enables him without further act on the donor's part to reduce it to his own manual possession.

Pom. Eq. Jur. § 1149; *Cook v. Lum* (N. J.) June 8, 1898.

A delivery of a key to a box, chest, or room, is a sufficient constructive delivery of the articles contained in the receptacle, on the principle that the donor thereby parts with all control, and places in the donee's hands the means of reducing the articles into his manual possession.

Bunn v. Markham, 7 Taunt. 224; *Smith v. Smith*, 2 Strange, 955; *Jones v. Selby*, Finch, Prec. in Ch. 300; *Hawkins v. Blewitt*, 2 Esp. 622; *Reddel v. Dobree*, 10 Sim. 245; *Cooper v. Burr*, 45 Barb. 9; *Coleman v. Parker*, 114 Mass. 30; *Pink v. Church*, 88 N. Y. S. R. 785; *Phipard v. Phipard*, 55 Hun, 489; *Miller v. Jeffress*, 4 Gratt. 472; *Trenholm v. Morgan*, 28 S. C. 268; *Yancey v. Field*, 85 Va. 756; *Page v. Lewis*, 18 L. R. A. 170, 89 Va. 1; *Crook v. First Nat. Bank of Baraboo*, 88 Wis. 31; *Jones v. Weakley* (Ala.) 19 L. R. A. 700; *Stephenson v. King*, 81 Ky. 425, 50 Am. Rep. 173; *Debinson v. Emmons*, 158 Mass. 592; *Basket v. Hassell*, 107 U. S. 602, 27 L. ed. 500; *Corle v. Monkhouse*, 50 N. J. Eq. 537.

Some text-writers have endeavored to distinguish between the case of bulky articles, incapable of manual tradition, and of a trunk or chest, holding that a key in the one case sufficed but not in the other, and invariably they quote as authorities—

Powell v. Hellicar, 26 Beav. 261; *Warriner v. Rogers*, L. R. 16 Eq. Cas. 346.

But in both of these the key, instead of being delivered, was expressly and purposely retained by the donor, and on that precise ground the attempted gifts were not sustained.

Mr. Joyce for defendant in error.

Messrs. Riker & Riker for estate of Minnie I. Munn.

Dixon, J., delivered the opinion of the court:

The first question for solution is whether the delivery of the key of a box containing valuable papers is sufficient delivery to constitute a valid *donatio mortis causa* of the papers, when the box is not in the presence or immediate control of the donor, and does not pass into the actual possession of the donee during the lifetime of the donor. The leading case on the subject of *donations mortis causa* is *Ward v. Turner* (A. D. 1752), 2 Ves. Sr. 431, where Lord Chancellor Hardwicke laid down the rule with reference to delivery, which has ever since formed the basis whereon such gifts are supported. After showing that the recognition of *donations mortis causa* by the common law was derived from the civil law, he declared that the civil law had been "received in England, in respect of such donations, only so far as attended with

delivery, or what the civil law calls 'tradition;' that "tradition or delivery is necessary to make a good *donatio mortis causa*." He further said: "It is argued that, though some delivery is necessary, yet delivery of the thing is not necessary, but delivery of anything by way of a symbol is sufficient. But I cannot agree to that; nor do I find any authority for that in the civil law, which required delivery in some gifts, or in the law of England, which required delivery throughout. Where the civil law requires it, it requires actual tradition,—delivery over of the thing. So, in all the cases in this court, delivery of the thing given is relied on, and not in the name of the thing. . . . Yet," he added, "notwithstanding, delivery of the key of bulky goods, where wines, etc., are, has been allowed as delivery of the possession, because it is the way of coming at the possession, or to make use of the thing." Although this doctrine has received general approval in the courts of England and of this country, yet some divergence has taken place respecting the facts which may constitute the delivery required. For the purpose of giving effect to the difference mentioned by Lord Hardwicke between articles that were bulky and those that were not, it was usually stated in the earlier cases, as if ignoring the ground of the distinction, it has often been asserted that the situation, as well as the nature, of the thing, must be taken into consideration, and only such delivery was requisite as, under all the circumstances, the donor could conveniently make. On this footing, it has, in some instances, been adjudged that delivery of the key was sufficient delivery for a valid *donatio mortis causa* of money or documents locked in a trunk or other receptacle, not within the presence or immediate control of the donor, and not otherwise transferred to the possession of the donee. *Cooper v. Burr*, 45 Barb. 9; *Marsh v. Fuller*, 18 N. H. 360; *Jones v. Brown*, 34 N. H. 439; *Thomas v. Lewis*, 89 Va. 1, 18 L. R. A. 170; *Phipard v. Phipard*, 55 Hun, 439; *Pink v. Church*, 88 N. Y. S. R. 735. That in this respect these cases depart from the view intended to be expressed in the leading case is, I think, manifest by noticing Lord Hardwicke's comment on *Jones v. Selby*, Finch, Prec. in Ch. 300, and his ruling in *Smith v. Smith*, 2 Strange, 955. In *Jones v. Selby* the donor had called his cousin, who was his housekeeper, and two of his servants, and said, "I give to my cousin, Mrs. Wetherley, this hair trunk, and all that is contained in it," and delivered her the key thereof; and, on the strength of this, Mrs. Weherley claimed a £500 tally as part of the contents of the trunk. This claim was allowed by the master of the rolls as a valid *donatio mortis causa*, and would have been allowed by Lord Chancellor Cowper, on appeal, except for lack of full proof that the tally was in the trunk at the time, and his conclusion that the gift was satisfied by a legacy to the donee given in a will subsequently made by the donor. On this Lord

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Hardwicke's comment was: "The only case wherein such a symbol seems to have been held good is *Jones v. Selby*, but I am of opinion that amounted to the same thing as delivery of the possession of the tally, provided it was in the trunk at the time." He thus seems to state that, with regard to the tally, the key was but a symbol, the delivery of which he had just declared to be insufficient, but that the circumstances showed a delivery of the trunk, and consequently of the tally, if in the trunk. *Smith v. Smith*, 2 Strange, 955, was a ruling at *nisi prius*, where the plaintiff's intestate, having lodgings in the defendant's house, had brought there furniture and plate, and had said that whatever he brought into those lodgings he did not intend to take away, but gave directly to defendant's wife. Whenever he went out of town, he used to leave the key of his lodgings with the defendant. He having died, probably out of town (see *Bunn v. Markham*, 7 Taunt. 224), Lord Hardwicke, then chief justice, permitted the jury to find a valid gift. This ruling accords with the view expressed in the leading case upon the idea that the things given were too bulky for actual delivery, otherwise than by leaving them in the defendant's house, and giving him the key of the rooms. The same distinction is clearly noted in *Hatch v. Atkinson*, 56 Me. 324, 96 Am. Dec. 464, and other cases.

The opinion that delivery of a key is equivalent to the delivery of documents locked up under the key is not at all supported by the views announced in such cases as *Hawkins v. Blewitt*, 2 Esp. 663; *Bunn v. Markham*, 7 Taunt. 224, and *Warriner v. Rogers*, L. R. 16 Eq. Cas. 340, where the retention of the key by the donor was deemed to negative the claim of a gift; for, to constitute a gift, there must be, besides delivery of the thing, an intention to transfer to the donee complete dominion over it, and the withholding of the key proved that no such intention existed, notwithstanding the fact of delivery. Nor is that opinion, in its general form, fully sustained by cases like *Debnson v. Emmons*, 158 Mass. 592, where the receptacle was in the immediate presence and control of the parties, in a room occupied by the donee, as well as the donor, and where the only external sign of the exclusive possession of the receptacle was the actual possession of the key. Under such circumstances, tradition of the key might be considered tantamount to tradition of the receptacle and its contents, without giving the same force to the tradition of the key when the receptacle was away from the presence of the parties, and in the actual possession of a third person. We are not willing to approve the extreme views which have been adopted in the cases cited. We agree with the sentiment expressed in *Ridden v. Thrall*, 125 N. Y. 572, 11 L. R. A. 684, that "public policy requires that the laws regulating gifts *causa mortis* should not be extended, and that the range of such gifts should not be enlarged." When it is remembered that these gifts come into question only after death has closed the lips of the donor; that there is no legal limit to the amount which may be disposed of by means

of them; that millions of dollars' worth of property is locked up in vaults, the keys of which are carried in the owners' pockets; and that, under the rule applied in those cases, such wealth may be transferred from the dying owner to his attendant, provided the latter will take the key, and swear that it was delivered to him by the deceased for the purpose of giving him the contents of the vault,—the dangerous character of the rule becomes conspicuous. Around every other disposition of the property of the dead, the legislative power has thrown safeguards against fraud and perjury; around this mode, the requirement of actual delivery is the only substantial protection, and the courts should not weaken it by permitting the sub-

stitution of convenient and easily-proven devices. We think the trial justice properly decided that the evidence would not warrant the jury in finding such a delivery as is essential to a *donatio mortis causa*. Nor was there any error in his ruling that the plaintiff had no title under the will of her father. That instrument made the estate of each of his daughters indefeasible upon her arriving at the age of twenty-three years. Only in case she died before that period and without issue, was there a gift over to her surviving sister. *Van Houten v. Pennington*, 8 N. J. Eq. 745.

The judgments should be affirmed.

Abbott, J., dissents.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Samuel M. WATTS

v.

Ellen M. WATTS.

(.....Mass.)

A cause of action for divorce in favor of the husband on the ground of the wife's adultery is not barred by failure to set it up as a defense to a suit by the wife for a separate maintenance, in which she obtains a decree.

(February 27, 1894.)

EXCEPTIONS by plaintiff to rulings of the Superior Court for Plymouth County made during the trial of a libel for divorce, which resulted in the dismissal of the libel. *Sustained.*

At the trial it appeared that the libelee was discovered by libelant on June 4, 1892, in the act of adultery. Libelant ejected her from his house and on June 6, 1892, she brought suit for separate maintenance. Libelant defended but offered no evidence of the adultery. August 22, 1892, the probate court entered a decree for libelee, reciting that for justifiable cause she was living apart from her husband. No appeal was taken. The court ruled in this case that that decree was a bar to the maintenance of this libel.

Further facts appear in the opinion.

Messrs. Simmons & Pratt, for libelant:

It does not follow because of the failure of the libelant to put in evidence the Adulterous Act of June 4, 1892, that he is concluded by the rule that the judgment of the probate court rendered not only upon the issues there being tried, but upon all that might have been tried in that action is a bar to any subsequent action between the same parties.

1. Because the probate court upon the wife's petition had no authority to decree a judicial separation of the parties. It cannot suspend

NOTE.—The decision in the above case as to the effect, to bar a divorce, of a decree for separate maintenance, in which the wife's adultery is not set up as a defense, seems to be one of first impression.

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the marriage status. It affects to a limited extent the rights and duties of the parties, except so far as they are modified by the decree. *Barney v. Tourtellotte*, 188 Mass. 106.

It might decree a separate maintenance of the libelee for the husband's gross cruelty or confirmed habits of intoxication, but such conduct upon his part is not a license for her to commit adultery.

Lea v. Lea, 99 Mass. 496, 96 Am. Dec. 779; *Lyster v. Lyster*, 111 Mass. 827; *Franklin v. Franklin*, 18 L. R. A. 843, 154 Mass. 515, and cases there cited.

2. The fact determined by the decree is not necessarily inconsistent with the necessary allegation in the libel and it does not therefore fall within the rule laid down in *Miller v. Miller*, 150 Mass. 111.

8. It is not to be taken for granted that because the record is silent upon this point, the actions by the wife in the probate court and by the husband in the superior court were for the same cause. On the contrary it may fairly be assumed and argued that the recrimination by way of which the decree was set up consisted in his violence at the time of ejecting her from his house. If they are not for the same cause of action the decree is not a bar to the maintenance of this libel.

Foye v. Patch, 133 Mass. 111; *Burien v. Shannon*, 99 Mass. 200, 96 Am. Dec. 738; *Lea v. Lea*, *supra*; *Hawks v. Truesdell*, '99 Mass. 557; *Cromwell v. Sac County*, 94 U. S. 351, 24 L. ed. 195.

Mr. Chester M. Perry, for libelee:

(a) The probate court had jurisdiction in the matter of the petition of the libelee for separate support and maintenance.

Pub. Stat. chap. 147, § 83.

(b) The parties being the same, the decree of the probate court must have the same binding effect as the judgment of any other court having jurisdiction.

Smith v. Rice, 11 Mass. 507; *Emery v. Hildreth*, 2 Gray, 228; *Pierce v. Prescott*, 128 Mass. 140; *McKim v. Doane*, 187 Mass. 195; *Miller v. Miller*, 150 Mass. 111.

It appears from the bill of exceptions that the libel alleges adultery with one Ford, on the fourth day of June, 1892, and on divers other

days and times during the three years next preceding said fourth day of June; and that the libellant ejected the libelee from his house on the said fourth day of June, at which time he discovered her committing adultery with said Ford. The bill of exceptions does not show what the evidence was which the libellant relied on in the defense to the petition of his wife for separate support and maintenance, yet it is certain that the issue there was the wife's conduct during marriage, and it is fair to infer, from the above facts, that his defense to said petition was the adultery of the libelee; and, although it appears by the bill of exceptions that no evidence was offered, at the hearing on said petition for separate support and maintenance, of the particular act of adultery of June 4, 1892, yet it does appear that the libellant alone knew of it, and he cannot now complain of his own laches; and the finding of the probate court that the libelee was living apart from her husband for justifiable cause estops him from again litigating the same issue.

Com. v. Evans, 101 Mass. 25; *Thurston v. Thurston*, 99 Mass. 89; *Lea v. Lea*, Id. 493, 96 Am. Dec. 772; *Lewis v. Lewis*, 106 Mass. 809.

The probate court, by its decree that the libelee was living apart from her husband for justifiable cause, has judicially determined the fact that she was guilty of no matrimonial offense that would entitle her husband to a divorce, and the libellant's exceptions cannot be sustained without virtually impeaching the correctness of said decree, which, from motives of public policy, the law does not permit to be done.

Burten v. Shannon, 99 Mass. 200, 96 Am. Dec. 733.

Knowlton, J., delivered the opinion of the court:

In regard to subjects of which the probate court has jurisdiction, and upon parties brought within its jurisdiction, a decree of that court, like a judgment of other courts, is conclusive. *Miller v. Miller*, 150 Mass. 111; *McKim v. Doane*, 137 Mass. 195; *Pierce v. Prescott*, 128 Mass. 140; *Laughton v. Atkins*, 1 Pick. 585.

The decree introduced at the trial, being between the same parties as those in the present action, is binding and conclusive upon them in this suit in regard to all matters shown to have been put in issue, or to have been necessarily involved, in the former suit, and actually tried and determined in it. In regard to matters not then in controversy, and not heard and determined, although it is conclusive so far as the final disposition of that cause of action is concerned, it is not conclusive to prevent a determination of them according to the truth, if they are subsequently controverted in a different case. *Foye v. Patch*, 132 Mass. 111; *Com. v. Evans*, 101 Mass. 25; *Burten v. Shannon*, 14 Gray, 433-437; *Thurston v. Thurston*, 99 Mass. 89; *Lewis v. Lewis*, 106 Mass. 809; *Burten v. Shannon*, 99 Mass. 200, 96 Am. Dec. 733; *Hawks v. Truesdell*, 99 Mass. 557; *Lea v. Lea*, Id. 496, 96 Am. Dec. 772; *Cromwell v. Sac County*, 94 U. S. 351, 24 L. ed. 195.

It would be a harsh and oppressive rule which should make it necessary for one sued

on a trifling claim to resist it and engage in costly litigation in order to prevent the operation of a judgment which would be held conclusively to have established against him every material fact alleged and not denied in the declaration, so as to preclude him from showing the truth if another controversy should arise between the same parties. There might be various reasons why he would prefer to submit to a claim rather than to defend against it. For the purpose of defending that suit he would have his day in court but once, and if he chose to let the case go by default, or with a trial upon some of the defenses which might be made, and not upon others, he would be obliged forever after to hold his peace. But a plaintiff can claim no more than to be given what he asks in his writ. He cannot justly complain that the defendant has not seen fit to set up defenses and raise issues for the purpose of enabling him to settle facts for future possible controversies. In subsequent proceedings which are independent of the original suit, the judgment in that suit is conclusive as evidence, or may be pleaded as an estoppel, only as to those matters which were put in issue and determined; but it is not necessary that these should be particularly mentioned in the pleadings, if they are involved in the issue made up, and if the case is determined upon the trial of that issue. The bill of exceptions in this case shows nothing in regard to the pleadings, further than that there was a petition brought under Pub. Stat., chap. 147, § 33, and that the respondent appeared and defended against it. It appears that no evidence was offered of the act of adultery on June 4, 1892, and we infer that it was not set up in answer to the petition. We must assume that the respondent's pleading was a general denial. Was the question whether the petitioner had committed adultery, as now appears, necessarily involved in the issue made up by an affirmation and denial that she was living apart from her husband for justifiable cause? The grounds of the decree do not appear. Could such a decree have been made upon any possible state of facts, if the petitioner had been known to have committed adultery on June 4, 1892? If so, the decree could not be held to be a bar to a divorce unless the only facts which would render the decree possible are such as would, of themselves, preclude the libellant from obtaining a divorce. The decision that a wife is living apart from her husband for a justifiable cause, made upon a hearing between them on the general issue, conclusively shows that she has not utterly deserted him. *Miller v. Miller*, 150 Mass. 111.

Living apart from a husband under such circumstances as to constitute utter desertion, for which a divorce may be granted, is a marital wrong, and cannot be legally justifiable. But facts may be supposed upon which the decision of the probate court might have been made in the present case, even if it was known that the wife was guilty of adultery of which the husband had knowledge. If he had for a long time been guilty of extreme cruelty towards her, and had inflicted serious bodily injury upon her when

he ejected her from his house, and then had asked her to return to his home, and had offered to forgive the adultery if she would come back, she would have been justified in refusing to return, on the ground that she had reason to fear great injury from his cruelty if she continued to live with him. If such facts appeared, the court might well decide that she was justifiably living apart from him on account of his cruelty, notwithstanding her adultery, which he was willing to forgive. It is obvious, therefore, that the decision in her favor on the question whether she was living apart from him for a justifiable cause is not necessarily a finding that she was not guilty of adultery; and upon the record before us it cannot be said that her guilt or innocence was necessarily involved in the issue then tried.

It may be said, however, that the facts above supposed are such as would bar his suit for a divorce, and that therefore such an hypothesis cannot help him in this case. It is true that the extreme cruelty of a libellant is a defense to a libel for a wife's adultery. *Handy v. Handy*, 124 Mass. 394; *Cumming v. Cumming*, 135 Mass. 386-389, 46 Am. Rep. 476; *Morrison v. Morrison*, 142 Mass. 361, 56 Am. Rep. 698. But there may be other causes which would justify her in living apart from him, less than those which would be a ground for a divorce in her favor. Such causes could not be availed of as an answer to his libel for a divorce on the ground of her adultery, although they might warrant this finding of the probate court. Against this proposition it is argued forcibly, by a prominent author, that no cause should be deemed sufficient to justify withdrawal from cohabitation which is not enough to call for a judicial separation. 1 Bishop, *Marriage, Divorce & Separation*, § 1758. This, until recently, was the law in England, and it is still the law in some of the American states; but it is now held by the English courts that the use of the words "separation without reasonable cause" in the statute in reference to desertion implies that there may be a separation with a reasonable cause which is something less than the causes for which a divorce may be granted. *Yeatman v. Yeatman*, L. R. 1 Prob. & Div. 489-491; *Haswell v. Haswell*, 1 Swab. & T. 502, 29 L. J. Prob. & M. 21. So, too, a voluntary separation of husband and wife is not there deemed to be against public policy, and articles of separation entered into by a husband and wife are enforced by courts of equity. *Wilson v. Wilson*, 1 H. L. Cas. 588; *Bevant v. Wood*, L. R. 19 Ch. Div. 605; *Hart v. Hart*, L. R. 18 Ch. Div. 670. In this commonwealth it has been held that an indenture whereby a husband agrees to pay to a trustee money for the support of his wife, made in contemplation of an immediate separation, which takes place as contemplated, is not void as against pub-

lic policy. *Fox v. Davis*, 118 Mass. 255, 18 Am. Rep. 476. In *Lyster v. Lyster*, 111 Mass. 327, Mr. Justice Gray says, in giving the opinion of the court: "It has accordingly been held, by a great weight of American authority, that ill treatment or misconduct of the husband of such a degree, or under such circumstances, as not to amount to cruelty for which a wife would be entitled to sue for a divorce against him, might yet justify her in leaving his house, and prevent his obtaining a divorce for her desertion if she did so." See, also, cases there cited.

The statute which we are considering (Pub. Stat. chap. 147, § 33) permits the husband as well as the wife to apply to a court to obtain an order "concerning support of a wife, or the care, custody, and maintenance of the minor children;" thus implying that the provisions of the statute are not alone for the benefit of a wife whose husband has been guilty of misconduct which would be a cause for divorce. If, to obtain the benefit of its provisions, a wife were obliged to show misconduct of the husband which would be a cause for a divorce, it would add but little to the provisions of previous statutes under which, in divorce proceedings, she could obtain orders for alimony, and in regard to the custody and support of minor children. We are of opinion that under this statute the wife may show that she is living apart from her husband for a justifiable cause, without necessarily going so far as to show a cause which would entitle her to a divorce, and that the reasons required to warrant the decree of the probate court in the present case were not necessarily reasons which would preclude a husband from obtaining a divorce for adultery from the wife. Precisely what reasons would justify a wife in withdrawing and living apart from her husband, so as to subject the husband to a liability for her support away from his home, under this statute, it is unnecessary in this case to determine; it is enough if the cause is something less than that required to entitle her to a divorce, and therefore less than that which would be necessary to furnish a bar to her husband's libel for her misconduct, if pleaded by way of recrimination. See *Sturbridge v. Franklin*, 160 Mass. 149.

Although ordinarily the question whether she was guilty of adultery would be important evidence on the issue tried in the probate court, the husband might offer to forgive her if she would return, or for other reasons the decision might be made to rest on grounds which would not involve a finding that she was innocent or guilty of that crime. It follows that the judgment of the probate court is not conclusive against the libellant in the present action, and there must be a new trial.

Exceptions sustained.

NEBRASKA SUPREME COURT.

BANK OF COMMERCE, *Pff. in Err.*,

Peter GOOS.

(.....Neb.....)

*1. The damages recoverable for the refusal of a bank to pay a check drawn upon it by one who has funds with the bank wherewith to make such payment should not exceed such amount as reasonably and fairly, in the natural course of things, would result from such refusal.

2. General damages are such as the jury may give when the judge cannot point out any measure by which they are to be ascertained except the opinion and judgment of a reasonable man. Special damages are such as by competent evidence are directly traceable to defendant's failure to discharge his contract obligations or such duties as are imposed upon him by law.

3. When a party litigant has, by an evasion of the adverse ruling of the court, intentionally and willfully introduced evidence of facts improper for consideration by the jury, it must be presumed that such improper evidence has had a prejudicial effect, and the verdict should accordingly be set aside.

(February 20, 1894.)

ERROR to the District Court for Douglas County to review a judgment in favor of plaintiff in an action brought to recover damages alleged to have been caused by defendant's wrongful refusal to pay a check. *Reversed.*

The facts are stated in the commissioner's opinion.

Messrs. Cornish & Robertson, for plaintiff in error:

It appears that the English courts have decided that an action like the one at bar will lie; that it is an action arising upon contract and not in tort, and that the measure of damages, following the rule in *Hadley v. Baxendale*, 9 Exch. 841, is such as naturally result from the dishonor of the check, or such as are reasonably within the contemplation of the parties, and "if the plaintiff is a trader, special damages need not be proved, just as in a case of an action for slander of a person in the way of his trade, or in case of the imputation of insolvency of a trader, the action lies without proof of special damage."

One reason given for the rule in the English cases, is that the payee of a check can bring no action against the bank to recover the amount due thereon, and it is necessary that the depositor have such an action as the present, to protect both himself and the payee of the check.

This court in *Fonner v. Smith*, 11 L. R. A. 528, 31 Neb. 107, has departed from the old rule as above stated, and declared that depos-

itor and banker were the same in all respects as other creditors and debtors, and the payee of the check could bring an action direct against the bank.

All the English authorities agree that the action is upon contract, and if so the motive of the bank in refusing to honor the check when it has on deposit funds wherewith to meet it, is not material.

Prehn v. Royal Bank of Liverpool, L. R. 5 Exch. 92.

In all other analogous cases of debtor and creditor, on failure of performance, the measure of damages is invariably the interest on the amount withheld.

The damages which may be recovered are such damages as naturally result from the wrongful act, or such as were reasonably within the contemplation of the parties.

Sycamore Marsh Harvester Co. v. Sturm, 13 Neb. 210; *Aultman v. Stout*, 15 Neb. 586.

A party injured by breach of contract must reasonably exert himself to prevent damage, and cannot unnecessarily enhance the damage.

Dillon v. Anderson, 43 N. Y. 281; 1 Sutherland, Damages, p. 148 *et seq.*; *Oliver v. Hawley*, 5 Neb. 419; *Long v. Clapp*, 15 Neb. 417; *Orde v. Childs*, 11 Neb. 252.

Mr. C. A. Baldwin for defendant in error.

Ryan, C., filed the following opinion:

By his petition filed in the district court of Douglas county, Neb., Peter Goos alleged that the Bank of Commerce was a corporation carrying on a general banking business, and that as such it invited and received deposits, to be held and paid out upon the checks of its customers; that during the month of September, 1889, the said Goos was a depositor in said bank, and had on deposit in said bank about \$3,800 on the 20th of said last-named month. The injuries for which compensation was sought were described in the following language: "Plaintiff says that on the 20th day of September, 1889, and when he so had in said bank said balance of more than \$3,800.00, that said bank had so received from plaintiff, as aforesaid, on deposit, and which said money was so held by defendant subject to the order of plaintiff, he drew his check on said bank for the sum of \$804.90, payable to the order of the city treasurer of Omaha; that at said date John Rush was the city treasurer of Omaha, and plaintiff delivered said check to said Rush in payment of certain taxes due from the plaintiff to the city of Omaha; that afterwards, on the 23d day of September, the said check was presented to said defendant (Bank of Commerce) for payment, and payment was refused on said check on the pretended excuse that plaintiff had no funds in the bank; and the defendant made no other or different excuse for not honoring and paying said check, and said check was not paid by defendant, and never

*Headnotes by RYAN, C.

NOTE.—Very few decisions have been rendered in this country on the question presented in the above case, as to damages for refusal by a bank to pay a check on a deposit which is applicable there-
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to. For a full review of the decisions on the subject, see *Schaffner v. Ehrman* (11) 15 L. R. A. 134, in connection with the note to that case.

was, and was returned by said bank to said Rush dishonored and unpaid. Plaintiff says that at the time said check was presented for payment at defendant's bank, and at all times from and after September 20, 1889, plaintiff had on deposit in said bank, subject to his order and to be paid on his checks, more than \$3,000.00, and out of which said funds said check should have been paid. Plaintiff says that for the reason that said check was not paid by said defendant when it was so, as aforesaid, presented to said bank for payment, and for no other cause, and without any fault on the part of said plaintiff whatever, the said John Rush filed a complaint with the police court of Omaha, charging said plaintiff therein with the crime of obtaining a tax receipt under false pretenses, and by falsely and feloniously representing to said Rush that he had funds in said defendant's bank subject to be paid on the check of said plaintiff; and, upon said complaint having been so filed, a warrant was issued by the police judge of Omaha for the arrest of said plaintiff, and by authority of said warrant, and upon said complaint, said plaintiff was arrested by the police officers of Omaha, and was taken to the city prison, where said plaintiff was imprisoned with the lowest, filthiest, and most abandoned of human creatures, and plaintiff was kept so imprisoned for a long space of time, to wit, four hours, and was released from his said imprisonment on the condition, only, of giving bail in the sum of \$1,200.00 for his appearance at the time fixed by said court for the trial of his case; and plaintiff was compelled to, and did, give said bail, and was thereby released from his said imprisonment. Plaintiff says that when he so gave said check he had, and knew he had, in said bank, subject to his order, a sum of money greatly in excess of the amount of said check, and plaintiff had no notice, or suspicion even, that said check would not be honored and paid; and said check was so given by said plaintiff in good faith, expecting that it would be honored and paid, and said check would have been paid but for the false, wicked, and cruel and illegal act of said defendant, its officers and employes, in refusing to honor and pay the same. Plaintiff says that he was, and for several years last past has been, engaged in the business of keeping an hotel in Omaha, and by so doing formed an extensive acquaintance, in the state of Nebraska and adjoining states, among the traveling public; that plaintiff is also doing an extensive business in various branches of trade, oftentimes requiring an extensive credit to carry on his said business, which, before the occurrence of the events so complained of, he was able to, and did, obtain. Plaintiff says that by reason of the refusal of the said defendant to honor and pay his said check, and his said arrest upon said charge aforesaid, and before the truth or falsity of said charge was known or could be determined, the said charge against him, and the fact of his arrest and imprisonment, was published in the daily papers of Omaha, and sent broadcast over the land in this state and adjoining states, and plaintiff was brought thereby to great and

everlasting disgrace and contumely; and plaintiff's character was, by reason of the premises aforesaid, greatly injured, and persons whose confidence he was entitled to and did have before that time, by reason of the acts of said defendant, questioned the integrity of said plaintiff, and refused to give him the financial credit which they had been accustomed to; and, although plaintiff is possessed of a large amount of property over and above all his indebtedness, by reason of the said acts of said defendant his said creditors became clamorous for their pay, and plaintiff has been caused great embarrassment, and has been compelled to make great sacrifices to meet and pay his said creditors,—all of which said state of facts were caused by the said acts of said defendant. Plaintiff says, by reason of said averments and the disgrace brought upon him, he has suffered great distress and pain of mind, and has suffered great loss and damage to his reputation as an honest business man; that he has suffered great pecuniary loss and damage in the manner aforesaid; and he says by reason of the premises he has sustained damages in the sum of \$50,000.00." For the sum last named, judgment was prayed.

The answer admitted that the defendant was a banking corporation, and that plaintiff was a customer of said bank, and that on September 1, 1889, plaintiff had on deposit in said bank the sum of \$103.50; and the defendant denied all other allegations of the petition. Affirmatively, the defendant answered that about September 20, 1889, plaintiff drew his check on said bank for the sum of \$804.90, payable to John Rush, city treasurer of Omaha, which check was presented for payment on the 28d day of said month, and payment thereof was refused, for the reason that the said bank then held a note of Peter Goos, dated August 15, 1889, due, by its terms, in ninety days from its date, and which it had been agreed, as defendant alleged, should be paid out of the proceeds of a mortgage loan (which, at the date of the note, Goos had in contemplation) whenever said loan should be effected. The defendant further answered that, in accordance with said understanding, the amount of the note aforesaid was charged against plaintiff when said loan was effected, and the unearned interest upon said note was credited to the account of Goos, and that this charge was afterwards assented to by Goos, and that, by reason of charging said note against the account of Goos, there was left an insufficient amount to pay his check afterwards given against said account in favor of the city treasurer. The bank, further answering, denied that the filing of the complaint, and the resulting arrest and imprisonment and the publication alleged in the petition, were the actual and necessary consequences of defendant's refusal to pay the check drawn in favor of said city treasurer, and denied that damages on that account were chargeable to the defendant. The matters affirmatively pleaded in the answer were denied seriatim in plaintiff's reply. During the progress of the trial the parties stipulated as follows: "It is agreed by the parties hereto, for the

purposes of this trial, that Peter Goos, at the time his check that he gave the city treasurer for \$804.90 was presented for payment, and payment thereof refused, had in the defendant's bank, subject to being drawn by him, \$3,625.24, unless the bank was authorized to charge Goos, as the bank did, the amount of his note which was dated August 15, 1889, given for \$3,000.00, and due in ninety days from date. If the bank had the right to charge Goos with the amount of that note, as they did charge him, then, at the time the check to the city treasurer was presented for payment, the bank was not liable for dishonoring the check. It is not the intention of this stipulation to admit, on the part of the defendant, that the sum of \$3,625.24 was correct, except for the purposes of this action, nor is it the intention of this stipulation to admit any proposition of law, the intention of the parties being simply to save, on this trial, an accounting of these matters." This stipulation restricted the scope of inquiries to the ground upon which the defendant acted in charging the ninety-day note against the account of the plaintiff, whereby arose the insufficiency of funds to pay the check in favor of the city treasurer when it was afterwards presented. The difficulty attending an analysis of the grounds of damage alleged in the petition was met in no way or degree, and to that question our attention must first be directed.

A reference to the averments of the plaintiff, relative to the special damages which he claims the right to recover, will show that plaintiff alleged that he had been keeping an hotel, whereby he had formed an extensive acquaintance, throughout the state of Nebraska and adjoining states, among the traveling public, etc. Following these introductory statements is this language: "Plaintiff says, by reason of the refusal of said defendant to honor and pay his said check, and his said arrest upon said charge aforesaid; and before the truth or falsity of said charge was or could be known or determined, the said charge against him, and the fact of his said arrest and imprisonment, was published in the daily papers of Omaha, and sent broadcast over the land in this and adjoining states, and plaintiff was brought thereby to great and everlasting disgrace and contumely, and plaintiff's credit was, by reason of the premises aforesaid, greatly injured," etc. Towards the close of his petition, plaintiff alleged that, by reason of said premises and the disgrace brought upon him, he had suffered great disgrace and pain of mind, and great loss and damage to his reputation as an honest business man, etc. It is evident that the petition was framed upon the theory that the bank was liable for the arrest and imprisonment of plaintiff, and the publication of that fact, whereby his credit was greatly damaged. The trial court, however, very properly held that these matters could not be charged to the bank for the mere refusal to pay the check of the plaintiff; his prosecution and imprisonment, and the published statements in relation thereto, not being the natural result of such refusal.

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Neb. 210; *Aultman v. Stout*, 15 Neb. 586. The action, therefore, as was properly held by the trial court, was maintainable only as one for loss of credit resulting from defendant's refusal to pay plaintiff's check. While this was the theory to which the court sought to limit the trial of the case, the utmost vigilance could not prevent evidence going to the jury of the arrest and imprisonment of plaintiff and of the manner in which these facts were published to the world. The offense charged against Goos, as will be noted in his petition, was that he fraudulently obtained credit by falsely pretending that he had on deposit with the defendant sufficient money to pay the check which he tendered the city treasurer for his taxes. Judge Benecke, one of plaintiff's witnesses, being under examination, was asked as to the arrest of plaintiff, and how he learned of it. In the face of an objection which, in view of the innocent appearance of that question, could not be sustained, this witness answered: "I was sitting in my office on 15th and Douglas, and the newsboys were hallooing on the street, 'All about Peter Goos' arrest,' and I went down the street and bought a newspaper, and to my great astonishment I found that he had given a check to John Rush, the city treasurer, which was not honored." This was followed by other evidence, of the same witness, that the fact just sworn to had a very bad effect upon the credit of plaintiff. In the examination of plaintiff himself he was asked: "What did they say about the matter; what did the boys say,—the newsboys?" Answer: "All about Peter Goos' arrest; giving a forged check." This evidence was given under a ruling of the court that evidence might be given as to what the newsboys said as to the refusal of the bank to pay plaintiff's check, and how that refusal affected his credit. Immediately following this, plaintiff testified that, immediately after his arrest, imprisonment, and the publication above referred to, ten or twelve business men of Omaha, where plaintiff did business, came down that same evening to plaintiff's house, and wanted to settle up with him, and asked him what was the matter. In another part of his evidence plaintiff testified that he was arrested because of the refusal of the bank to pay his check. Again, on re-examination, he was asked why he did not go to the bank in answer to a telephone message, instead of going home, as he did, and he answered: "I did not get the papers; I got arrested; I got pulled in before I reached home." A motion was sustained to strike this out of the record, but that ruling did not probably efface from the minds of the jurors the effect of the testimony. Following this ruling upon the motion to strike from the record the above evidence, plaintiff's counsel offered to prove, without any question pending, that the reason he did not go to the bank was because he was arrested. Upon the final submission of the case the jury was instructed that the fact that Peter Goos had been arrested and imprisoned must not be taken into consideration to enhance his damages. The giving of this instruction was probably all that lay within

the power of the court to do in avoidance of the prejudicial effect of the evidence to which we have just made reference, and yet that evidence must necessarily have had a prejudicial effect upon the minds of the jurors. This result was attained through the mistaken zeal of plaintiff's counsel in his endeavor to avoid the effect of the adverse rulings of the court, as to which, if he was aggrieved, he had an ample remedy otherwise than by circumvention.

At best it is a question more difficult of application than of a general definition to determine what the measure of damages is for the refusal, by a bank, to pay a check, when it has in its hands sufficient funds of the drawer for that purpose. In *Rosewater v. Hoffman*, 24 Neb. on page 280, is found the following language: "It is a well-settled rule in this state that punitive, vindictive, or exemplary damages will not be allowed. The only damages recoverable are denominated 'compensatory,' which are in satisfaction of the injury sustained. *Boyer v. Barr*, 8 Neb. 70, 80 Am. Rep. 814; *Roose v. Perkins*, 9 Neb. 815, 81 Am. Rep. 409; *Riewe v. McCormick*, 11 Neb. 263; *Boldt v. Budwig*, 19 Neb. 789." In *Brooks v. Tradesmen's Nat. Bank*, 69 Hun, 202, it was said that the measure of damages for a refusal to pay a check drawn upon a bank which had sufficient funds of the drawer for that purpose was such damages as might fairly and reasonably be considered as arising from a breach of contract according to the usual course of things. The supreme court of Illinois, in *Schaffner v. Ehrman*, 139 Ill. 109, 15 L. R. A. 184, used the following language: "The question, therefore, is, What is the measure of a banker's liability, to a person engaged in trade, for a refusal to pay his check, he having sufficient funds on deposit for that purpose, in the absence of evidence of malice and special injury to the depositor? Authorities are not numerous on the question, but they seem to be uniformly to the effect that more than mere nominal damages are, in such cases, recoverable. The leading case is that of *Rolin v. Steward*, 14 C. B. 595. In that case there was no evidence of malice in fact nor of special damages, but the jury were told that they ought not to confine their verdict to nominal damages, but should give the plaintiffs such temperate damages as they should judge to be a reasonable compensation for the injury they must have sustained from the dishonoring of their checks; and the jury accordingly, by their verdict, gave substantial damages, on which judgment was rendered by the trial court. On appeal, all the judges concurred in holding that the directions to the jury were correct; the case being likened to that of a slander of a person in the way of his trade. Williams, J., said: 'I think it cannot be denied that if one who is not a trader were to bring an action against a banker for dishonoring a check at a time when he had funds of the customer in his hands sufficient to meet it, and special damages were alleged and proved, the plaintiff would be entitled to recover special damages; and, when it is alleged and proved that the plaintiff is a trader, I think it is equally clear that the jury, in estimating the dam-

ages, may take into their consideration the natural and necessary consequences which must result to the plaintiff from the defendant's breach of contract, just as, in the case of an action for the slander of a person in the way of his trade, the action lies without proof of special damages.' This case was cited with approval in *Prehn v. Royal Bank of Liverpool*, L. R. 5 Exch. 92, in which Martin, B., says: 'Now, with respect to damages in general, they are of three kinds: First, nominal. The second kind is general damages, and their nature is clearly stated by Creswell in *Rolin v. Steward*, 14 C. B. 595, to be such as the jury may give when the judge cannot point out any measure by which they are to be assessed except the opinion and judgment of a reasonable man.' In Wood's *Mayne on Damages* (1st Am. ed. § 8, p. 12), the rule is announced, that 'when there may be an injury existing at present, though unascertainable, or to arise hereafter, and for which no further action could be brought, substantial damage might be given at once;' citing the case of *Rolin v. Steward*, *supra*. And text-writers, without exception, seem to approve of the rule announced in that case. See Bishop, *Non-cont. Law*, § 49; 1 Sutherland, *Damages*, 129. In 8 Am. & Eng. *Encyclop. Law*, 226, it is said: 'The depositor, by proving special loss, may recover special damages from a bank for its breach of duty; but, if unable to do so, he may recover such temperate damages as will be a reasonable compensation for the injury he has sustained,'—citing authorities. 'Where a bank refuses to honor a check of its depositor without legal cause, the latter is entitled to recover substantial damages.' [5 Gen. Dig. U. S. Ann. 283],—citing *Patterson v. Marine Nat. Bank of Pittsburgh*, 180 Pa. 419, and other authorities."

Plaintiff might have relied upon his right to general damages under the above rule, but he did not. Special damages, we believe, are such as, by competent evidence, are directly traceable to a defendant's failure to discharge his contract obligations, or such duties as are imposed upon him by law. The language which we have just quoted at great length probably, as nearly as possible, defines this kind of damages in cases like that under consideration. In the case at bar the attempt to recover special damages was upon allegations and proofs of an unjustifiable dishonor of a check presented by the city treasurer, so confusedly interwoven with the subsequent arrest of the plaintiff, his incarceration, and the newspaper and newsboys' account thereof that it was impossible, in the nature of things, for the jury to segregate and ascertain the amount of damages which were solely traceable to the refusal to pay plaintiff's check, independently of the other circumstances to which we have referred. This confusion of matters which should have been kept distinct seems, by plaintiff, to have been intensified by working in evidence which the court had repeatedly ruled was inadmissible in proof of recoverable damages.

For the reasons given, *the judgment of the District Court is reversed.*

The other Commissioners concur.

MISSOURI SUPREME COURT (Div. 2).

STATE of Missouri, *ex rel.* Edward J. ROBB,
v.
William J. STONE.

(.....Mo.....)

Mandamus will not lie to compel official action, by the governor, whether the act is of the kind regarded as ministerial or otherwise, under constitutional provisions that the three departments of the government shall be distinct and that neither branch can interfere with the duties of the others.

(February 27, 1894.)

ON DEMURRER to an application for a writ of mandamus to compel the governor to order payment of money alleged to be due under a contract for legal services. *Demurrer sustained.*

The facts are stated in the opinion.

Messrs. Edward Robb and Silver & Brown for relator.

Mr. Robert F. Walker, Atty-Gen., for respondent.

Sherwood, J., delivered the opinion of the court:

The relator in this case, Edward J. Robb, was employed by David R. Francis, then governor of the state, as counsel on behalf of the state in the case of the *State of Missouri v. Louis Ulrich*, at that time pending in the Supreme Court of the United States. This employment had its origin in an Act of the 86th General Assembly approved March 25, 1891, which authorized and empowered such employment to be made, at and for a sum not exceeding the sum of \$500; all disbursements out of the fund thus created to be made upon the order of the governor. By an Act approved March 31, 1893, the general assembly reappropriated said amount for the purpose aforesaid, which act provided that all disbursements under this section should be made by order of the governor, and that counsel fees should be paid "only on determination of suit." The sum which David R. Francis, then governor, agreed to pay relator for his services as counsel in that cause, was the said sum of \$500, in consideration of which sum relator agreed to represent the state as counsel in said cause until the determination thereof. After thus entering into such contract, relator duly performed all of its conditions on his part, and discharged his duty as counsel for the state thereunder, until the final determination of said cause, which resulted in Ulrich dismissing his appeal therein on the 15th of May, 1893. No part of the amount appropriated by the general assembly for the payment of counsel fees, and agreed to be paid relator, has ever been paid him. On the 22d day of August, 1893, relator presented his said contract with, and claim against, the state of Missouri, to

Gov. William J. Stone, exhibiting to him at the same time all necessary papers, etc., and asked that said sum of \$500 be paid to relator, but which sum said governor neglected and refused to order to be paid to relator. Upon these facts thus presented in the petition, relator prays that an alternative writ of mandamus issue, directed to the governor, commanding him, etc. Waiving the issuance of the alternative writ, the governor has entered his appearance herein, and by his counsel has filed a general demurrer to relator's petition, to the effect that the petition does not state facts sufficient, etc.

As the petition states a good contract with, and cause of action against, the state, and the demurrer admits the allegations of the petition to be true, the only question for determination is whether the respondent is amenable to the process of this court in a case of this sort; in other words, whether this court has jurisdiction to entertain this application made by relator. The inquiry thus suggested brings into prominence article 3 of our Constitution, by which it is provided that: "The powers of government shall be divided into three distinct departments—the legislative, executive, and judicial—each of which shall be confined to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any powers properly belonging to either of the others, except in the instances in this constitution expressly directed or permitted." In this instance, we, constituting a portion of the judicial department of the government, are called upon to exercise, or what amounts to the same thing, to control the exercise of, powers belonging exclusively to the executive department of that government. To such action on our part the organic law interposes an insuperable barrier. In addition to the provisions of the organic law quoted, that instrument also declares that: "The supreme executive power shall be vested in a chief magistrate, who shall be styled 'The Governor of the State of Missouri.'" Const. art. 5, § 4. Section 6 of the same article requires that "the governor shall take care that the laws are . . . faithfully executed." Of the same article, section 1 provides that the governor "shall perform such duties as may be prescribed by law." And section 6 of article 14, as a prerequisite to his entering on the duties of his office, prescribes that he "take and subscribe an oath to support the Constitution of the United States and of this state, and to demean himself faithfully in office." Under these plain and comprehensive provisions, it must be apparent that any duty "prescribed by law" for the governor to perform is as much part and parcel of his executive duties as though made so by the most solemn language of the constitution itself. Conceding the validity of any given law, the fact that the duties which it prescribes are merely ministerial cannot take them out of the domain of executive duties, nor make them any

NOTE.—For other authorities in line with the above decision, see note to *Hovey v. State* (Ind.) 11 L. R. A. 763.
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the less those which "properly belong" to the executive department of the government. And should we, by our process, be able to compel the performance by the governor of such duties, we would, in effect, and to all intents and purposes, be performing those duties ourselves; for there can be no substantial distinction drawn between our assumption of duties pertaining to another department of the government, and our intervention resulting in the compulsory performance of such duties. "*Qui facit per alium*," etc. Nor does the fact that any duty which the law prescribes for the governor to perform might have been assigned to some other officer, who would have been amenable to the process of this court, alter the conclusion to be reached, or vary the result; for the fact would still remain that the act required to be done was nevertheless an official one, assigned by the legislative department of the government to be performed by the executive department, *eo nomine*,—by the governor, and by him alone,—and therefore, if he is not bound to obey the law in question as governor, he is not bound to act at all, since he only assumed to obey the laws in his gubernatorial capacity, and not otherwise or elsewhere. See *Rice v. Austin*, 19 Minn. 103 (Gil. 74), 18 Am. Rep. 830. So that we should manifestly be trenching on the exclusive powers of two separate magistracies of the government, should we assume to exercise jurisdiction in this case.

Abundant authority establishes the position here taken that mandamus will not issue to the governor to compel the performance of any duty pertaining to his office, whether political or merely ministerial; whether commanded by the constitution or by some law passed on the subject. *People v. The Governor*, 29 Mich. 320, 18 Am. Rep. 89; *Hawkins v. The Governor*, 1 Ark. 570, 33 Am. Dec. 346; *State v. Warmoth*, 22 La. Ann. 1, 2 Am. Rep. 712, 24 La. Ann. 351; *State v. Board of Liquidation*, 42 La. Ann. 647; *Mauran v. Smith*, 8 R. I. 192, 5 Am. Rep. 584; *Rice v. Austin*, *supra*; *Dennett, Petitioner*, 32 Me. 508, 54 Am. Dec. 602; *Vicksburg & M. R. Co. v. Lowry*, 61 Miss. 102, 48 Am. Rep. 76; *State v. The Governor*, 25 N. J. L. 831; *State v. Drew*, 17 Fla. 67; *Hovey v. State*, 127 Ind. 588, 11 L. R. A. 763, which distinguishes or virtually overrules *Gray v. State*, 72 Ind. 567; *People v. Bissell*, 19 Ill. 229, 68 Am. Dec. 591; *People v. Yates*, 40 Ill. 126; *People v. Cullom*, 100 Ill. 472; *Jonesboro Fall Branch & Blair's Gap. Turnp. Co. v. Brown*, 8 Baxt. 490, 35 Am. Rep. 718; *Bates v. Taylor*, 87 Tenn. 819, 3 L. R. A. 816; *State v. Towns*, 8 Ga. 360; *Houston, T. & B. R. Co. v. Randolph*, 24 Tex. 317; *Harttrant's App.* 85 Pa. 433, 27 Am. Rep. 667; *Mississippi v. Johnson*, 71 U. S. 4 Wall. 475, 18 L. ed. 487.

The same views are enunciated by several text-writers. Thus High says: "While, as to purely executive or political functions devolving upon the chief executive officer of a state, and as to duties necessarily involving the exercise of official judgment and discretion, the doctrine may be regarded as uncontroverted that mandamus will not lie, yet as to duties of a ministerial nature, and

involving no element of discretion, which have been imposed by law upon the governor of a state, the authorities are exceedingly conflicting, and, indeed, utterly irreconcilable. Upon the one hand, it is contended, and with much show of reason, that as to duties of this character the general principle allowing relief by mandamus against ministerial officers should apply, and the mere fact of ministerial duties having been required of an executive officer should not deter the courts from the exercise of their jurisdiction. Upon the other hand, it is held that under our structure of government, with its three distinct departments,—executive, legislative, and judicial,—each department being wholly independent of the other, neither branch can properly interfere with the duties of the others, and that as to the nature of the duties required of the executive department by law, and as to its obligation to perform those duties, it is entirely independent of any control by the judiciary. While the former theory has the support of many respectable authorities, and is certainly in harmony with the general principles underlying the jurisdiction, as applied to purely ministerial officers, the latter has the clear weight of authority in its favor, and may be regarded as the established doctrine upon this subject." High, *Extr. Legal Rem.* 2d ed. § 118. Touching this subject, Wood says: "The attempt on the part of some of the courts to interfere with the discharge of executive duties is not only in opposition to our theory of government, and in excess of their power, but also attended with great danger. If the courts may interfere with the discharge of any ministerial duties of the executive department of the government, they may with all; and we should have the singular spectacle of a government run by the courts, instead of the officers provided by the constitution. Each department of the government is essentially and necessarily distinct from the others, and neither can lawfully trench upon or interfere with the powers of the others; and our safety, both as to national and state governments, is largely dependent upon the preservation of the distribution of power and authority made by the constitution, and the laws made in pursuance thereof. If the governor refuses or neglects to discharge his duties, or exceeds his powers in flagrant cases, there is ample remedy by impeachment and removal from office. It is not believed that the courts have the power to discharge his duties for him, or to say what he shall or what he shall not do." Wood, *Mandamus*, pp. 123, 124. See also Merrill, *Mandamus*, § 97.

Although the precise point now presented has never been decided in this state, yet in *State v. Fletcher*, 39 Mo. loc. cit. 388, the clear intimation is made by this court, speaking through Wagner, J., that there was really no valid distinction between a political and a ministerial act of the governor, when considered with reference to the issuance of a mandamus against him.

There are many respectable authorities, however, which maintain views diametrically opposed to those here advanced. Most

of them will be found collated in the brief filed for relator. *Tennessee & C. R. Co. v. Moore*, 86 Ala. 871; *Middleton v. Low*, 80 Cal. 596; *Greenwood Cemetery Land Co. v. Routt*, 17 Colo. 156, 15 L. R. A. 869; *Gray v. State*, 72 Ind. 567; *Magruder v. Swann*, 25 Md. 173; *Grooms v. Gwinn*, 43 Md. 573; *Chumassero v. Potts*, 2 Mont. 242; *State v. Blasdel*, 4 Nev. 241; *State v. Chase*, 5 Ohio St. 528; *State v. Nicholls*, 42 La. Ann. 209. In addition to those cited, see *Martin v. Ingham*, 88 Kan. 641; *State v. Thayer*, 81 Neb. 82.

The fact that the governor has voluntarily submitted himself to the jurisdiction of this court has been pressed upon our attention as a reason why we should pass on or adjudicate the question submitted; and cases have been cited—among them, *Pacific Railroad v. The Governor*, 28 Mo. 360, 66 Am. Dec. 673, as showing that, where the governor does not claim his exemption, then this court may adjudicate the matters at issue, and leave the governor to claim his exemption afterwards. But we regard such cases as wrong in theory,

and unsafe and unsound in practice. If we have authority to render a judgment, then we have jurisdiction to enforce that judgment by all appropriate process, and need not inquire whether any exemption from that process will be pleaded. If, however, we have no jurisdiction over the chief magistrate, his consent will not confer it on us. We will not "assume a jurisdiction if we have it not." We will not sit as a moot court, and pass upon questions, and enter a judgment thereon which we are powerless to enforce. "For all jurisdiction implies superiority of power. Authority to try would be vain and idle without authority to redress; and the sentence of a court would be contemptible, unless that court had power to command the execution of it." 1 Cooley, Bl. Com. p. 242.

As we do not possess any jurisdiction over the governor, *we shall decline any further discussion of this cause, hold the demurrer well taken, and deny the issuance of the peremptory writ.*

All concur.

MICHIGAN SUPREME COURT.

Charles E. WRIGHT *et al.*

Frank WRIGHT, *App't.*

(.....Mich.....)

1. A contract may be implied and enforced in equity to leave to an adopted child as an heir the property of the adopting parent, where the proceedings for adoption were taken under a statute which was unconstitutional for defect in its title, but were supposed by the adopting parent as long as he lived to be valid.
2. A contract to leave property to an adopted child as an heir is taken out of the statute of frauds by its complete performance on the part of the child.
3. The rights of a person under an alleged contract to leave him as heir the property of the other party cannot be determined in proceedings, under Pub. Acts 1887, Act No. 278, to determine who are the legal heirs or legal representatives of such person.

(*Montgomery and Hooker, JJ., dissent.*)

(February 27, 1894.)

APPPEAL by defendant from a decree of the Circuit Court for Jackson County in favor of plaintiffs in a suit brought to enjoin waste. *Reversed.*

The facts are stated in the opinion.

Mr. Thomas E. Barkworth for appellant.

Mr. Louis J. Pierson for appellees.

NOTE.—As to validity of agreement to pay money or give property after the death of the promisor, see note to *Krell v. Codman* (Mass.) 14 L. R. A. 860. As to legal status of adopted child, see note to *Warren v. Prescott* (Me.) 17 L. R. A. 435.
23 L. R. A.

Long, J., delivered the opinion of the court:

This bill is filed by Charles E. Wright, of Denver, Colo., Edward Wright, of Jackson, Mich., Nettie Hart, of Oakley, Mich., and Elizabeth Pierson, of Chicago, Ill.,—all of whom claim to be the heirs-at-law of Phineas Wright, deceased,—to restrain defendant from committing waste on land of which Phineas Wright died seised, and which complainants now claim to own. The three complainants first named claim an undivided one-half interest in said land as children of Chester Wright, who was the brother of the deceased; and the complainant Elizabeth Pierson claims, as a sister of the deceased, to be entitled to an undivided one-half interest. On the hearing in the court below it was conceded by complainants and defendant that Phineas R. Wright was the owner of this land, consisting of 240 acres, situate in the township of Blackman, Jackson county, this state, and died seised thereof on May 28, 1898, leaving Polly M. Wright (now Polly M. Richardson, by a second marriage) as his widow, but no children surviving him; that after his death, and prior to the filing of this bill, what would amount to legal waste was committed by the defendant, by cutting timber upon the premises, as averred in the bill, to an amount which would confer jurisdiction upon the court to hear and determine,—the complainants agreeing, upon this conceded state of facts, to waive all claim for damages arising out of such waste already committed. The defendant set up in his answer his claim of title to the premises; and upon the hearing in the court below it was shown, in his behalf, that he entered the family of deceased when about one and a half years old, under an agreement entered into between the superintendent of the poor for the county of Jackson and the deceased, said agreement being

in the form of an indenture binding him to deceased until he became twenty-one years old; that this indenture was dated January 29, 1868; that his name was then Frank Creer, but subsequently deceased and his wife, acting under the statute then in force, filed their petition in the probate court declaring their intention to make him their heir-at-law, and praying that his name be changed to Franklin P. Wright; that the order was accordingly made on January 30, 1875, defendant being then about eight years old; that defendant remained in the family, and at the time of the death of Phineas R. Wright was twenty-two years and three months old; and that he had performed his duty to his adopted parents faithfully, and given them his entire time, never receiving any compensation for such services. It was testified by Mrs. Richardson on the hearing in the court below that it was understood between her husband (the deceased) and herself that the defendant should, as the result of the adoption, be their heir, and ultimately come into possession of their property, and that it was always so intended. She was asked: "Did that intention continue to your knowledge, during Mr. Wright's lifetime?" *Answer.* "It did." *Question.* "Do you know whether or not Mr. Wright expressed from time to time a belief that that was successfully accomplished by the adoption papers?" *A.* "He told me a number of times that he had seen the lawyers about it, and they all said it was just as safe." *Q.* "State whether or not the defendant, to your knowledge, understood that he was to be the heir-at-law?" *A.* "He expected—He did not know but what he was our child until after Mr. Wright's death."

The witness further testified that there was never any talk between herself and her husband about paying the defendant in any way, and that about three months before Mr. Wright's death he was at a neighbor's house, and was speaking about these heirs coming up to break down this adoption, when he said: "Rather than have it done, he would do most anything, for he intended his property should go to Frank, if he used it up in four weeks after he died." The witness further testified that Mr. Wright meant and expected that Frank would inherit the property, the same as a son, and that he died in that belief. After Phineas R. Wright's death, proceedings were taken under the statute, in the probate court for Jackson county, to determine who were the heirs-at-law. Upon the hearing in that court, the defendant was so adjudged. An appeal was taken to the circuit court, and on the 1st of February, 1890, the proceedings of the probate court were reversed, and the complainants in the present case adjudged the heirs-at-law.

Defendant claims that in effect, and by force of the arrangement actually made, there was an agreement upon the part of Phineas R. Wright to reward him for his services and love and affection as a son, with such property as he might be seised at his death; that defendant, acting under that belief, performed the duties which made up the consideration of the contract, and is therefore

entitled to receive his reward; and that equity will enforce this understanding, despite the failure of the law. On the other hand, it is contended by complainants that the case is barren of any proof of contract to will or devise the property to defendant, only as defendant might have inherited it, had there been a law under which he might have been adopted, and had legal proceedings been had under such law to accomplish such purpose; that there is no such thing as adoption known to the common law; that the proofs fail to show an agreement, except the agreement to adopt, which has failed because of the unconstitutionality of the statute; and that the defendant's claim is set up, apparently, to have the court find an agreement to let him have the estate, and then enforce it. It is also contended by counsel for complainants that the order of the circuit court made upon the appeal from the probate court is an adjudication upon the question here in controversy and is *res judicata* as to all matters here involved.

The statute under which defendant was adopted was held unconstitutional in *People v. Congdon*, 77 Mich. 357. It is apparent, however, that Phineas R. Wright and his wife supposed that defendant's adoption had been successfully accomplished by the proceedings taken for that purpose. During all these years they treated defendant as their son and heir, and Mr. Wright died in the belief that he would inherit the property the same as an own son would have done. So careful had the parties been to show him their love and affection, that he never knew until after Mr. Wright's death but that they were his own parents. During all these years he had rendered them filial affection, and given them his labor upon the farm, with the belief that at their decease he would inherit all they possessed. We think there may be said to be a contract, impliedly at least, that defendant was to have this property, and that there had been such a performance on the part of the defendant as to take the case out of the operation of the statute of frauds. If this arrangement so solemnly made by Mr. and Mrs. Wright cannot be carried out,—if strangers may now step in and take this inheritance which the defendant has been led to believe would be his,—the defendant would be most outrageously wronged. He has lived since his adoption upon this farm, in the full belief that he was under his own father's roof, and in the full expectation and belief that, as a son and only child, he would inherit it. It would be technical, indeed, to say, from all these circumstances, no contract could be implied which a court of equity would enforce to save the rights of the defendant.

There are two cases arising in the New Jersey equity court which sustain this doctrine,—*Van Dyne v. Vreeland* (decided in 1857), 11 N. J. Eq. 370, and *Van Tins v. Van Tins* (decided in 1888), reported in 1 L. R. A. 155, in which *Van Dyne v. Vreeland*, *supra*, is cited and approved. In the first of these cases, an uncle had made an agreement with the father of an infant child that he would adopt the boy, and after the death of himself and wife all the property should go

to him. There was no formal adoption, but the child lived in the family twenty-five years, assumed their name, and treated them as parents. The court held that there was performance on the part of the child, and the agreement could be enforced. In the latter case, a girl eight years old was adopted by Mrs. Stryker, who assumed the obligation, by parol, with her parents, to treat the girl as her own child, and make her her heir. The girl remained in the family, giving her time and affection to Mrs. Stryker, with the expectation of becoming Mrs. Stryker's heir. The court found that there was a contract with the child, that the contract was performed on her part, and therefore she was entitled to receive the property, which was real estate, as in the present case. The doctrine of these cases finds support in *Rhodes v. Rhodes*, 8 Sandf. Ch. 279, 7 L. ed. 852, and *Sutton v. Hayden*, 62 Mo. 101. In *Shahan v. Swan*, 48 Ohio St. 25, the supreme court of Ohio expressly recognize the doctrines of these cases. It there said: "Notwithstanding that it is the established rule in Ohio that the payment of the consideration, even in the personal service of the party seeking relief, does not ordinarily constitute such part performance as will take a case out of the operation of the statute, we do not wish to be understood to hold that cases may not arise where specific performance of a contract in parol may be had on the ground that the consideration had been paid in personal services not intended to be, and not susceptible of being, measured by a pecuniary standard." This doctrine is also recognized in *Sharkey v. McDermott*, 91 Mo. 647, 60 Am. Rep. 270. We are aware that the principle laid down here is not supported in *Wallace v. Rappleye*, 108 Ill. 239, and *Wallace v. Long*, 105 Ind. 523, 55 Am. Rep. 222, and some other Illinois and Indiana cases, as well as in *Shearer v. Weaver*, 56 Iowa, 578, but we think the better reasons support the conclusions reached by the New Jersey court.

It is contended, however, that in the cases referred to a contract was shown to have been entered into between the party adopting the child and the parent, or some one who had the right and authority to make the contract. We think it has already been sufficiently demonstrated that such a contract is to be found in the arrangement made for defendant's adoption, and the acts of the parties subsequent thereto, and that it has been fully performed on the part of the defendant, so that it is taken out of the operation of the statute. It was expressly held in *Carmichael v. Carmichael*, 72 Mich. 76, 1 L. R. A. 596, that a person may enter into a valid agreement by parol, binding himself to make a particular testamentary disposition of his property. In that case, *Van Dyne v. Vreeland* was cited with approval.

One other question arises. Are the proceedings had in the circuit court *res judicata*? These proceedings were taken under the provisions of Act No. 273, Pub. Acts 1887, which gives to any person claiming an interest in the lands to which deceased had title at the time of his death the right to apply to the probate court, and gives that court power

to adjudicate and determine who are the legal heirs or legal representatives, and entitled to such lands. Section 3 of the Act provides that such "adjudication shall be entered on the journal of said court, and which entry, or a duly certified copy thereof, shall be prima facie evidence of the facts therein found." The inquiry to be instituted under that statute would give the probate court no jurisdiction to determine the questions involved in the controversy here. That proceeding was to determine who were the legal heirs or legal representatives entitled to take. Here the claim set up by the defendant by way of cross-bill is for the enforcement of a contract, which he insists that equitably he is entitled to have enforced against the legal heirs. The probate court had no jurisdiction to hear and determine that question, and, on appeal from the probate court, the circuit court would have no such jurisdiction. *Nester v. Ross' Estate* (Mich.) 57 N. W. Rep. 122; *Linneman v. Moross' Estate* (Mich.) 57 N. W. Rep. 109.

It follows that the decrees of the court below must be reversed, and decrees entered here dismissing complainants' bill, and finding that the title to the estate of Phineas R. Wright vested, by reason of this contract, at his decease, in the defendant, the same as if he had been the son. By reason of the stipulation between the parties, no costs will be allowed to either party.

McGrath, Ch. J., concurred with Long, J.

Grant, J., concurring:

Each case of this character stands upon its own peculiar circumstances and facts, upon which relief is granted or denied. The present case forms no exception. Mr. and Mrs. Wright were childless. They desired to adopt some one as heir, who should inherit their property. They first took the defendant under articles of apprenticeship. The adoption superseded these articles, and from that time until the date of his majority the relations existing between them were understood by all to be those of parent and child, and not of apprentice and employer. In no more solemn manner could Mr. Wright and his wife have declared that upon their death defendant should receive their property. It is no reply to this to say that, in his lifetime, Mr. Wright might have made other disposition of his property. He did not do so, and died in the belief that defendant would have it, and that he was his legal heir. They gave defendant their own name, and by their conduct, language, and treatment represented to him that he was their own son. He lived with them upon this understanding until some time past the age of majority. He had a right to rest and act upon the belief that he was the legal heir. So long as his reputed father and mother chose to let him repose in this belief, others had no right to interfere. Equity is clearly with the defendant, and, if relief cannot be granted, it must be because the strict rule of law interferes, and permits the accomplishment of an act of the greatest injustice. Unfortunately, the law

in regard to adoption was found to be unconstitutional because the real object of the act was not expressed in its title. Each party acted in the undoubted belief that the defendant, upon the death of Mr. Wright, would take the property. Can equity give validity to such intention, in the absence of an express contract? I see no reason why it may not. Defendant rendered services upon the faith of his relationship. Those services were accepted in reliance upon such relationship, declared in the most solemn manner. There are no children interested. If there were no collateral heirs, the property would otherwise escheat to the state. While it is true, in the cases cited from New Jersey, that the parties who took the complainants to live with them said that if they would remain they should have their property, still great stress is laid upon facts and circumstances similar to, but not as strong as, some in the present case. As I read those authorities, they are not based solely upon the existence of a promise. This is a case where, in my judgment, equity should declare that to be done which the parties clearly intended. I therefore concur in the opinion of my Brother Long.

Hooker, J., dissenting:

I am unable to concur in the opinion of my Brother Long. The defendant admits the acts which constitute waste, unless he can establish his right to the premises under his answer, which partakes of the nature of a cross-bill. The undisputed testimony shows that he was bound to the intestate in 1868, when an infant of less than two years of age. This imposed upon him the obligation of rendering service to his master until he should reach the age of twenty-one years. In 1875—he having lived with the intestate during the interval—proceedings were had for his adoption under the statute, and with the intention of making him the heir of his foster parents. These proceedings are regular, but unfortunately the act was declared unconstitutional some years later, and hence the defendant did not become the heir of the intestate by force of the statute. If he can be held to have been his heir-at-law, it must be by reason of our ability to find that the intestate made a valid contract to make him such. Whether a man can, in the absence of statutory authority, make another his heir, and procure recognition for him as such, is a question not discussed. If he could, that question is concluded for this case by the adjudication by the circuit court, which, in the proceeding appealed from probate court, in which all of the parties were heard, determined that he was not such heir, and that the complainants were the lawful heirs of the intestate. Accordingly, we find that the defendant is not claiming upon the theory that he is the heir, but upon the theory that he is not the heir, and that he has the right to the specific performance of a contract whereby

the intestate undertook and promised to give him his property at death in consideration of service until the defendant should reach his majority, which service he says has been rendered. Unfortunately for him, however, the testimony conclusively shows that the intestate never made any such promise. The indentures of apprenticeship were not pretended to have been based on any such promise. The adoption proceedings contain no more than the consent to make him an heir, the same as the intestate's own children; and if we shall, viewing these proceedings in the light of the unconstitutional law under which they were had, think that the intestate may be held to have promised to make him such heir, there is yet a fatal variance between the contract relied upon and the one proved. Were this an express and unqualified agreement to make him such heir, and were it based on the promise of service to which the intestate was not already entitled, it could not be enforced as a contract whereby the intestate had promised to give to the defendant his property, in consideration of his rendering certain service. The defendant cannot recover upon the theory which he is relying upon. He is precluded by the former adjudication from recovering as the heir, if that could otherwise be permitted, which we do not intimate. The evidence, so far as it appears in the record, shows an intention on the part of the intestate to allow his property to go to the defendant. Whether the complainants could have produced evidence to the contrary, we have no means of knowing, as they appear to have relied upon their legal rights. Perhaps, however, it is fair to infer that they could not, and, if so, it is a hardship upon the defendant to be deprived of the property. But he was under the obligation to render the service to the intestate before the adoption, and he incurred no further obligation by reason of the adoption. It is therefore difficult to see how the case differs from any other *nudum pactum*. The disappointment is one that comes from finding that he has labored under a mistake in relation to his ancestry and ancestral rights. I find no case which holds that proceedings like those shown in this case can be construed into a contract to convey property by will or otherwise, where the evidence conclusively shows that the undertaking was merely to adopt and make an heir of a child, subject to the right upon the part of the foster parent to cut him off as he might his own child, especially where the child adopted was not only ignorant of the transaction, but already under a legal obligation to perform all of the services which constitute the consideration for such agreement. I think the decree of the circuit court was correct, and should be affirmed, with costs.

Montgomery, J., concurred with Hooker, J.

KENTUCKY COURT OF APPEALS

Walter WILLIAMSON, by Benjamin Thomas, His Next Friend, *Appt.*,

LOUISVILLE INDUSTRIAL SCHOOL OF REFORM.

(15 Ky. L. Rep. 629.)

A reform school under the control and oversight of the legislature, which is an agency of the state and maintained by taxation and state aid, is not liable to an action for damages for negligent or malicious injuries to an inmate by its servants or employes.

(January 27, 1894.)

NOTE.—Liability of charitable institution for negligence.

The decisions are few in which the liability of a charitable corporation for negligence of its officers or agents has been adjudicated.

The earliest case directly in point which we have found is that of *Fees of Heriot's Hospital v. Ross*, 12 Clark & F. 507, in which it is expressly held that no damages can be given out of the fund of a charity hospital. The case was one in which damages were claimed for refusal to receive an applicant. The court follows the case of *Duncan v. Findlater*, 6 Clark & F. 394, MacL. & Rob. 911, but the latter case was one relating to the liability of trustees under a public road act and therefore related to a kind of public or municipal corporation involving nothing about charity, except so far as municipal corporations, or those engaged in the public service instead of for private gain are all to be considered charitable. The distinction between a charity and a public or municipal corporation was not clearly taken in the above case and has not been kept entirely clear in some of the later decisions; but no attempt is here made to touch the question of the liability of municipal or public corporations, as such, but merely the question of liability as affected by the charitable nature of the enterprise in which a master is engaged.

While the later English cases have held public corporations, such as boards of health, or other local boards, liable for negligence of their servants, we do not find that the case of *Fees of Heriot's Hospital v. Ross*, has been overruled by any case directly relating to a charity.

Following the above case it was held in *McDonald v. Massachusetts Gen. Hospital*, 120 Mass. 432, 21 Am. Rep. 629, that a hospital corporation, not operated for profit but holding property in trust for the purpose of benefit to the sick, although it had some receipts from paying patients, was not liable for the negligence of its aids.

Again in *Benton v. Boston City Hospital Trustees*, 140 Mass. 13, 54 Am. Rep. 426, the negligence of the superintendent in respect to the outside stairway of a city hospital, which constituted a charity, maintained by the city and by private donations with some receipts from paying patients, would not make the trustees of the corporation liable for an injury sustained by a person on such stairway while on a visit to a paying patient in order to arrange for the latter's removal from the hospital.

To the same effect it was held in respect to a house of refuge, which constituted a charity, that there was no liability of the institution for an assault by its officers on an inmate, for the property of the institution was contributed solely for benevolent purposes. *Perry v. House of Refuge*, 68 Md. 20, 52 Am. Rep. 495.

The court expressly approved the rule that dam-

A PPEAL by plaintiff from a judgment of the Circuit Court for Jefferson County in favor of defendant in an action brought to recover damages for personal injuries alleged to have been inflicted by the cruel acts of one of defendant's servants. *Affirmed.*

The facts sufficiently appear in the opinion.

Messrs. George Weissinger Smith and Samuel B. Kirby, for appellant:

Where the defendant corporation has knowledge of the incompetency of its servant it will be liable for the servant's tort even though the defendant would be ordinarily exempt from liability to pay damages out of a trust fund.

ages cannot be recovered from a fund held in trust for charitable purposes, and the decision was based on the authorities above cited.

On the other hand, it was held in Rhode Island in respect to a hospital, that it was liable to a paying-patient for negligent treatment, although the hospital was administered largely as a charity, with income derived mainly from endowments and voluntary contributions, and its physicians gave gratuitous services, except for the board and lodging given to those persons who were constantly in attendance. *Glavin v. Rhode Island Hospital*, 12 R. I. 411, 84 Am. Rep. 675.

The court in this case regards the authority of *McDonald v. Massachusetts Gen. Hospital* as somewhat impaired by the fact that it was based in part on the case of *Holliday v. St. Leonard*, 11 C. B. N. S. 192, 8 Jur. N. S. 79, 4 L. T. N. S. 408, the authority of which it considered to be overthrown by later English cases; but the case of *Holliday v. St. Leonard* was one in respect to the liability for negligence of an employe of a surveyor of highways.

The Rhode Island case holds that a corporation holding property for a charity should not be more highly privileged than corporations created for public purposes holding their property for such purposes; but it says: "It may be that some of the corporate property, the buildings and grounds for example, is subject to so strict a dedication that it cannot be diverted to the payment of damages. But however that may be, we understand that the defendant corporation is in the receipt of funds which are applicable generally to the uses of the hospital, and following the decision in *Mersey Docks Trustees v. Gibbs*, L. R. 1 H. L. 93, 11 H. L. Cas. 686, 35 L. J. Exch. 225, 12 Jur. N. S. 571, 14 L. T. N. S. 677, 14 Week. Rep. 872, we think a judgment in tort for damages against the corporation can be paid out of them." It is seen therefore that the Rhode Island case treats the case of a charitable corporation as governed by the same rule as that governing public corporations.

There are other cases relating to liability for negligence of officers or employes of a hospital, in which the liability is denied, but these are cases in which the hospital was operated by a municipal corporation, and the exemption from liability is upheld, not on the ground that the enterprise is a charity, but on the broader ground of the exemption of municipal corporations from liability for negligence of officers engaged in public duties.

Such is the case of *Richmond v. Long*, 17 Gratt. 375, 94 Am. Dec. 461, in which a city was held not liable for the negligence of its agents at a city hospital, resulting in the death of a slave, which was being treated in a hospital.

Likewise in the case of *Murtaugh v. St. Louis*, 41 Mo. 479, a city is held not liable to a nonpaying phre-

McDonald v. Massachusetts Gen. Hospital, 120 Mass. 432, 21 Am. Rep. 529; *Perry v. House of Refuge*, 63 Md. 20, 52 Am. Rep. 495.

The master is liable even for the malicious tort of the servant, if the tort was committed by the servant in the scope of his authority and while carrying out his master's ends.

Addison, Torts; *Howe v. Newmarrh*, 12 Allen, 49; *Ortig v. Lee*, 14 B. Mon. 119.

The corporation though charitable will be responsible for negligence in selecting its servants.

Several American decisions hold that a charitable corporation is not liable for the torts of its servants on the ground that to pay damages out of the trust fund designed to

be devoted to the needs of the organization would tend to deprive it of the means to carry out the purposes of the charity.

Fire Ins. Patrol of Philadelphia v. Boyd, 1 L. R. A. 417, 120 Pa. 624; *Perry v. House of Refuge*, *supra*; *Benton v. Boston City Hospital Trustees*, 140 Mass. 18, 54 Am. Rep. 486; *McDonald v. Massachusetts Gen. Hospital*, *supra*.

These cases are not based upon statute or common law but rely upon precedent alone.

Trustees of Heriot's Hospital v. Ross, 12 Clark & F. 507; *Holliday v. St. Leonard*, 11 C. B. N. S. 192, two English cases, but these English cases were overruled.

Mercy Docks Trustees v. Gibbs, L. R. 1 H.

tient at a city hospital for injuries resulting from negligence and misfeasance of officers.

Again in *Ogg v. Lansing*, 35 Iowa, 493, 14 Am. Rep. 490, the city was held not liable for the negligence of its sanitary officials, whereby a dangerous disease was communicated to the plaintiff.

The same decision was made in respect to the negligence of selectmen, whereby such a disease was communicated, in *Brown v. Vinalhaven*, 65 Me. 402, 20 Am. Rep. 708.

And a county is held not liable for the improper treatment of a patient in a county hospital. *Sherbourne v. Yuba County*, 21 Cal. 112, 81 Am. Dec. 151.

Somewhat akin to these cases is the decision in *Clark v. Missouri Pac. R. Co.*, 45 Kan. 654, to the effect that a railroad company is not liable for alleged negligence of its local surgeon in delaying the amputation of an injured limb of an employé, where it did not appear that the company was under any legal obligation to provide medical or surgical aid for him.

The liability of a physician for negligence, in case of gratuitous services, is considered in *Du Bois v. Decker* (N. Y.) 14 L. R. A. 429, and *note*.

That a county which employs physicians to attend poor persons is not liable for his negligence in treatment of them is decided in *Summers v. Davies County Comrs.* 108 Ind. 202, 53 Am. Rep. 512.

But this decision is based, like those about city hospitals, on the broad ground that public corporations are not responsible for the negligence of their officers in the exercise of governmental powers, and therefore has little bearing on the present question of liability of charitable institutions.

A school district is held in Pennsylvania to be merely a public agency in the administration of the great public charity of education, and therefore not liable for the negligence of its officers, agents, or employes. *Ford v. School Dist. of Kendall Borough* (Pa.) 1 L. R. A. 607; but this case, although it considers the charitable nature of the enterprise, is based chiefly on the ground of the public character of the corporation, and recites an exception to the doctrine in respect to highways.

A corporation called the fire insurance patrol and supported by voluntary contributions of insurance companies is held in *Fire Ins. Patrol of Philadelphia v. Boyd* (Pa.) 1 L. R. A. 417, to be a charitable corporation, which is not liable for negligence of its employes in throwing bundles from a burning building, whereby a person on a sidewalk is injured.

But a somewhat similar corporation in Massachusetts, which is organized under a statute giving it power to levy assessments on insurance companies, and giving such companies each a representation and right to vote at the annual meeting of the corporation, is held to be a private corporation and not a public charity, and therefore to be liable for the negligence of its servants in driving through

the streets. *Newcomb v. Boston Protective Department* (Mass.) 6 L. R. A. 778.

The court distinguishes this case from that of *Fire Ins. Patrol of Philadelphia v. Boyd*, on the ground that in the latter membership was open to everybody, and the expenses were wholly paid by voluntary contribution. This case, however, does not in any way discredit the other Massachusetts cases above cited, but denies the exemption on the ground merely that the corporation is not a charity.

Another Massachusetts case holds the town liable for injuries resulting from negligence in conducting a poor farm, where it is managed not only to support its paupers but also to board paupers of other towns for pay, and to board persons employed on the highways, while the managers were also overseers of highways and selectmen, and the surplus income is used for general town purposes. *Neff v. Welleasley* (Mass.) 2 L. R. A. 600.

This case is also based on the law applicable to towns rather than that governing charities.

So in *Maxmillan v. New York*, 62 N. Y. 160, 20 Am. Rep. 468, a city was held not liable for negligence of commissioners of public charity, or of other subordinates, where such commissioners were appointed by the mayor and paid from the city treasury, but were really officers of the state government regulated by state statute. This decision also turns on the law applicable to public corporations, and not that concerning charities.

The claim that a cemetery corporation was a charity within the law exempting a charity from liability for negligence, was made in a Massachusetts case, in which plaintiff claimed damages for burying a stranger in his lot, but the court held that the corporation was not a charity within this rule, although it actually applied its funds to charity to a considerable extent. *Donnelly v. Boston Catholic Cemetery Assn.* 146 Mass. 163.

A congregational church corporation was held liable for negligence in respect to the condition of a passageway by which a person attending a public meeting at that church in the evening was injured, but nothing was said in the case about an exemption from liability on the ground that the corporation was a charity. *Davis v. Central Cong. Soc. of Jamaica Plains*, 129 Mass. 367, 37 Am. Rep. 366.

The rule that a municipal corporation is not liable for negligence of its fire department, which is the subject of a *note* to *Dodge v. Granger* (R. I.) 15 L. R. A. 781, is held applicable also to the acts of a volunteer association of firemen. *Torbush v. Norwich*, 38 Conn. 225, 9 Am. Rep. 325.

Excluding from consideration the cases incidentally mentioned above, which decide as to the liability of municipal corporations, it will be seen that the clear weight of authority is in favor of the doctrine of the main case, which exempts a charitable institution from liability for negligence of officers or agents.

B. A. R.

L. 98, 119; *Foreman v. Canterbury*, L. R. 6 Q. B. Div. 214; *Ruck v. Williams*, 8 Hurlst. & N. 321; *Gibbs v. Liverpool Docks Trustees*, Id. 164.

As those American cases were based upon neither common law nor statute law but upon English precedents, and as those English precedents were overruled, therefore the American decisions are not entitled to much if any weight.

Glavin v. Rhode Island Hospital, 12 R. I. 411, 34 Am. Rep. 675, holds that charitable organizations are liable for the torts of their servants and disapproves of the Massachusetts cases.

Where a duty not discretionary is imposed upon a municipality it is liable for the tort of its servant in the performance of that duty.

Dill. Mun. Corp. § 752; 3 Am. & Eng. Encyclop. Law, p. 698.

If it is shown that the defendant is a public corporation, then it is not liable for tort. If, on the other hand, it is shown that it is a private corporation, it is liable.

A public corporation is one which has for its object the municipal government of a portion of the people (*e. g.* a city or a county), or which is founded for other public, although they be political purposes, and which belongs wholly to the government.

1 Minor, Inst. 8d ed. *508.

The main distinction between public and private corporations is, that over the former the legislature, as the trustee or guardian of the public interest, has the exclusive and unrestrained control. Private corporations, on the other hand, are created by an act of the legislature, which, in connection with its acceptance, is regarded as a compact, and one which, so long as the body corporate faithfully observes, the legislature is constitutionally restrained from impairing, etc.

Ang. & A. Priv. Corp. 9th ed. § 81.

Private corporations are created for private, as distinguished from purely public purposes, and they are not, in contemplation of law, public because it may have been supposed by the legislature that their establishment would promote, either directly or consequentially, the public interest. They cannot be compelled to accept a charter or incorporating act. The assent of the corporation is necessary to make the incorporating statute operative, etc.

1 Dill. Mun. Corp. §§ 29, 80.

The Louisville Industrial School of Reform is not a public corporation, for as said by Minor, Angell & Ames, and Dillon, all its interests and property must belong exclusively to the government, and it must be entirely controlled by the government. The school of reform may hold, purchase, and convey real estate. It owns the property, not the state. Again, having received its charter, it controls and governs itself.

Perry v. House of Refuge, 63 Md. 20, 52 Am. Rep. 495.

Mr. T. L. Burnett for appellee.

Hazelrigg, J., delivered the opinion of the court:

The appellee, the Louisville Industrial School of Reform, was created a body cor-

porate by an Act of the General Assembly in 1854, under the name of the Louisville House of Refuge. Its object and business was to take charge of such youths as might be committed to it, and care for their moral and physical training and education. It was a charity, and its purpose was reformation by training its inmates to habits of industry, and by instilling into their minds the principles of right living, to the end that they might become useful citizens of the state, rather than fill its prisons and poor-houses. The incorporators and their successors are under the control and oversight of the legislature, and are mere instrumentalities of the commonwealth. The state interposed in behalf of neglected and abandoned children within its confines in its capacity of *parens patriæ*, and assumed the guardianship of such children as were committed to the institution. It was an agency of the state, and maintained by taxation and state aid. The appellant, a boy of ten years of age, was committed to the care, control, and restraint of the institution, and his petition, brought by his next friend, Thomas, alleges that without fault on his part one of the servants and employes of the appellee, and known by it to be incompetent and unfit for such service, struck and beat the appellant in such cruel and inhuman manner that he was caused great suffering in mind and body, and was permanently injured and damaged, etc. To this petition a general demurrer was sustained, and the petition dismissed. The correctness of this judgment is the question on this appeal, and, while it has not been determined directly, the general principles are well established. The functions of the institution are governmental. As said in *Farnham v. Pierce*, 141 Mass. 208, 55 Am. Rep. 452: "It is a provision by the commonwealth, as *parens patriæ*, for the custody and care of neglected children, and is intended only to supply to them the parental custody which they have lost." In *Perry v. House of Refuge*, 63 Md. 20, 52 Am. Rep. 495, it was held that an action does not lie against a state house of refuge for an assault on an inmate by an officer thereof. It is there said: "Youths, in whom the seeds of vice have already germinated, are placed there under proper restraint, so that the growth of crime may be arrested or eradicated in its incipency. Funds are contributed by individuals impelled by philanthropic motives, and donations are obtained from municipal and state treasuries. These are the funds of the institution, contributed by the managers, not for their own profit or benefit, but solely for the charitable purposes designated by its organic law. . . . Several of the most eminent judges in England expressed themselves with much emphasis in opposition to an allowance of damages out of a fund so held by fiduciary agents;" and the principle determined in a number of English cases, that "damages are to be paid out of the pocket of the wrongdoer, and not from the trust fund," was approved. It is contended that these cases followed the older decisions in England, and that the latter have been since overruled. Be this as it may, the principle

announced seems entirely just and reasonable. If the funds of these institutions are to be diverted from their intended beneficent purposes by lawsuits and judgments for damages for negligent or malicious servants, their use-

fulness—indeed, their existence—will soon be a thing of the past.

The judgment dismissing the petition is affirmed.

WISCONSIN SUPREME COURT.

Emma ANDERSON, Admx., etc., of Fred Anderson, Deceased, *Resp't.*,

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA R. CO., *Appt.*

(.....Wis.....)

1. Evidence that for a few days after an accident on a railroad trestle trains were run quite slowly and afterwards the former alleged dangerous speed was resumed is inadmissible on the question of negligence in the speed of the train.
2. One who, while intoxicated, walked out on a railroad trestle to a position of great peril and was there killed by a train cannot be held free from contributory negligence.
3. An implied license to cross a railroad trestle so narrow that there is no room on it outside of a passing train, and over which at least twelve regular trains cross each day besides special trains and switch engines, is contrary to public policy,—especially where the statutes prohibit walking on railroad tracks, except along public roads.

(Orton, Ch. J., dissents.)

(February 23, 1894.)

APPEAL by defendant from a judgment of the Circuit Court for Ashland County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

Statement by Pinney, J.:

This action was brought to recover damages for the death of the plaintiff's intestate, alleged to have been caused by the negligence of the defendant on the 19th of November, 1892. It was alleged that, at the time mentioned, the said Fred Anderson was lawfully traveling along and crossing a portion of the track of the defendant which was used for several years, and down to the time of the accident, with defendant's knowledge and consent, for the purpose of a footway by foot travelers at or near the intersection of Sixteenth avenue west and Third street, in the corporate limits of the city of Ashland; that the defendant, by its servants, etc., carelessly and negligently caused one of its locomotives, with a tender and two passenger cars, to pass over and across said railway track and said

traveled way at the rate of about thirty miles an hour, and negligently failed to give any signal by bell or whistle of its approach, so that the said Anderson was unaware of the approach of said engine and cars; and by reason of such fault and negligence of the defendant, while so traveling along said footway upon said railroad, without fault or negligence on his part, said Anderson was struck by said locomotive and killed. And the complaint contained other appropriate averments, and claimed damages in the sum of \$5,000. The defendant admitted that Anderson was walking on its track at the time in question, and across one of its bridges, and was struck by a locomotive and train of cars of defendant, and killed, but denied all other material allegations of the complaint. At the trial before a jury, it was testified, in substance, by one Swanson, on the part of the plaintiff, that on the morning in question, about half past 6 o'clock, Anderson came to his house, and they went down town to see if there were any lumber boats in; that they went across the bridge to Swan Swanson's, on Second street, where they had some whisky and hot water to drink, and then went to the bay, and in about half an hour returned to Swanson's, where they had two more drinks of the same kind, talked together, and read a paper, and started for home; that they got another drink at the billiard hall,—straight whisky,—and went right out, thence up Fourteenth avenue, to the railroad, and then took the railroad track west. In going home they went the usual way, and crossed the trestle; "used it all the time. People crossed it most every hour,—men, women, and children. When we got to the trestle, I turned around to look behind, and I looked ahead. Did not see any train, nor hear any bell or whistle sounded, before we got on the trestle. We walked out on the trestle, and the bell was rung. I looked ahead, but did not see any locomotive, and I turned partly around to see if the train was coming on the Northern Pacific track. Saw no train there, and I turned around a little more: Looked behind me again. I did not see any train there. Turned clear back. I looked ahead, and saw the train coming about 200 feet from us. That is the first I saw of it. I said: 'Anderson, the train is coming. We will have to jump.' I leaned myself over the edge of the bridge, and hung onto the bridge. Anderson, as far as I could see, turned sideways to try to get off, and one of his feet slipped, and he got between the ties.

NOTE.—As bearing somewhat upon the question of the implied license to walk along a railroad trestle, on which the judges are not agreed in the above case, see *note* to Central E. & Btg. Co. v. 28 L. R. A.

Eyles (Ga.) 13 L. R. A. 634, in respect to an implied license to go upon a railroad track. Also *Chenery v. Fitchburg R. Co.* (Mass.) 23 L. R. A. 675.

Then he went down, and did not get away from that place before the train struck him. I did not turn and run back, because I thought I hadn't time. He was dead when I next saw him. The train was the 'Bayfield Scoot.' I knew that train came along every morning about a quarter to ten o'clock. When on the railroad track, did not think of the train. Thought it had got to the depot already. Anderson was walking on the left hand, and I on the right. I think he had hold of my arm. Was about thirty-three feet on the bridge when I heard the bell ring. It is not a fact that Anderson and I were quite full that morning. He was not staggering as he went along with me. He had hold of my left arm. Sometimes, when walking together, he used to take hold of my arm, but not because he was drunk. We were friends. He lived on 16th avenue, in sight of this trestle, near 5th or 6th street. I lived on 4th street, only a short distance from the west end of the trestle. I was not so drunk but what I knew what I was about, and Anderson was not. He was able to walk. The train was running as it usually did. Cannot tell how many miles an hour."

Considerable evidence was given to the effect that it was a common occurrence for everybody to travel over this trestle every day, and all classes of people, at the time of the accident, and had been for some four years; that the ordinary rate of speed in passing over it was about thirty to thirty-five miles an hour. The plaintiff was allowed, against objections of the defendant, to show by one Weed, and also by one Oleson, that, for two or three days or so after the accident, the train ran very slowly over the trestle, and that in a couple of weeks they ran at their former rate of speed again. There was no planking or footway on this bridge; simply the open trestle. They had to step from tie to tie in crossing it. It was 120 feet long, and Anderson was killed 33 feet from the east end, on the east side of Fifteenth avenue, as he and Swanson were going towards the train approaching from the west. The ravine at the deepest point was 23 feet deep. There was another like trestle over a deep ravine to the west, 189 feet long, and the interval between the two was 139 feet—both on the main track or line of defendant, and used by pedestrians to about the same extent. Going west from the east end of the first trestle, there is a curve in the track to the right, and both are embraced in the curve. The view from the east to the westward along the track was somewhat obstructed by a bank of earth and a building. But it was shown that a person in an engine cab, coming from the west, could see persons on the trestle work at the point where Anderson was struck for a distance of 456 feet. That the whole of the man and the entire track could be seen, and the ties distinguished. There was a plank crossing at the east end of the first trestle, and one could go from there down to Third street with a wagon. That Fifteenth avenue, within the limits of which Anderson was struck, had never been opened, nor had Sixteenth, Seventeenth, Eighteenth, and Nineteenth avenues to the westward. The train, at the time of

the accident, had not passed all the traveled streets of Ashland. The railroad crossed the avenue nearly at a right angle, and the streets were at right angles with the avenues. The plaintiff having rested, the defendant moved for a nonsuit, on the ground that there was not sufficient proof of negligence on the part of the defendant, and that the plaintiff's intestate was guilty of contributory negligence, but the motion was denied. It was testified on behalf of the defendant, among other things, by the engineer, that the train, at the time in question, was running along at the rate of eight or ten miles an hour. That the first he saw of Anderson was when he was within six or eight feet of him. That he could not see him before from the west end of the trestle, on account of the curve and the engine being in the way, but could see from the east end of the trestle westward 350 feet. That the first information he had that there was anything on the track was when the fireman gave the signal to stop and apply the brakes; and, just about the time he had applied the brakes, the fireman said, "Man on the track!" and then he reversed the engine, and blew the whistle, and reached for the sand lever, and then he saw the man on the track six or eight feet ahead. That he was somewhere between the two trestles, about the middle, when the fireman gave the signal to stop. Made a good stop. Could stop that train at about 150 to 200 feet from getting the signal, when going at the rate of six or eight miles an hour; at twenty miles an hour, about 400 feet; and at thirty-five miles, between 700 and 800 feet. There was testimony on the part of the plaintiff tending to show that the train might have been stopped in a shorter distance. The fireman testified, among other things, that the rate of speed was five or six miles an hour, and he was ringing the bell all the time. When he first saw the men, it was difficult to tell where they appeared to be, on account of the curve. First discovered they were on the trestle when he gave the signal to stop. Was then in view of the whole bridge. It was admitted that no warning had been put up to keep the public off of the bridge, and it was shown that no gates had been put up to keep people from crossing; that there were gates on some streets west of the depot towards the junction. The evidence tended to show that the running time, between Ashland and the junction was fifteen minutes, and the distance four and three tenths miles. The conductor testified, among other things, that on this occasion they were running at about the usual rate of speed after they left the switch where they bring lumber onto the track from the Bay Front line, which it was admitted was 2,250 feet west of the east end of the trestle on which Anderson was killed; and from the plat in evidence it appeared to be somewhat further than that distance from Ashland station to where Anderson was struck. Evidence was given tending to show that, at the time, Anderson was drunk, so that he staggered; and, in rebuttal, to show that he was not drunk; that he had a swaggering gait; that he and Swanson were intimate friends, and sometimes walked arm in arm. Defendant

asked the court to direct a verdict in its favor, on the same grounds that it had moved for a nonsuit, but this was denied. The court charged the jury that: "The evidence of the plaintiff tends to show that the track or trestle had been dedicated to the public at the point where the deceased lost his life, and that there had been no objection to such use made by the defendant. That, if you find that the track at such point had been so dedicated, it was the duty of the defendant to keep a careful lookout when approaching said point with the train, and while crossing the same, and to keep its train, as far as practicable, under reasonable control, so that there would not be any injury done to any person crossing which might be prevented by due caution on the part of the defendant. That it was the duty of the engineer and fireman, if you find that this point was used by the public as alleged, to keep a careful outlook to avoid injury to any person crossing the said point which could be prevented by said outlook. The fact, if it be a fact, that Anderson was under the influence of intoxicating liquors did not relieve the defendant in any particular, but could only be considered for the purpose of showing that there was contributory negligence on the part of the deceased; for the defendant, if there were no contributory negligence on the part of the deceased, would be liable even if the deceased were intoxicated at the time he lost his life, the same as it would be if he were sober." The jury found a general verdict for the plaintiff in the sum of \$5,000, and also that, at the time of the accident, the train was running seventeen miles per hour.

Messrs. Tompkins & Merrill and S. L. Perrin, for appellant:

Both these men had lived near this bridge for years, knew that trains were continually and frequently crossing the same, and that this particular train was due about this time. It was negligence upon their part not to take immediate steps to put themselves in a place of safety as soon as they heard the alarm of the bell.

Schilling v. Chicago, M. & St. P. R. Co. 71 Wis. 255; *Hansen v. Chicago, M. & St. P. R. Co.* 83 Wis. 631; *Schmolze v. Chicago, M. & St. P. R. Co.* Id. 659; *Liermann v. Chicago, M. & St. P. R. Co.* 82 Wis. 288; *Carney v. Chicago, St. P. M. & O. R. Co.* 46 Minn. 220; *Beck v. Portland & V. R. Co.* (Or.) Nov. 29, 1893.

Deceased knew that the train was then due, that the bridge was not constructed for use as a footway, and that it was not necessary to use it as such; he was clearly guilty of some want of ordinary care in going where he did at that time. He was cognizant of the usual rate of speed of the train and of the dangers incident to the use of the bridge as a footway.

Wright v. Boston & A. R. Co. 142 Mass. 296; *Grethen v. Chicago, M. & St. P. R. Co.* 22 Fed. Rep. 609, 19 Am. & Eng. R. R. Cas. 342; *Morgan v. Pennsylvania R. Co.* 7 Fed. Rep. 78; *Johnson v. Boston & M. R.* 125 Mass. 75; *Illinois Cent. R. Co. v. Godfrey*, 71 Ill. 500, 22 Am. Rep. 112; *Nicholson v. Erie R. Co.* 41 N. Y. 526; *Studley v. St. Paul & D. R. Co.* 48 Minn. 249.

23 L. R. A.

The court allowed the plaintiff to introduce evidence that the trains were run slower immediately after the accident than before. This is certainly error.

Lang v. Sanger, 76 Wis. 71; *Baird v. Daly*, 68 N. Y. 547; *Castello v. Landwehr*, 28 Wis. 524.

Messrs. John F. Dufur and Cate, Jones & Sanborn for respondent.

Pinney, J., delivered the opinion of the court:

1. The plaintiff's contention was that the defendant had been guilty of negligence in running its train at a dangerous and unlawful rate of speed, and in not keeping a proper outlook, and for failure to give timely warning of the approach of the train. It was error, we think, to admit the testimony of the witnesses Weed and Oleson to the effect that for a few days after the accident, the defendant ran its trains over the trestle quite slowly, and afterwards ran them at its former alleged dangerous rate of speed, of 30 or 35 miles an hour. The tendency of the testimony was to show, by implied admission, that the defendant habitually, down to the time of the accident, had been guilty of negligence, in not using reasonable and ordinary care towards those who crossed the trestle, and towards the plaintiff's intestate as well; that the conduct of the defendant after the accident was an implied admission of fault on its part, and it soon after, in disregard of its alleged duties, returned to its former dangerous, if not reckless, course of conduct. The question is the same in principle as in the case where an injury has been caused by defective machinery or an insufficient highway, and repairs have been made immediately or soon thereafter. A party may have exercised all the care which the law required, and yet, after an accident, he may think it well to use additional caution or safeguards; and it is unjust to hold that the fact that he had done so is an admission of previous negligence, or that his return to previous methods evinced a disposition to persist in a negligent and dangerous course of conduct. *Castello v. Landwehr*, 28 Wis. 530; *Lang v. Sanger*, 76 Wis. 75; *Morse v. Minneapolis & St. L. R. Co.* 80 Minn. 485; *Columbia & P. S. R. Co. v. Hawthorne*, 144 U. S. 202, 207, 36 L. ed. 405, 406; *Shinners v. Proprietors of Locks & Canals*, 154 Mass. 168, 12 L. R. A. 554.

2. The question whether a party injured or killed on the track was drunk at the time, and whether his being drunk was contributory negligence, is, as a rule, a question of fact for the jury. The court stated to the jury that the fact, if it was a fact, that the plaintiff's intestate was under the influence of intoxicating liquors at the time he lost his life, "did not relieve the defendant in any particular, but could only be considered for the purpose of showing that there was contributory negligence on his part," adding: "For the defendant, if there were no contributory negligence on the part of the deceased, would be liable even if the deceased were intoxicated at the time he lost his life." This instruction, as given, is somewhat obscure and contradictory, and fails to express the idea

the court probably intended to convey. The instruction left the jury to infer that, although drunk when he went into this position of great danger, as detailed in the evidence, the defendant might be liable "the same as it would be if he were sober." The instruction was not called for by the facts, and was, we think, misleading. We do not think that the plaintiff's intestate can be held free from contributory negligence if he was intoxicated, and in that condition walked out upon the trestle to a position of great peril to life or limb, and, in attempting to cross it, lost his life at the time and under circumstances given in evidence, and about which there is really no dispute. The instruction left it to the jury to conclude that there could be a recovery, although he was drunk at the time, and it was therefore misleading and erroneous, and it was erroneous in leaving the jury to conclude that there could be any recovery at all.

3. Walking upon the track of a railway has been held in many cases to be negligence *per se*, and sufficient to defeat a recovery in case of injury to the party by a passing train (*Moore v. Pennsylvania R. Co.* 99 Pa. 801, 44 Am. Rep. 106; *Bresnahan v. Michigan Cent. R. Co.* 49 Mich. 410; *McClaren v. Indianapolis & V. R. Co.* 83 Ind. 319; *Harty v. Central R. Co. of New Jersey*, 42 N. Y. 468; *Tennenbrock v. Southern Pacific Coast R. Co.* 59 Cal. 269; *Yarnall v. St. Louis, K. C. & N. R. Co.* 75 Mo. 575); but in general it is held that the question as to such an act, in the event of any injury, is one proper to go to the jury. *Beach, Contrib. Neg.* § 211; *Townley v. Chicago, M. & St. P. R. Co.* 53 Wis. 626; *Johnson v. Chicago & N. W. R. Co.* 56 Wis. 274. Courts universally characterize such an act as dangerous, and "a civil wrong of an aggravated nature, as it endangers not only the trespasser, but all who are passing and being carried over the road." *Philadelphia & R. R. Co. v. Hummell*, 44 Pa. 375, 84 Am. Dec. 457. The use of a railroad is exclusively for its owners, or those acting under its authority, and the company is not bound to the exercise of any active duty of care or diligence towards mere trespassers on its track, to keep a lookout to discover or protect them from injury, except that, when discovered in a position of danger or peril, it is its duty to use all reasonable and proper effort to save and protect them from the probable consequences of their indiscretion or negligence. The company is also bound to provide for a careful outlook, in the direction in which a train is moving, in places where people, and especially children, are likely to be on the track, as in and about station grounds, depots, and regular crossings. This rule has been laid down in *Townley v. Chicago, M. & St. P. R. Co.* 53 Wis. 626, and *Whalen v. Chicago & N. W. R. Co.* 75 Wis. 654, and other cases; but its limit is best understood in view of the character of the places where the injuries in such cases occurred, that is to say, such as are above indicated. The rule, manifestly, has no application to the main track of the company in other places; for, as to them, it is not bound to act upon the assumption that the public or way-

farers will trespass upon its rights. But after discovery that a party is on its track, and in a position of danger, it is bound to the exercise of reasonable and appropriate care to prevent his injury even though wrongfully on its track, and to take as prompt and active measures as possible, if the person is helpless or unconscious or unable to escape. It has frequently been held in this and other states that where the grounds of a railway are used by pedestrians for a considerable time without objection, or with acquiescence on the part of the company, a pedestrian crossing over the same thereby becomes a licensee, and is no longer to be considered as a mere trespasser, acting at his peril, and that it is the duty of the company to exercise increased prudence and caution in operating its road at such point, and to keep a reasonably vigilant lookout to prevent injury or accident to those so crossing its grounds. *Townley v. Chicago, M. & St. P. R. Co.* 53 Wis. 626; *Whalen v. Chicago & N. W. R. Co.* 75 Wis. 656; *Davis v. Chicago & N. W. R. Co.* 58 Wis. 646, 46 Am. Rep. 667; *Delaney v. Milwaukee & St. P. R. Co.* 53 Wis. 67; *Johnson v. Lake Superior Terminal & Transfer R. Co.* 86 Wis. 64.

In all these cases the injury occurred at the station or on the depot grounds or yard where parties would naturally resort and cross over the same, and where the agents and servants of the company could exercise a proper degree of care and watchfulness under the circumstances; but we have not met with any case, in which the point was necessary to the decision, where it has been held that a license can be implied from such acts of frequent use by pedestrians or wayfarers of the main track or bridges or trestles distant from such places as a pathway for travel, though we find that in other states the rule of implied license has been applied to parties frequently crossing the track at particular points, other than regular crossings. In the case of *Hooker v. Chicago, M. & St. P. R. Co.*, 76 Wis. 542, it was reasonably clear, and was so found, that the company was guilty of negligence that caused the accident; and it appeared that "from a point 1,168 feet north of the bridge on the west side of the track, at the height of an engine cab, the whole track could have been plainly seen southward through the bridge, and to Main street beyond, without any obstruction whatever." The case was rightly decided, and whether the injured party was a licensee or not was not material or necessary to sustain the judgment. In the *Davis Case*, 58 Wis. 646, 46 Am. Rep. 667, the party injured was walking between the main track and a side track, across a public street, when he was injured by the explosion of the boiler of a locomotive that had been left unattended on a side track. In the case of *Mason v. Missouri Pac. R. Co.*, 27 Kan. 83, 41 Am. Rep. 405, where the company had constructed a trestle or bridge over a creek and street on the plat of a city, and where the street had not been graded or improved, with a span of 160 feet over a stream of 65 feet wide, and 80 feet above the water, and there were no railings to the trestle or bridge, and no foot planks on it, and the only way

of crossing was by stepping from tie to tie, and the railway company was constantly using the track for the operation of its engines and cars, it was held that, in an action by a person injured while crossing the bridge by a collision with a hand-car, no license could be implied from the custom of foot passengers to cross over the bridge, and evidence to show such user was held to have been properly stricken out. In *Tennenbrock v. Southern Pacific Coast R. Co.*, 59 Cal. 269, in a similar case, it was held that one injured while walking over the bridge or trestle by a train was guilty of contributory negligence. In the present case the defendant company had done nothing to invite or induce the public to use this trestle for a footway. It was on the main track, over which at least twelve regular trains crossed each day, and there were occasionally special trains, and trains and switch engines besides passed over it from the Bay Front track to bring lumber upon the main line. It was impossible to meet or have a train pass one on the trestle without almost certain death, or the greatest possible injury to the pedestrian. It was not planked over in any part, and was so narrow as to leave no room on it outside of a passing train, and was so built as rather to repel than induce or invite foot travel over it. If the deceased was intoxicated, that was his own fault; and, if not, there was still less excuse for his being on the trestle. It did not become any the less dangerous on account of the frequency of its use, and we think that it would be contrary to sound public policy and a due regard to the safety of passengers over the road and operatives to hold that there can be any implied license to use the track along or between the rails or over trestles or other bridges as a way for foot travel. But the statute of the state has declared the public policy of the state upon this subject beyond cavil or dispute. It is provided by Rev. Stat., § 1811, that "it shall not be lawful for any person, other than those connected with or employed upon the railroad, to walk along the track or tracks of any railroad, except when the same shall be laid along public roads or streets; provided, that this section shall not be construed to prevent any person from driving across any such roads from one part of his own land to another." "This legislation is justified," it was held in *McDonald v. Chicago, M. & St. P. R. Co.*, 75 Wis. 128, in construing the previous clause of the same section, as "not only being for the protection of the lives and property of those owning and engaged in the operation of the railroad, but also for the protection of the lives of those traveling upon it;" and a violation of the act was held to be contributory negligence. The consequence is that the plaintiff's intestate was a trespasser and unlawfully upon the

trestle bridge at the time he came to his death. There could be no license that would be of any avail to allow him or others to walk over and along the track upon this bridge. The law forbids such use of the track, and makes the alleged implied license relied on nugatory, and of no avail. Any other conclusion would entirely defeat the manifest purpose of the statute, and render it wholly inoperative. The company was only bound to exercise the care and caution towards the deceased that they are required to exercise in the case of a trespasser, after it has been discovered that he is on the track, and in a position of probable or actual peril. It follows from these views that the instructions of the circuit court in respect to the right of the plaintiff's intestate to cross the trestle bridge, and the duty of the defendant towards him while crossing, were erroneous. Upon the case as made by the plaintiff, we think that the plaintiff's intestate, at the time he was killed, was guilty of negligence contributing to the result. Comment on the facts is unnecessary. They speak for themselves. The evidence on the subject of contributory negligence is clear and decisive. For these reasons the judgment of the circuit court must be reversed.

The judgment of the Circuit Court is reversed, and the case is remanded for a new trial.

Orton, Ch. J., dissenting:

The undersigned respectfully dissents from the decision or intimation in this case that a person walking along a railroad track, and injured by a passing train, cannot set up and prove an implied license of the company for his walking in such a place, except where the track shall be laid along a public road or street. The Statute (Rev. Stat. § 1811) which makes it unlawful for any person to walk along the track of any railroad has been in force since 1872, and yet there have been in this court numerous cases since that time, in which it is held that, notwithstanding that statute, a person so injured may set up an implied license of the company to show that he was not a trespasser. The last case in which it has been so held was that of *Johnson v. Lake Superior Terminal & Transfer R. Co.*, 86 Wis. 64. The opinion was written by the same learned justice. The person injured was walking along the center of a switching track when injured by the train, the most dangerous track of the railroad. The question of the plaintiff's implied license to walk there was submitted to and found by the jury, and this was approved by this court. To now hold otherwise will overrule a great many cases of this court, which ought to stand protected by the maxim, "*stare decisis et non quieta movere.*"

RHODE ISLAND SUPREME COURT.

William ELLIOTT
v.
NEWPORT STREET R. CO.

(.....R. I.....)

1. A trolley railway company should foresee the possible danger to which passengers on the foot-boards of its cars may be exposed by slight movement of the body, when trolley poles are placed from ten to twelve inches from the edge of the foot-board.
2. A passenger is not bound to anticipate the danger and be on the lookout for trolley poles while riding with permission on the foot-board of a street-car, unless he has knowledge of the proximity of such poles to the track.
3. It is not *prima facie* the fault of a passenger where he is injured by riding on the foot-board of a trolley car.

(November 8, 1893.)

APPPLICATION by plaintiff for a new trial, after verdict in favor of defendant, in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Granted.*

The facts are stated in the opinion.

Messrs. Patrick J. Galvin and Charles Acton Ives, for plaintiff, in support of the motion:

It is not *per se* negligence for passengers to ride upon the platform or foot-board of crowded street-cars or railway cars, and when in such position even voluntarily, the care required of the passenger is only increased to the extent of the obvious, and naturally to be expected dangers connected with the position; but if the position be taken with the consent or invitation expressed or implied of the carrier, the normal duty of the carrier is in no way abated.

Bowie v. Greenville Street R. Co. 69 Miss. 196; *Germantown Pass. R. Co. v. Walling*, 97 Pa. 55, 39 Am. Rep. 796; *Topeka City R. Co. v. Higge*, 38 Kan. 875; *City R. Co. v. Lee*, 50 N. J. L. 435; *Spooner v. Brooklyn City R. Co.* 54 N. Y. 230, 18 Am. Rep. 570; *Fleck v. Union R. Co.* 134 Mass. 480; *Geitz v. Milwaukee City R. Co.* 72 Wis. 307; *Clark v. Eighth Ave. R. Co.* 86 N. Y. 135, 93 Am. Dec. 495; *West Philadelphia Pass. R. Co. v. Gallagher*, 106 Pa. 524; *Lehr v. Steinway & H. P. R. Co.* 118 N. Y. 556.

It is not even negligence *per se* for passengers to board or leave moving cars, and when they do so the question of contributory negligence is in most cases for the jury.

Murphy v. Union R. Co. 118 Mass. 228; *Spooner v. Brooklyn City R. Co. supra*; *Noian v. Brooklyn C. & N. R. Co.* 87 N. Y. 73, 41 Am. Rep. 345; *Lehr v. Steinway & H. P. R. and Fleck v. Union R. Co. supra*. See also Booth, Street Railway Law, §§ 886, 837, and cases there cited.

The maintenance of a line of poles by the

carrier close to its car tracks is not one of the obvious and naturally to be expected dangers against which a passenger standing on the platform of, boarding, or alighting from a moving car is bound to protect himself.

See *North Chicago Street R. Co. v. Williams*, 140 Ill. 275, and cases there cited.

In *Clark v. Eighth Ave. R. Co., supra*, a verdict was sustained against the carrier for injuries sustained by a passenger who was driven against a cart by a horse-car of the defendant, on the steps of which the passenger was by the implied permission of the conductor, the car being crowded.

In *Spooner v. Brooklyn City R. Co. supra*, a passenger was standing upon the foot-board along the side of a sleigh of the defendant and was in precisely the position and under almost the precise circumstances of the plaintiff in this case, he was injured by the sleigh running close to a passing vehicle for which he was not looking out and a direction of nonsuit was reversed.

See also *Oraighead v. Brooklyn City R. Co.* 123 N. Y. 391; *Gray v. Rochester City & B. R. Co.* 61 Hun, 212.

Messrs. Darius Baker, David S. Baker, Jr., and William C. Baker for defendant, *contra*.

Matteson, Ch. J., delivered the opinion of the court:

This is an action of trespass on the case to recover damages for personal injuries alleged to have been sustained by defendant's negligence. The case was tried at the March term of the supreme court for Newport county. When the testimony on the part of the plaintiff had been submitted to the jury, the court directed a verdict for the defendant. The plaintiff thereupon excepted to the direction, and filed this petition for a new trial. The testimony shows that the plaintiff was injured September 1, 1892, while riding on one of the defendant's electric cars in Newport. The facts attending the injury were these: The plaintiff boarded the car a few minutes past 8 o'clock in the evening, at the foot of Tourou street, on Spring street, with the intention of riding to Morton Park, in the southern part of the city. The car was an open one, with seats running crosswise, and with steps or foot-boards on each side lengthwise of the car. This car had in tow another car. All the seats in both cars, and also the platforms, were filled with passengers, and passengers were standing on the foot-boards. The plaintiff took a position on the foot-board of the first car, on the left hand or easterly side of the car as it was going south, between the second and third seats from the rear end of the car, standing with his face turned towards the opposite side of the car, and holding onto the two stanchions supporting the roof of the car on either side of him. Instead of standing on the foot-board,

NOTE.—As to the difference in the care required of passengers on railroad and street-cars, see the decisions as to how far placing the arm on the window sill is negligence in the respective classes of cases collected in the *note* to *Richmond & D. R. Co. v. Scott* (Va.) 16 L. R. A. 92.

the plaintiff might have stood, if he had seen fit, between the seats inside of the car. Shortly after the car had started, while the plaintiff was reaching for his money to pay his fare, he was thrown from the car by coming in contact with a trolley pole, fell to the ground, and was run over by the wheels of the car in tow. No objection was made by the conductor to the plaintiff's standing on the foot-board, nor was he warned that there was any danger in doing so. Between Touro and Franklin streets the defendant's track ran close to the curbstone on the easterly side of Spring street. The cars were propelled by the trolley system. Between Touro and Franklin streets the poles supporting the trolley wire were located on the edge of the curbstone, so that the distance from the rail to the inner side of the pole varied from 26 to 28 inches. The distance between the inside of the poles and the outer edge of the foot-board of a passing car varied from 10 to 12 inches; the distance in the case of the pole by which it is alleged the plaintiff was struck being 10½ inches. The plaintiff did not know of the location of the pole at the point where he was injured. He did not notice any poles from the time he got onto the car until he was struck, and could not have seen them, in the position in which he stood, because they were behind him. He had never ridden over that part of the defendant's road prior to the accident, and was familiar with the street only as he had occasionally driven through it. From the point where the plaintiff got onto the car, to the point where he was thrown off, the car had passed eight poles, that by which the plaintiff was struck being the ninth.

The question raised by the plaintiff's exception is whether, on these facts, the court was justified in directing a verdict for the defendant. To have warranted the direction it must have clearly appeared,—so clearly that the court could say as a matter of law,—either that the defendant was not negligent, or that the plaintiff was guilty of negligence which contributed to the accident. We do not think that either of these propositions was sufficiently clear to warrant the court in taking the case from the jury, and directing a verdict for the defendant. Common carriers of passengers are required to do all that human care, vigilance, and foresight reasonably can, in view of the character and mode of conveyance adopted, to prevent accident to passengers. *Tuller v. Talbot*, 28 Ill. 357, 76 Am. Dec. 695; *Meier v. Pennsylvania R. Co.* 64 Pa. 225, 8 Am. Rep. 581; *Topeka City R. Co. v. Higgs*, 38 Kan. 875; *Philadelphia & R. R. Co. v. Derby*, 55 U. S. 14 How. 468, 486, 14 L. ed. 502, 509. It is a matter of common knowledge that railway companies daily undertake to carry, as did the defendant on the occasion in question, passengers greatly in excess of the seating capacity of their cars; that they stop their cars and take on passengers so long as there is standing room on platforms or foot-boards, and collect fares from those on platforms or foot-boards as well as from those within the cars. Ought not the defendant, in view of the rule prescribing the duty of carriers of

passengers to have foreseen the possible danger to which passengers on the foot-boards of its cars might be exposed by a slight turn of the body sidewise, or by a slight inclination of it backward, in consequence of the proximity of its track to its trolley pole at the point where the plaintiff was injured? We think so. *North Chicago Street R. Co. v. Williams*, 140 Ill. 275; *Topeka City R. Co. v. Higgs*, *supra*; *Gray v. Rochester City & B. R. Co.* 61 Hun, 212; *Lehr v. Steinway & H. P. R. Co.* 118 N. Y. 558.

But the question which has been chiefly argued is whether, on the facts recited, it sufficiently appeared that the plaintiff was guilty of contributory negligence to justify the direction of the court. The defendant concedes that it is not negligence *in se* for a passenger to ride on the foot-board of an open car, but contends that, as the outside of a car is obviously more dangerous than the inside, it is incumbent on any one who rides there to exercise care commensurate with the danger. This proposition is doubtless correct. But we do not assent to the defendant's further contention that, if the passenger is injured while riding on the foot-board, it is *prima facie* his own fault. Undoubtedly, by the law of this state, the burden is on him who sues for an injury to show that he was in the exercise of due care, and the question whether he was in the exercise of due care is to be considered with reference to the fact that he was riding in a dangerous situation. But the question of contributory negligence is generally for the jury, the exceptions being where the facts are not controverted, or it clearly appears what course a person of ordinary prudence would pursue, or where the standard of duty is fixed, or the negligence is clearly defined and palpable. *Clarke v. Rhode Island Electric Lighting Co.* 16 R. I. 468, 465; *Chaffee v. Old Colony R. Co.* 17 R. I. 658, 668. A passenger who rides on the foot-board of a car necessarily takes on himself the duty of looking out for and protecting himself against the usual and obvious perils of riding there,—such, for instance, as injury from passing vehicles, or by being thrown off by the swaying or jolting of the car; assuming, of course, proper management of the car, and proper construction and condition of the road. We do not think, however, that the danger of being hit by a trolley pole is such a peril as a passenger whom the railway company has undertaken to carry on the foot-board of its car is bound to anticipate and be on the lookout for, unless, indeed, it appear that the passenger had knowledge of the close proximity of the track to the trolley pole. He has a right to assume that the railway company has performed its duty in so constructing its road that its passengers, even on the foot-boards of its cars, riding there by its permission, shall not be exposed to injury by the unsafe construction of its road. *City R. Co. v. Lee*, 50 N. J. L. 435, 439. The testimony does not show that the plaintiff knew of the close proximity of the defendant's track to its trolley poles. Moreover, the accident occurred in the evening, when, on account of the darkness, the danger of being struck by

the pole would not be so apparent as in the daytime. Nor does the testimony show that the posture of the plaintiff on the foot-board was an unusual one, or any movement of his which would naturally expose him to danger. The defendant's counsel argues that it is a necessary inference from the fact that he was struck that he was leaning backward at a considerable angle. The plaintiff's testimony was that he was in the act of taking his fare out of his pocket. The defendant's counsel, in argument, stated that the plaintiff illustrated his testimony by raising his arm as

though to take his money out of his vest-pocket. If this be so, the plaintiff's elbow, as he stood with his back to the trolley poles, would naturally project several inches beyond the line of his body, and a slight inclination would suffice to bring it into contact with a pole only ten and a half inches from the edge of the foot-board. The fact that the plaintiff had already safely passed eight poles gives probability to the theory that the accident was due to the lifting of his arm in the manner stated.

Plaintiff's petition for a new trial granted..

NEBRASKA SUPREME COURT.

SINGER MANUFACTURING CO., *Plf.*
in Err.,

v.

Charles R. FLEMING.

(.....Neb.....)

- *1. The act to provide for the better protection of the earnings of laborers, servants, and other employes of corporations, firms, or individuals engaged in interstate business, (Laws 1889, chap. 25), is not in conflict with the constitution of Nebraska, either as being broader than its title or as being prohibited class legislation.
2. Nor does the act seek to impose a penalty for the benefit of an individual. The recovery provided for in the act of the debt, costs, expenses, and attorney's fee is simply a recovery of compensatory damages, and not a penalty.
3. Whether the act is valid in so far as it makes its violation a crime is not decided; that portion of the act not being so connected with the rest as to affect the validity of the whole act.
4. Nor is the act in conflict with section 1 of article 4 of the Constitution of the United States, requiring that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state.
5. A foreign corporation having a place of business in Nebraska, which institutes, in another state, attachment proceedings, and seizes the earnings of a citizen of Nebraska, exempt under the laws of Nebraska, is subject to the operation of the act; the contract out of which the proceedings arose having been made in Nebraska, and being here performable.
6. While under the laws and decisions of Iowa, a judgment in a proceeding by foreign attachment, whereby earnings of the defendant, a resident of Nebraska, earned in Nebraska and payable there, are seized and applied to the payment of the defendant's debt, must be treated as within the jurisdiction of the Iowa courts, still, the *status* of said earnings, for

the purpose of determining the right to exemption, is Nebraska.

(March 6, 1894.)

ERROR to the District Court for Douglas County to review a judgment in favor of plaintiff in an action brought to recover the amount of a debt, costs and expenses, which had been collected by defendant in violation of the Nebraska statutes. *Affirmed.*

The facts are stated in the commissioner's opinion.

Messrs. Breckenridge, Breckenridge & Crofoot, for plaintiff in error:

The penalties provided are clearly beyond the scope of, and not indicated by the title of the act, for no protection in any legitimate, lawful sense is given any debtor, by subjecting his creditor to penalties, forfeitures, and fines.

White v. Lincoln, 5 Neb. 505; *Ex parte Thomson*, 16 Neb. 288; *Messenger v. State*, 25 Neb. 674; *Toussaint v. Omaha*, 25 Neb. 817.

Legislative authority cannot reach the life, liberty, or property of the individual, except when he is convicted of crime.

Atchison & N. R. Co. v. Baty, 6 Neb. 87, 29 Am. Rep. 356.

Exemplary or punitive damages are not allowed in this state, in an action for a tort; and attorneys' fees, which in such an action can be regarded only in the nature of punitive damages, ought not to be recovered.

Ibid.; *Winkler v. Roeder*, 28 Neb. 706, and authorities cited in both cases.

A similar statute in Indiana was said to have been "enacted to promote the public welfare, and not to redress merely private grievances."

Uppinghouse v. Mundel, 108 Ind. 288.

By the common-law rule of comity in force throughout the United States, each state extends to all duly incorporated foreign corporations a legal right to carry on business within its jurisdiction. It may therefore be said to be a general rule, that a corporation can legally carry on its business in the usual way, and by the usual agencies, wherever it may find it convenient and profitable to do so.

Morawetz, Priv. Corp. § 953.

*Headnotes by IRVINE, C.

NOTE.—The statute in the above case seems to be in advance of those in other jurisdictions as a means of protecting a debtor against a foreign garnishment, which is permitted in some of the states 28 L. R. A.

as shown by the note to Illinois Cent. R. Co. v. Smith (Miss.) 19 L. R. A. 577. The same note also contains decisions upon other means which have been adopted to secure the same end.

Corporations are citizens and residents of the state under the laws of which they were created, and they cannot, by engaging in business in another state, acquire a residence there.

Fales v. Chicago, M. & St. P. R. Co. 32 Fed. Rep. 678; *Germania F. Ins. Co. v. Francis*, 78 U. S. 11 Wall. 210, 20 L. ed. 77; *Ex parte Schollenberger*, 96 U. S. 377, 24 L. ed. 854; *Baltimore & O. R. Co. v. Koontz*, 104 U. S. 5, 26 L. ed. 648.

A corporation cannot acquire a residence in a state, otherwise than the one in which it is incorporated.

Booth v. St. Louis Fire Engine Mfg. Co. 40 Fed. Rep. 1; *Bensinger Self-Adding Cash Register Co. v. National Cash Register Co.* 42 Fed. Rep. 81.

This action is for a tort, certainly not being founded upon contract, and the tort, if any was committed, was committed in Iowa. The proceeding was innocent and legal in Iowa, and if it is a tort here, it is tortious because the Nebraska statute has made it so.

In order to maintain an action of tort, founded upon an injury to person or property, and not upon a breach of contract, the act which is the cause of the injury and the foundation of the action must at least be actionable or punishable by the law of the place in which it is done, if not also by the law of the place in which redress is sought.

LeForest v. Tolman, 117 Mass. 109.

The legislative authority of every state must spend its force within the territorial limits of the state.

Cooley, Const. Lim. 5th ed. p. 151.

The money collected in Iowa in satisfaction of the judgment there, was not property in this state, for wherever the domicile of defendant in error may have been, when the court in Iowa, by its regular procedure, acquired the custody of the money, it was assuredly property in Iowa and subject to the control of the court, and the fact that it may have been due for wages earned in Nebraska makes no difference.

Mooney v. Union Pac. R. Co. 60 Iowa, 348.

State laws have no extraterritorial validity. The moment a state attempts to lay its hands upon the rights of those whose domicile and whose affairs are beyond its boundaries, its acts are null.

Black, Constitutional Prohibitions, § 120.

Where at the place of commission the act is legally innocent, it cannot be elsewhere made a delict (tort) for the principle of territorial sovereignty would be infringed.

Wharton, Conf. L. § 478.

The judgment infringes upon the "full faith and credit" clause of the Federal Constitution.

A nonresident, or a foreign corporation may have an attachment in the courts of Iowa against a nonresident, upon precisely the same grounds and upon the same conditions as a resident.

Mooney v. Union Pac. R. Co. supra.

The Supreme Court of the United States characterizes legislation which permits this as "enlightened."

Green v. Van Buskirk, 74 U. S. 7 Wall. 139, 19 L. ed. 109.

Exemptions under the laws of Nebraska, 23 L. R. A.

cannot be pleaded in the courts of Iowa, and will not be allowed there.

Mooney v. Union Pac. R. Co. supra. See also *Broadstreet v. Clark*, 65 Iowa, 870; *Harwell v. Sharp*, 8 L. R. A. 514, 85 Ga. 124; *Jenks v. Ludden*, 34 Minn. 483; *Warner v. Jaffray*, 96 N. Y. 248, 48 Am. Rep. 616.

It is generally held that in the courts of a state, any citizen of that state may be enjoined from resorting to the courts of any other state for the purpose of evading the exemption laws of his own state.

See *Cole v. Cunningham*, 133 U. S. 107, 33 L. ed. 538, and cases cited.

But the courts of a state will enjoin only citizens of that state from so doing.

Hovey v. Rhode Island Locomotive Works, 98 U. S. 664, 23 L. ed. 1008; *Walworth v. Harris*, 129 U. S. 355, 32 L. ed. 712.

Messrs. Kennedy, Gilbert & Anderson for defendant in error.

Irvine, C., filed the following opinion:

The plaintiff in error is a corporation organized under the laws of the state of New Jersey. It has a place of doing business styled a "general agency," at Denver, Colo. It has also agencies in Iowa and Nebraska, and does business in both of those states. The agents there report to the general agent at Denver. The defendant in error is a resident of Nebraska, the head of a family, and an employé of the Union Pacific Railway Company, whose lines extend into both Iowa and Nebraska. Fleming bought from the Singer Company a sewing machine upon credit. The agent of the Singer Company in Omaha, after some efforts to collect the bill, returned it to the general agent at Denver, who in turn sent it to the agent in Council Bluffs, Iowa. The agent at Council Bluffs brought an action in Pottawattamie county, Iowa, against Fleming, on behalf of the Singer Company proceeding by process of foreign attachment, and garnished the Union Pacific Railway Company. The result of this proceeding was that wages of Fleming, to the amount of \$38.05, due him from the railroad company, were seized by the Iowa court, and appropriated to the payment of the judgment there rendered against Fleming. Fleming then instituted this action in Douglas county, Neb., under section 531c-531f of the Code of Civil Procedure to recover from the Singer Company the debt so garnished, with costs, expenses, and attorney's fees. The wages reached by garnishment were earned within sixty days prior to the commencement of the action in Iowa. Judgment was rendered in favor of Fleming in the district court of Douglas county in the sum of \$95.55 and costs, from which the Singer Company prosecutes error. No question is raised as to the sufficiency of evidence to support a judgment for that amount, but the judgment is sought to be reversed upon three grounds: First, that the statute under which the action was brought is contrary to the constitution of Nebraska; second, that it conflicts with section 1 of article 4 of the Constitution of the United States, requiring that full faith and credit shall be given to

each state to the public acts, records, and judicial proceedings of every other state; third, that, if the law be constitutional, it does not apply to foreign corporations.

The statute referred to is as follows: "That it be, and is hereby declared, unlawful for any creditor, or other holder of any evidence of debt, book account, or claim of any name or nature against any laborer, servant, clerk, or other employé of any corporation, firm, or individual, in this state, for the purpose below stated, to sell, assign, transfer, or by any means dispose of any such claim, book account, bill, or debt of any name or nature whatever, to any person or persons, firm, corporation, or institution, or to institute in this state, or elsewhere, or to prosecute any suit or action for any such claim or debt against any such laborer, servant, clerk, or employé by any process seeking to seize, attach, or garnish the wages of such person or persons earned within sixty days prior to the commencement of such proceeding for the purpose of avoiding the effect of the laws of the state of Nebraska concerning exemptions. That it is hereby declared unlawful for any person or persons to aid, assist, abet, or counsel a violation of section one of this Act for any purpose whatever. In any proceeding, civil or criminal, growing out of a breach of sections one or two of this Act, proof of the institution of a suit or service of garnishment summons by any persons, firm, or individual, in any court of any state or territory other than this state or in this state to seize by process of garnishment or otherwise, any of the wages of such person as defined in section one of this Act shall be deemed prima facie evidence of an evasion of the laws of the state of Nebraska and a breach of the provisions of this Act on the part of the creditor or resident in Nebraska causing the same to be done. Any persons, firm, company, corporation, or business institution guilty of a violation of sections one or two of this Act shall be liable to the party injured through such violation of this Act, for the amount of the debt sold, assigned, transferred, garnished, or sued upon, with all costs and expenses and a reasonable attorney's fee, to be recovered in any court of competent jurisdiction in this state; and shall further be liable by prosecution to punishment by a fine not exceeding the sum of two hundred dollars and costs of prosecution."

1. Three arguments are made upon the proposition that the statute is in conflict with the constitution of Nebraska. In the first place, it is said that the act is broader than its title. The title is as follows: "An Act to Provide Better Protection for the Earnings of Laborers, Servants and Other Employés of Corporations, Firms, or Individuals Engaged in Interstate Business." We are somewhat at a loss to appreciate the argument based on this proposition. It seems to be the theory of counsel that that portion of the act which provides for the recovery of the debt, costs, expenses, and attorney's fee, and which enacts a penalty for the violation of the law, is not expressed in the title. These features are not distinctly expressed; but the

title to the act need not amount to an analysis or complete abstract of its text. It is sufficient if the title, by general language, fairly expresses its subject matter. Where a bill has but one general object, it will be sufficient if the subject is fairly expressed in the title. *People v. McCullum*, 1 Neb. 182; *State v. Ream*, 16 Neb. 681. The title of this Act is comprehensive. Merely to declare the doing of certain acts unlawful would be nugatory, unless the act itself, or other provisions of the law, provided a redress for injuries inflicted by reason of its violation. Without the section providing a remedy, the act would not provide "for the better protection of the earnings" of the persons sought to be protected. Both a substantial enactment of law and a remedy for its violation are fairly included in the title, and the act would not be complete in the absence of either provision.

It is next urged that the act is unconstitutional because imposing a penalty which does not go to the school fund. The last section of the act undertakes to provide two remedies. One is that the person violating it shall be liable, by prosecution, to punishment by fine. It is not necessary to here consider whether that portion of the act is valid. If it is, the fine imposed is like all other fines in criminal cases, and is not subject to the objections urged. If it be not valid, the whole act is not, therefore, unconstitutional. Where a part of an act is void, and a part in its nature valid, the whole is not void unless it appears, from an examination of the act itself, that the invalid portion was designed as an inducement to pass the valid, so that the whole, taken together, will warrant the belief that the legislature would not have passed the valid portion alone. *State v. Lancaster County Comrs.* 6 Neb. 474; *State v. Lancaster County Comrs.* 17 Neb. 85; *Trumble v. Trumble* (Neb.) 55 N. W. Rep. 869. But counsel say the provision permitting the recovery not only of the debt, but of costs, expenses, and attorney's fees, is in the nature of a penalty; and we are cited, upon that subject, to *Atchison & N. R. Co. v. Baty*, 6 Neb. 87, 29 Am. Rep. 356. In that case an act was held void because it sought to give, to the owner of livestock injured upon a railroad, double the value of his property. This double recovery was clearly in the nature of a penalty. It has no element of compensation, but, in the statute we are considering, the damages awarded are purely compensatory. Nothing is allowed by way of vindictive damages or as a penalty, but the injured party is made whole by being permitted to recover the amount of money wrongfully taken from him, together with the exact costs and expenses by him incurred, and a reasonable attorney's fee which is also an item of expense for which he should be compensated, and which, probably, would have been included as costs and expenses, even though not otherwise expressed. The law is for none of the reasons urged in conflict with the constitution of Nebraska.

2. Is the act in conflict with the Constitution of the United States? It is said, in support of this proposition, that the courts of

Iowa have held that a nonresident of Iowa or a foreign corporation may have an attachment in that state against a nonresident upon precisely the same grounds, and upon the same conditions, as a resident. The case of *Mooney v. Union Pac. R. Co.*, 60 Iowa, 846, is cited as sustaining that contention. The case cited certainly goes that far; and that case, and later cases which might have been cited, carry the doctrine further, and go to the extent of holding that a citizen of Nebraska may sue another citizen of Nebraska in the courts of Iowa, and obtain jurisdiction by attaching and garnishing the wages earned by defendant in Nebraska, and there payable to him by a railroad company which happens to operate in both states; and that in such case the defendant, being a nonresident of Iowa, is not entitled to the benefits of the Iowa exemption laws, and that the Iowa courts will not, even upon principles of comity, give effect to the Nebraska exemption laws, and that by such a device the defendant is absolutely deprived of his exemptions under the law of either state. The question presented is whether the courts and the legislature of this state are required, in order to give full faith and credit to the judicial proceedings of Iowa, to sanction such a proceeding. We think not. The section of the Federal Constitution referred to requires, not only that full faith and credit shall be given to the judicial proceedings of another state, but also that full faith and credit shall be given to the public acts of such state. The laws of Nebraska make sixty days' wages of laborers, mechanics, and clerks, who are heads of families, exempt from attachment execution and garnishee proceedings. Where the wages are earned in Nebraska, and are there payable to the laborer residing there, Nebraska is the *situs* of the debt. *Wright v. Chicago, B. & Q. R. Co.*, 19 Neb. 175; *Mason v. Beebe*, 44 Fed. Rep. 556. As pointed out in the case of *Mason v. Beebe*, last cited, there is a marked distinction between the *situs* of a chose in action for the purpose of jurisdiction and its *situs* for determining the rights of the parties thereto. The case of *Mason v. Beebe* contains a well-reasoned discussion of the whole subject by Judge Shiras. The opinion is too long to quote entire, and the whole of it is so closely applicable to the case at bar that we could not select one portion as more proper for citation than the rest. Suffice it to say that the case of *Mooney v. Union Pac. R. Co.* is there discussed *extenso*, its fallacies laid bare, and the monstrous injustice and disregard of the laws of other states which would result, from following the *Mooney Case* are there demonstrated. If the *situs* of the debt was Nebraska, and not Iowa, then it follows that no legislative or judicial interposition in Iowa could rightfully sustain the jurisdiction of Iowa courts in such a case. If the courts of Iowa should seek to prosecute a citizen of Nebraska who does not come within their jurisdiction, and to reach over into Nebraska, and take from this state the property of that citizen here located, can any one for a moment urge, or seriously consider, that our legislature and courts, in

order to give full faith and credit to the judicial proceedings of Iowa, must stand idly by and countenance such a proceeding? Must we permit our laws to be nullified and evaded, in order to sustain the courts of another state in overreaching their jurisdiction, in refusing to exercise the comity elsewhere accorded sister states, and in seizing the property in Nebraska of citizens of Nebraska who have not brought themselves within the lawful reach of Iowa courts? To quote from the brief of the plaintiff in error a citation from Black on Constitutional Prohibitions: "The moment a state attempts to lay its hands upon the rights of those whose domiciles and affairs are beyond its boundaries, its acts are null." And to quote again from that brief: "Where, at the place of commission, the act is legally innocent, it cannot be elsewhere made a delict;" a principle which, if correct, must give rise to another principle,—that, where at the place of commission the act is legally wrong, it cannot be elsewhere made right. The decision of the Supreme Court of the United States in no wise militates against this view. In *Green v. Van Buskirk*, 72 U. S. 5 Wall. 810, 18 L. ed. 600, 74 U. S. 7 Wall. 139, 19 L. ed. 109, the decision, so far as it is applicable to this case, we think directly tends to support our view. In that case one Bates, a citizen of New York, owned certain iron safes in Chicago, upon which he gave a mortgage to Van Buskirk and others, which was executed and delivered in New York. The laws of Illinois required for the validity of a chattel mortgage, as against third persons, that it should be recorded, and the property delivered to the mortgagee. These conditions were not complied with. The laws of Illinois further permitted attachments against a nonresident debtor. A creditor of Bates sued by attachment in Illinois, and levied upon and sold the safes. Van Buskirk then sued this creditor in New York state, and the creditor pleaded in bar the attachment proceedings in Illinois. The New York courts held that the transaction was governed by the laws of New York, and the case was then taken by writ of error to the Supreme Court of the United States, which held that the attaching creditor had been denied a privilege accorded him by the Constitution of the United States; that the property, to wit, the safes, were situated in Illinois; and that the Illinois law must govern them. That is precisely the position of the defendant in error here. His property which was seized was in Nebraska, and subject to the jurisdiction of our courts, and not those of Iowa.

In *Cole v. Cunningham*, 183 U. S. 107, 88 L. ed. 588, it was held that it was not in violation of the Constitution of the United States for a court in one state, in which proceedings have been begun to distribute the estate of an insolvent debtor among his creditors, to enjoin a creditor of the insolvent, a citizen of the same state, from proceeding to judgment and execution in a suit against the insolvent in another state by an attachment of his property which property the insolvent law of the state of the domicile of the parties required the debtor to convey to his assignee.

It is true that in *Cole v. Cunningham* there was a strong dissenting opinion by Mr. Justice Miller, concurred in by Justices Field and Harlan; but the dissent there was upon the ground that the opinion of the majority was contrary to *Green v. Van Buskirk*, the status of the debt in *Cole v. Cunningham*, which it was sought to reach by attachment, being in the state where the attachment was levied, and not in the state of the residence of the parties, where the injunction was granted. So that, taking either the majority opinion or the dissenting opinion in *Cole v. Cunningham*, we think that the case lends force to the views we have expressed. Even the courts of Iowa have refused to apply to their own citizens the rules which they seek to enforce extraterritorially against the citizens of other states, and have restrained a citizen of Iowa from prosecuting a suit by attachment in Minnesota against another citizen of Iowa by garnishment reaching a debt due for wages earned in Iowa. *Teager v. Landsley*, 69 Iowa, 725. As said by Judge Shiras in *Mason v. Beebe*: "Is it consistent for the courts of Iowa to forbid, by injunction, its own citizens from suing in Illinois for the purpose of evading the exemption laws of Iowa, and at the same time entertain suits by citizens of Illinois brought here for the purpose of evading the exemption laws of Illinois?" If full faith and credit have, in these proceedings, not been given to the public acts, records, and judicial proceedings of another state, it is certainly not the Legislature or courts of Nebraska which have been in fault. The conclusion reached does not conflict with the decision in *Chicago, B. & Q. R. Co. v. Moore*, 31 Neb. 639. It was there held that earnings so seized in Iowa could not be recovered from the garnishee, the Iowa courts having acquired jurisdiction so far as to require the garnishee to pay the money, and the judgment binding the parties to that extent. It is for that reason that a cause of action arose against the creditor for wrongful proceedings in evasion of our exemption laws.

Finally, it is urged that, if the law be constitutional, it cannot be made to apply to foreign corporations. It is stipulated in the bill of exceptions that the Singer Sewing-Machine Company was and has continued doing business in Nebraska. It is stipulated that the debt out of which the controversy arose was contracted in Nebraska. As said by this court in *Turner v. Sioux City & P. R. Co.* 19 Neb. 241: "There is great force in the argument that the exemption existing where a debt is contracted is a vested right *in rem*, which follows the debt into any jurisdiction in which an action may be brought; that is, that the law in force when and where a debt is contracted should govern as to the rights of the creditor and debtor in that case." See, on this subject, *Dorrington v. Myers*, 11 Neb. 388; *De Witt v. Wheeler & W. Sewing Mach. Co.* 17 Neb. 533. It is only upon a principle of comity that a foreign corporation is permitted to here do business. When it does come here and do business, it does so with reference to our laws. It claims the rights and privileges of our laws, and it can-

not evade its obligations. It would be monstrous to permit a foreign corporation to hold property here, to conduct business here, to enforce contractual rights obtained under our laws, and at the same time to avoid the contractual obligations imposed by the same laws.

But it is said that the judgment complained of grew out of an act committed elsewhere, and innocent where it was committed. The general principle is conceded that the law of the place where an act is done determines its validity; but the tort complained of was not committed in Iowa. The tort consisted in seizing property in Nebraska, exempt under the laws of Nebraska. The plaintiff in error was enabled to do this by instituting proceedings in another state. But the tort consisted not in instituting those proceedings in Iowa. A suit might rightfully be begun there *in personam* had Fleming brought himself within the jurisdiction of the Iowa courts. No action would have arisen had the property attached been situated in Iowa, or in a state other than Nebraska; but the wrong was in seizing the debt situated in Nebraska, payable in Nebraska, to a citizen of Nebraska. The statute in this respect is not confined to actions begun in another state, but extends to every attachment or garnishment of exempt wages, whether the proceeding be instituted in this state or elsewhere. It is true that, if the proceeding had been instituted in Nebraska a partial redress could have been had by way of defense in the original action; but that consideration only affects the quantum of damages. The tort—the cause of action—would have been precisely the same. There is no question raised as to the jurisdiction of the court over the person of the plaintiff in error. It has committed an act here which is a tort, and it must here answer for that tort. A somewhat similar question was presented in the case of *O'Connor v. Walter* (Neb.) 55 N. W. Rep. 867. It was there said: "In extending credit, every one dealing with the head of a family must take into account this right of exemption, and, presumably, in every extension of credit, this right is recognized. It therefore in no way operates to the injury of the law abiding creditor. The rapacity which respects neither implied contract obligations nor statutory enactments must, in damages, respond for this, as for any other act of misappropriation."

We neglected, perhaps, in the proper place, to notice one objection to the act, but it is one which can be appropriately noticed in closing,—that is, that the act is "a vicious example of class legislation;" and *Atchison & N. R. Co. v. Baty*, 6 Neb. 37, 29 Am. Rep. 356, is cited in support of that proposition. The act under discussion in that case applied to one class only, and there was, perhaps, no basis, founded upon any reasonable distinction, for selecting that class as the recipient of that peculiar privilege. Here the case is different. The act we are now considering applies to every one who falls within the purview of the law exempting wages. The validity of that exemption cannot be doubted, and, if it were proper for the legislature to

provide that exemption, then it certainly was also proper for the legislature, by appropriate action, to enforce the rights so granted. The mischief to prevent which the act was passed is a matter of common knowledge. An extensive and thriving business was being conducted by the institution of suits precisely similar to that out of which this action arose, and having for their sole object

the evasion of the laws of this state. The act was passed to prevent, and should be so construed as to prevent, the continuance of this infamous business. It is perhaps only fair to say that neither the representatives of the corporation in Nebraska nor counsel for the corporation engaged in this case is shown to have had any part in the Iowa proceedings.

Judgment affirmed.

MICHIGAN SUPREME COURT.

Alfred WOLCOTT, Relator,

v.

John W. HOLCOMB, Resp't.

(97 Mich. 361.)

1. The words "any asylum" at which persons are kept at public expense,

NOTE.—Acquiring residence as a voter while attending school or public institution.

Inmates of soldiers' homes, or occupants of government posts.

Some of the states, as in the main case, have a constitutional provision to the effect that a residence is not gained or lost by reason of employment in the service of the United States, or state, nor while a student at a seminary, nor while kept at an almshouse or asylum.

This leaves the question to be determined by evidence outside of the fact of presence at such institution, although a residence may be gained there.

It is generally held that the inmates of a soldiers' home do not acquire the right to vote by reason of their residence in such institutions, but there are many things to be considered in regard to the qualifications of a voter as to his acquiring a new residence: abandonment of his former residence, and the intention to make a change, are all factors in determining the question of his right to vote. *People v. Hanna* (Mich.) Jan. 26, 1894; *Silvey v. Lindsay*, 107 N. Y. 45, reversing 42 Hun, 116.

Nor does he acquire a new residence by being in the government service at a certain place. *People v. Holden*, 28 Cal. 123; *People v. Riley*, 15 Cal. 43.

Residence on lands ceded to the United States for navy yards, forts, and arsenals does not give the right to vote at state elections in such territory. *Opinion of the Justices*, 1 Met. 580; *Re Highlands*, 48 N. Y. S. R. 795.

And the inmates of a soldiers' home in Ohio on land the exclusive jurisdiction of which is vested in the United States government, are not entitled to vote at the state elections, notwithstanding the provision of 64 Ohio Laws, 149, to the effect that this act shall not prevent the inmates from voting, as the legislature could not confer the right of suffrage upon persons whose legal status is fixed as nonresidents. *Sinks v. Reese*, 19 Ohio St. 306, 2 Am. Rep. 397.

But where the United States relinquishes to the state jurisdiction over that place, the persons who resided in the state asylum at that time and for a year next preceding an election, are regarded as residents of Ohio for the entire year, notwithstanding the fact that part of the year was while jurisdiction was in the United States. *Renner v. Bennett*, 21 Ohio St. 431.

Inmates of almshouses and hospitals.

A pauper inmate of a poorhouse does not acquire thereby residence in a township in which a

within the meaning of the constitution, providing that residence for voting purposes shall not be changed by staying in such institutions, includes a soldiers' home supported by the state.

2. The residence of an elector is not changed by reason of his presence and support in a soldiers' home, which is maintained by the state, for disabled and depend-

poorhouse is located, so as to enable him to vote there. *Clark v. Robinson*, 88 Ill. 498; *Dale v. Irwin*, 78 Ill. 170; *Esker v. McCoy* (Ohio) 6 Am. L. Rec. 694; *Covode v. Foster*, 4 Brewst. (Pa.) 414.

But in the case of *Re Elk Twp. Election*, 14 N. J. L. J. 263, it was held that an aged man who had been for a year or two working for farmers in that township, and whose only home was the county poorhouse in that township, was entitled to vote in that place.

And a voter who left his place of residence with no intention of ever returning, and finally went to another township to the county infirmary, with the intention to remain there permanently, having no family and no other home, with no intention of removing, and having no settlement in any township, is entitled to vote where such infirmary is situated. *Mallanée v. Hilla*, 3 Week. L. Bull. 61.

So where there is no constitutional or statutory provision against an inmate of an almshouse acquiring a residence at such place, he may change his residence from his township and adopt and select one where the almshouse is located as his residence, if he is a voter and has no family in another township. *Sturgeon v. Korte*, 84 Ohio St. 823.

Persons at hospitals under treatment do not thereby obtain a residence there for the purpose of voting. *Election Law*, 9 Phila. 497.

Students.

A student at college, who is there for the sole purpose of obtaining an education, does not thereby necessarily acquire the right to vote at that place. *Allentown Contested Election Case*, 8 Phila. 575; *Rep. of Jud. Comm. Cush. Mass. Election Cases*, 436; *Vanderpoel v. O'Hanlon*, 58 Iowa, 246, 36 Am. Rep. 216.

And is not entitled to vote there, unless it was his intention to remain permanently, or for some indefinite time, although he abandoned his father's house as his home after he was of age, and intended to make the place where the college was situated his only home while he was to remain there. *State v. Daniels*, 44 N. H. 333.

And, if students come to college for no other purpose than to receive an education, intending to leave after graduating, they do not acquire a residence at that place. *Fry's Election Case*, 71 Pa. 302, 10 Am. Rep. 698.

There must be evidence of complete abandonment of the former residence; but absence from it will be regarded as temporary, and too much weight should not be attached to declarations of present or future purpose by a student after the

ent soldiers, under a constitutional provision that "no elector shall be deemed to have gained or lost a residence by reason of being employed in the service of the United States or in this state, nor while a student at any seminary of learning, nor while kept at any almshouse, or any asylum at public expense, nor while confined in any public prison."

3. Inspectors of election have no right to reject a ballot offered by a registered voter who tenders the oath prescribed by statute, where the statute says that if the person challenged shall take such oath "his vote shall be received."

(Hooper, Ch. J., and Long, J., dissent.)

(November 10, 1893.)

APPPLICATION by the prosecuting attorney for Kent County for a writ of mandamus to compel defendant, a justice of the peace, to entertain the complaint of Uriah Carpenter against the board of election inspectors of the first precinct of Grand Rapids Township for refusal to receive his ballot, and to proceed to a determination of his right to vote. *Granted.*

Statement by Grant, J.:

The principal question presented in this case is whether the inmates of the Soldiers' Home, situated in the township of Grand Rapids, in Kent county, are entitled to vote in that township. Section 5, article 7, of the Constitution, reads as follows: "No elector shall be deemed to have gained or lost a residence by reason of his being employed in the service of the United States, or in this state, nor while a student at any

seminary of learning, nor while kept at any almshouse or any asylum at public expense, nor while confined in any public prison." The Soldiers' Home was erected under Act No. 152, Pub. Acts 1885, entitled "An Act to Authorize the Establishment of a Home for Disabled Soldiers, Sailors and Marines in the State of Michigan." By the act, \$100,000 was appropriated from the general fund in the state treasury for its erection and equipment, and \$50,000 for the purpose of maintaining it for the years 1885 and 1886. It has since been supported by annual appropriations made by the legislature. Section 11 of the Act provides the conditions for admission to the home, which are as follows: "All applicants must be honorably discharged soldiers, sailors, or marines who served in the army or navy of the United States in the war of the Rebellion, or in the Mexican war; they must be disabled by disease, wounds, or otherwise; must have no adequate means of support; must be incapable of earning their living, and otherwise dependent upon public or private charity." The board of managers is, by the same section, empowered to adopt rules and regulations to govern the admission of applicants. Among the rules adopted by the board for such admissions is one requiring the applicant to show, by satisfactory evidence, "that he has no relations of sufficient ability to maintain him, who are legally liable for his support under the laws of the state of Michigan." Another rule provides that he must produce "the certificate of the supervisor of the township or ward in which the applicant resides, the county clerk or judge of probate of the county in which he

question of residence is raised; there must be other satisfactory evidence tending to show abandonment. *Lower Oxford Contested Election, 11 Phila. 641.*

And in the case of *Granby v. Amherst, 7 Mass. 1*, it was said that a student of a college does not change his domicile by his occasional residence at college. But this was not the question involved in the case.

But the fact that a student has continued to reside in the place of the college for a period of seven years, supporting himself by his own efforts and procuring a transfer of registration as a voter, voting there and never voting at any other place, shows a bona fide intention to abandon the former residence. *Shaeffer v. Gilbert, 73 Md. 68.*

And proofs of change of domicile so as to overcome the presumption of the continuance of the prior domicile, concurring with an actual residence of the student in the town where the public institution is situated, will be sufficient to establish his domicile, and give him a right to vote in that town. *Opinion of the Justices, 5 Met. 587.*

And a student who had formed the purpose of making W. his home for an indefinite period, when twenty-four years of age, and who was taxed there, and voted there for several years, is entitled to claim that place as his residence, although attending a theological institution in Massachusetts. *Sanders v. Getchell, 76 Me. 158, 49 Am. Rep. 606.*

And in *Pedigo v. Grimes, 113 Ind. 148*, it was held that where voters after entering the state university determine that place should be their residence, they have a right to vote there if their intention was formed and acted upon in good faith.

And it was held in *Putnam v. Johnson, 10 Mass. 488*, that a student at a theological institution, of age, qualified, and not under his father's control, 23 L. R. A.

is entitled to vote at the place of such college, notwithstanding it may not be his expectation to remain there forever. In this case, he had left his father's family several years before, and had become a resident of S. where he was taxed and permitted to vote; his father had ceased to support him, and he was at S. preparing himself for an independent living when he removed to the town where the theological seminary was, which, as he was on a charitable foundation, required a residence of three years.

If students abandon their former home and come to the town where the seminary is situated, to make that town their residence, leaving to the future to determine whether they shall enter a profession or some other business in that town, they acquire a residence there. *Re Ward, 29 Abb. N. C. 187.*

And under Ill. Rev. Stat. 1874, providing that a permanent abode is necessary to constitute a residence, students who are entirely free from parental control and regard the place of the college as their home and have no other to which to return in case of sickness or domestic affliction, are entitled to vote there. Generally, however, undergraduates of colleges are no more residents of a town in which they pursue their studies than mere strangers. *Dale v. Irwin, 78 Ill. 170.*

In the case of *Warren v. Board of Registration, 2 L. R. A. 208, 72 Mich. 399*, it was stated that the provisions of the Michigan constitution in regard to acquiring and losing a residence while a student, do not prevent persons from becoming residents if such is their purpose and if they are able to choose; but that was not the question involved in that case.

The cases concerning the right of soldiers and sailors to vote are not included in this note. I. T.

resides, that he has carefully examined the proofs, that to the best of his knowledge and belief they are true and satisfactory to him, and that the applicant is a proper person for admission." The act further provides that no applicant shall be admitted who has not been a resident of the state for one year next preceding the date of the passage of the act, unless he served in a Michigan regiment, or was accredited to the state of Michigan. Uriah Carpenter, the inmate of the home whose right to vote is here in question, was at the time of his application and admission, in 1887, a resident of the township of Woodstock, in Lenawee county. In his application he made affidavit that he was a resident of that township, and upon it is indorsed the certificate of the supervisor that he was then an "actual resident" thereof. His vote was challenged and rejected on the ground that he was not an elector in the township of Grand Rapids.

Mr. Moses Taggart, with **Mr. Alfred Wolcott**, *Prosecuting Attorney*, for relator: Carpenter's registration as an elector, in itself, constituted prima facie evidence of legal residence, and all the essentials entitling him to vote.

Harbaugh v. People, 88 Mich. 241.

The importance of the intention of a person as to where his legal residence shall be in offering to vote at an election is strongly emphasized, in *Warren v. Board of Registration*, 2 L. R. A. 208, 72 Mich. 402, the court saying: "It is equally true that temporary abode in a city or ward does not make a person an elector. Unless the person coming in does so with the honest and settled intention of obtaining a new domicile, he gains no rights."

The case of *Hugh, Appellant*, 2 Dougl. (Mich.) 523, quoting Story's Conflict of Laws, defines a domicile to "be the habitation fixed in any place, without any intention of removing therefrom."

Presence makes a prima facie case of legal residence, and shifts the burden of proof.

Kennedy v. Ryall, 67 N. Y. 386.

No authority of the highest court of any state has gone so far as to hold it impossible for any one in attendance upon an institution of learning, or an inmate of a soldiers' home, from becoming a legal resident therein.

Putnam v. Johnson, 10 Mass. 488; *Re Ward*, 29 Abb. N. C. 187; *Sanders v. Getchell*, 76 Me. 159, 49 Am. Rep. 606; *Sinks v. Reese*, 19 Ohio St. 312, 2 Am. Rep. 897; *Renner v. Bennett*, 21 Ohio St. 431; *People v. Riley*, 15 Cal. 48; *People v. Holden*, 28 Cal. 125; *Dupuy v. Wurtz*, 53 N. Y. 582.

Vanderpoel v. O'Hanton, 53 Iowa, 248, 36 Am. Rep. 216, involved the right of a student at the state university, at Iowa City, to vote there or at a former residence, and it was held to be simply a question of intent, whether he had changed his former residence, "that the intent and fact must concur," citing,—

Opinion of the Justices, 25 Met. 587; *Fry's Election Case*, 71 Pa. 302, 10 Am. Rep. 698; *Hinds v. Hinds*, 1 Iowa, 38; *State v. Mennick*, 15 Iowa, 123. See also *Sanders v. Getchell*, *supra*; *Shaeffer v. Gilbert*, 73 Md. 66.

The Statute of 1891 is so clear as to the duty imposed upon the board of inspectors of elec-

tion, both as to the administration of oaths to parties offering to vote who are challenged, and as to the duty of the board when such oath has been administered, that it would seem impossible for members of such board to be lacking in knowledge as to what it imperatively requires.

People v. Cicott, 16 Mich. 283, 97 Am. Dec. 141; *Goetcheus v. Mattheson*, 61 N. Y. 420; *People v. Bell*, 119 N. Y. 175; *Sprague v. Houghton*, 3 Ill. 377; *State v. Robb*, 17 Ind. 536; *People v. Pease*, 30 Barb. 598; *Gillespie v. Palmer*, 20 Wis. 544; *People v. Gordon*, 5 Cal. 235; *Com. v. McHate*, 97 Pa. 397, 39 Am. Rep. 803. **Mr. Henry J. Felker** for respondent.

Grant, J., delivered the opinion of the court:

The Soldiers' Home is purely eleemosynary in character. To hold otherwise would be contrary to sound legal principle and good sense. The title to the act shows it. It is not the character of the beneficiaries, nor the cause of their inability to earn a living, nor the reason for granting the bounty, which determines whether such an institution is charitable in its character. An institution established and maintained for the support of indigent persons who became blind or deaf in the service of their country or state is as much eleemosynary as one established for the support of those who are born blind or deaf, or who have become so from other causes. All institutions in this state, established and maintained at the public expense, for the care, education, and support of the unfortunate, belong to this class of institutions, and are included in the term "asylum," used in the above clause of the constitution. It is immaterial whether they are called "schools," "retreats," "homes," or "asylums." It is equally immaterial what the feeling is which prompts their erection and maintenance. An "asylum" is defined by Webster to be "an institution for the protection or relief of the unfortunate." Such is its meaning as used in the constitution. It follows that one's entry and residence in such an institution partake of the same character as the institution itself, and are likewise eleemosynary in character. One entering them cannot, under the constitution, gain or lose his residence. Inmates of the home enter it for one purpose, only, and the constitution solemnly and clearly declares that their status as to residence when they enter must control while they remain there. When Mr. Carpenter entered the home, he was a legal resident of the town of Woodstock. He entered the home upon his own application, solely as a beneficiary, and a resident of that township, to accept a well-bestowed and deserving charity. He did not by this act lose his residence there, and his intent is wholly immaterial. To permit his intent to control would result in the practical annulment of this provision of the constitution. The mischief intended to be avoided is as apparent in this case as in any. The inmates of the home own no home, pay no local taxes, do no work in or for the benefit of the municipality, and have no pecuniary interest in its local affairs. In fact, they

have no connection with, and stand in no relation to, the local municipal government. They occupy state property, and are exclusively under the control and management of the state.

The provision of our constitution was evidently copied from that of New York, for the two are identical in language. The court of appeals of that state, in an opinion concurred in by the entire court, held that the inmates of the Soldiers' Home of that state were not entitled to vote in the municipality where the home was located. *Silvey v. Lindsey*, 107 N. Y. 55. The facts in that case and in this are substantially identical. After stating the facts, the court says: "These reasons satisfied the conscience of the plaintiff [the inmate], and enabled him to say he was a resident of Bath, but in reality they bring the case within the prohibition of the constitution. He could not gain a residence by being an inmate, which means nothing more than his presence in the home; and, excluding that, there is nothing in the case to show that a residence in Bath had been acquired. It follows that he had not lost the right to vote in the place of his legal residence,—New York. As to that city, he is to be regarded as temporarily absent and his residence as a citizen is still therein. We have no doubt that the institution in question is within the purview of the constitutional provision. It is an asylum supported at the public expense, and its members are within the mischief against which that provision is aimed,—the participation of a body of unconcerned men in the control, through the ballot box, of municipal affairs, in whose further conduct they have no interest, and from the mismanagement of which, by the officers their ballots might elect, they sustain no injury." This language is applicable to the present case, and we quote it with approval. But it is insisted that that case still leaves the question open to depend upon the intention of the elector, by reason of the following language: "But the question in each case is still, as it was before the adoption of the constitution, one of domicile or residence, to be decided upon all the circumstances of the case. The provision (art. 2, § 3) disqualifies no one; confers no right upon any one. It simply eliminates from those circumstances the fact of presence in the institution named, or included within its terms. It settles the law as to the effect of such presence, and as to which there had before been a difference of opinion, and declares that it does not constitute a test of a right to vote, and is not to be so regarded. The person offering to vote must find the requisite qualifications elsewhere." Mr. Carpenter, as above stated, was a resident and elector in the township of Woodstock, which was then his domicile of citizenship, when he made his application, and was admitted to the home. There was no indication in his application of any intention to change his residence for the purpose of voting, or for any other purpose than that for which the home was established. In his complaint against the respondent, he states that he had always lived with his father prior to his death, in 1867; that he

was unmarried; that, by the death of his father, the home was broken up; that since that time he had had no home with any relative or friend; and "that he always intended, and in fact made, the township of Grand Rapids, and that part of it in which the Soldiers' Home is located, his home, subsequent to his entry therein." His father was living at the time he entered the home. If he entered as a resident of Woodstock, and that was then his actual residence, can he gain a new residence while kept in this asylum at public expense, except in violation of this plain provision of the above article? Would not this be losing one residence, and gaining another, while kept in an asylum at public expense? In the New York case, the inmate had been in the home for six years, and swore that it was his intention, at all times, to make his residence in said institution, so long as he should be permitted to do so. Is Mr. Carpenter's statement, in fact, any stronger than this? Does he swear to any residence or domicile of citizenship, aside from that which attached to him as an inmate of the home? That case gives us no light upon the requisite qualifications, which must be found elsewhere. It determined the one question before the court, and held that one who had been for six years an inmate, and who swore that he intended to remain there the rest of his life, if permitted to do so, was not an elector in the township where the home was located. If the inmate was a resident of the township where the home is located, at the time of his admission, the requisite qualifications of an elector would be found in that fact, and his right to vote would be undoubted.

We are of the opinion that the terms, "by reason of," and "while," were understood by the framers of the constitution to have a different meaning. In the former case, the intention would very largely, if not entirely, govern the question of domicile, while in the latter it would not. It was clearly the intention of the former provision to give the citizen the right, if he chose, to carry his residence with him to the place where he was employed in the service of the United States or of the state, and in that latter case it seems equally clear that it was the intention not to give that right. What object, otherwise, could there have been in the use of these two terms? While the results of the adoption of one construction of the fundamental law of the state are not conclusive, nor of much force, where the construction is otherwise clear, still they are important considerations in determining the intent and purpose of the law. If the construction contended for by the relator be correct, it follows that all the inmates of county almshouses and of prisons and jails are electors, at their option, in the townships and cities where those institutions are located. In the township of Haulin, in Wayne county, where the almshouse of that county is located, there were, in the year 1891, 1,851 male inmates,—more than twice the whole number of voters in the township. Ann. Rep. Supt. Poor, 1891, p. 2. Furthermore, students in all institutions of learning, although they are in

attendance there for the sole purpose of obtaining an education, might, at their own will, become electors in the places where such institutions are located. We think the constitution prohibits a change of residence, under such circumstances, and that, when one's presence in any of the institutions named is due to the sole purpose of receiving the benefits conferred, his former residence must be considered his domicile, for citizenship.

We are cited to the language of *Mr. Justice Campbell in Warren v. Board of Registration*, 72 Mich. 398, 2 L. R. A. 203. That language is conceded to be a dictum. It is not, therefore, binding in this case. It has often been said by this and other courts that the language of a decision must be construed with reference to, and confined to, the facts of that case. The sole question in that case was whether the lodging room or boarding place of the voter should govern. Applied to that question, the language was appropriate, and the reasoning conclusive.

No question of disfranchisement is involved. The inmates of the home are no more disfranchised than were the soldiers when absent from their domicils, and in the army. The people, in that case, amended their constitution, providing that they might cast their votes when absent from home, in the service of their country. So, in this case, the people may amend their constitution, either making these inmates electors in the township where the home is located, or providing for casting their ballots at the home, to be counted in the township from which they came.

Another question, of no little importance, is also involved. Are inspectors of election clothed by the law with judicial, or only ministerial, functions? Have they the right to reject a ballot, when the voter is registered, and tenders the oath prescribed by the statute? *Mr. Carpenter* was registered, took the prescribed oath, and tendered his ballot, which the inspectors refused to receive. Section 24, Act No. 190, Laws 1891,* determines the conditions under which a challenged voter may have his vote received. This section is the same as those in former laws, and was referred to in *People v. Cicott*, 16 Mich. 302, 97 Am. Dec. 141, where it was said that "the inspectors cannot reject a registered voter, who takes the proper oath." The statute is clearly mandatory. It says that, "if the person so challenged shall take such oath, his vote shall be received." Inspectors are sometimes partisan, and sometimes corrupt, and the clear purpose of the act is to take from them all discretionary and judicial power, and confer upon them a purely ministerial function. The qualification of the voter is no concern of theirs. Upon taking the oath, his vote must be received. If he swear falsely, the law provides a way to

deal with him. *Mr. Cooley* states the rule as follows: "Where, however, by the law under which the election is held, the inspectors are to receive the voter's ballot if he takes the oath that he possesses the constitutional qualifications, the oath is the conclusive evidence on which the inspectors are to act, and they are not at liberty to refuse to administer the oath, or to refuse the vote after the oath has been taken. They are only ministerial officers, in such a case, and have no discretion but to obey the law, and receive the vote." *Cooley, Const. Lim.* 4th ed. 777. For this reason, it was the duty of the respondent to entertain the complaint, issue a warrant, and proceed to an examination.

The writ must issue.

McGrath and Montgomery, JJ., concurred with **Grant, J.**

Hooker, Ch. J., dissenting:

I cannot concur in the proposition that article 7, section 5, of the Constitution of this state should be construed as to deprive a citizen of his right to choose his own residence, or to compel him to avail himself of the privileges of asylums or schools, at the cost of a citizen's privileges, by requiring him to retain a former residence, inaccessible, and to which he does not intend to return. It should not be assumed that those who inhabit almshouses or asylums are unworthy people, or that they have no interest in elections, or that they are disqualified from discharging the duties of the citizen understandingly and properly. It cannot be claimed that these men are disfranchised because, under the section, no one is denied the right to vote at his residence. Inmates formerly residing in the township where the asylum is situated do not lose their residences by reason of being such inmates, and, clearly, others retain their residences and the right to vote at their former domicils, if they choose to do so. The only reason given for the construction contended for is that these classes are undesirable voters at the place of the asylum; that they pay no taxes, do no work for the benefit of the municipality, and have no interest in local affairs. The same may be said of many persons in all localities, and was probably as true of these before their admission as after. It is as true of those admitted from the locality of the asylum, who may vote under this section, as of those who come from a distance who may not vote, under this construction. It never has been a requisite to electoral rights that the citizen should pay taxes, do work for the benefit of the municipality, or evince interest in municipal affairs. Nor does the right depend upon a wise, or even honest, exercise of the privilege of the ballot. Doubtless, there are many whose votes could be dispensed with, to the profit of all local municipalities, and the state as well, but the electoral franchise is based upon broader principles. There is no man so poor or low that he is not richer and manlier for his political equality, and the ballot is essential to the protection of the rights of all classes. Immediately a class or race is disfranchised, its members are deprived of an equal chance with their fellows.

*If any person offering to vote shall be challenged, as unqualified, by any inspector, the chairman of the board of inspectors shall declare to the person challenged the constitutional qualifications of an elector, and shall tender to him such one of the oaths enumerated therein as he may claim to contain the grounds of his qualification to vote, and, on his taking such oath, his vote shall be received.

This proposition is so important a part of the foundation of our institutions that it should not be eliminated or weakened by any unnecessary construction of a constitution based upon civil liberty and political equality. Under this construction, a student who goes to our state university for a term of years, abandoning his residence, taking his family with him, residing in a house of his own, with no intention of living elsewhere after his education shall be finished, cannot gain a residence there, or lose his former one. It cannot be said that he is an undesirable voter, that he has no interest in local concerns, or that he is not a taxpayer there. The true construction of this section should be just what its language imports, *i. e.* that being kept in an almshouse, or attendance at college, or service in the employment of the United States, or the navigation of the lakes or high seas, does not work a change of residence, against the intention or desire of the individual. I have an acquaintance, the intelligent master of a great lake steamer, who is at home only occasionally; who comes home the day before election to vote,—a right which this section secures to him,—though absent most of the year. Will it be said that he cannot change his residence so long as his employment continues? It would seem that these things cannot have been intended, and that the rule indicated is the reasonable one, *viz.* that the section was designed for the benefit of, and to enlarge and protect the rights of, these classes, not to deprive them of privileges common to all. The opinion of the late *Mr. Justice Campbell* is in accord with this view, as appears from a dictum in the case of *Warren v. Board of Registration*, 73 Mich. 401, 3 L. R. A. 203, where he cites this section after stating that: "Our own constitution is full on this subject, where it lays down expressly, what would perhaps be implied, that certain continuous presences or absences shall have no effect on elective residences." And he adds: "These provisions do not prevent such persons from becoming residents, if such is their purpose, and if they are able to choose."

The case of *Silvey v. Lindsay*, 107 N. Y. 55, which is relied upon as authority by counsel for respondent, is reconcilable with this view, and does not appear to go to the extent of holding the doctrine contended for. In that case, a vote was rejected because the voter did not show himself to be a resident of the township. His vote being challenged, he answered as follows: "I answer that I reside in the town of Bath, for the reason that I was admitted an inmate of the New York Soldiers' and Sailors' Home, in this town, by the authorities thereof, in the year 1880, and have remained such inmate from that time to the present, with the intention, at all times, of making my residence in said institution, so long as I shall be permitted to remain such inmate. At the time of my admission to said institution, I was an honorably discharged soldier of the United States, and a resident and voter of the city of New York. I therefore answer that I am a resident of the town of Bath. In becoming an inmate of said institution, I intended to

change my residence from the city of New York to the fifth election district of said town of Bath." It will be observed that after stating the facts of his former residence, and his admission to the Soldiers' Home, and his intention of making his residence in said institution as long as he should be permitted, he argues, "I therefore answer that I am a resident of the township of Bath." The opinion says: "It is obvious that his narration of an intention to change his residence to Bath, and his assertion that he resided in Bath, can be accepted only as conclusions from the circumstances detailed in connection with them. They were his conclusions, and the defendants, in view of his whole statement, were not bound by them. They were bound by the facts stated, and were required to say, upon those facts, whether the plaintiff was qualified in the necessary particular; and, undoubtedly, they were to determine the question at their peril. The constitution, in the section referred to *supra*, specifies the qualifications necessary to the elective franchise, and provides who shall have the right to vote; and one duly qualified cannot be deprived of that right by an inferior tribunal. But the Constitution also provides (art. 2, § 3): 'For the purpose of voting no person shall be deemed to have gained or lost a residence, by reason of his presence or absence, while employed in the service of the United States; nor while engaged in the navigation of the waters of this state, or of the United States, or of the high seas; nor while a student of any seminary of learning; nor while kept at any almshouse or other asylum at public expense; nor while confined in any public prison.' And the decision of the inspectors of election was that, in their opinion, the intending voter was in Bath as a mere inmate of the institution, and for a temporary purpose, and not as a resident of the voting district, or with intent to make the town a fixed or permanent place of residence, and so it would seem. His presence there was eleemosynary in its character. He was there as a dependent, because he had no means of support, or relatives to maintain him, and liable to be discharged whenever the board of trustees were satisfied that he was of sufficient ability or means to support himself. Rules and regulations of the home. As to the home, he was a beneficiary, and nothing else. As to Bath, his residence was a beneficiary's residence, and no other. His relations were not with the village, but with the institution, which was situated within its borders. His intention to remain was conditioned upon, and limited to, the duration of the charity which he enjoyed. His intention to remain in Bath depended upon his expectation to remain at the home. This gave no residence, for he was there only in the character of a beneficiary, for a temporary purpose. His only intention, in going to Bath, was to be an inmate of the home; and it was only as such inmate that his residence was to be continued. He was not there as a citizen changing his residence, but as an object of well-bestowed and deserving charity. He was, as is clear upon his statement, present in Bath, and at the institution, because

he was then kept (that is, supported) at public expense. 'I reside in Bath,' he says, 'for the reason that I was admitted to the home as an inmate.' He continues there with the intention of making his residence in the institution 'so long,' he says, 'as I shall be permitted to remain an inmate.' These reasons satisfy the conscience of the plaintiff, and enable him to say that he was a resident of Bath; but, in reality, they bring the case within the prohibition of the constitution. He could not gain a residence by being an inmate, which means nothing more than his presence in the home; and, excluding that, there is nothing in the case to show that a residence in Bath had been acquired. It follows that he has not lost the right to vote in the place of his legal residence.—New York,—for the provision of the constitution in question also declares that he shall not lose his residence by reason of such presence in the institution. As to that city, he is to be regarded as temporarily absent, and his residence as a citizen still therein. We have no doubt that the institution in question is within the purview of the constitutional provision (art. 2, § 3) above referred to. It is an asylum supported at the public expense, and its members are within the mischief against which that provision is aimed,—the participation of an unconcerned body of men in the control, through the ballot box, of municipal affairs, in whose further conduct they have no interest, and from the mismanagement of which, by the officers their ballots might elect, they sustain no injury." If this language should create the impression that the section of the constitution does more than to negative an implication of a change of domicile from the fact of residence

in the institution, the next paragraph of the opinion settles the question, clearly showing that the court did not intend to hold that inmates of a soldier's home could not acquire a residence in the locality of the home, and, to my mind, clearly implying that, had the voter stated that he entered said home with the intention of abandoning his former domicile, and making a new one in the locality of the home, the decision would have been different, and that, instead of supporting respondent's contention, the case contains a plain dictum to the contrary. It is as follows: "But the question in each case is still, as it was before the adoption of the constitution, one of domicile, or residence, to be decided upon all of the circumstances of the case. The provision (art. 2, § 3) disqualified no one, confers no right upon any one. It simply eliminates from those circumstances the fact of presence in the institution named, or included within its terms. It settles the law as to the effect of such presence, and as to which there had before been a difference of opinion, and declares that it does not constitute a test of a right to vote, and is not to be so regarded. The person offering to vote must find the requisite qualifications elsewhere. We think, therefore, the question submitted by the parties, viz.: 'Did James Silvey gain a residence in the town of Bath, so as to entitle him to vote at said town meeting, by reason of his presence as an inmate of said institution?'—should have been answered in the negative; and it is so answered by this court."

In my opinion, the writ should issue as prayed.

Long, J., concurred with Hooker, *Ch. J.*

NEW YORK COURT OF APPEALS.

PEOPLE of the State of New York, *Resp't.*,

Carson J. SHELTON *et al.*, *Appls.*

(139 N. Y. 251.)

An organization of coal dealers intended to prevent competition in prices, in pursuance to which the price of coal is raised, is a conspiracy condemned by N. Y. Penal Code, § 168, making it a misdemeanor to conspire to commit any act injurious to trade or commerce; and raising the price of coal is a sufficient overt act.

(October 3, 1893.)

APPPEAL by defendants from a judgment of the general term, of the Supreme Court, Fifth Department, affirming a judgment of the Court of Sessions for Niagara County convicting them of conspiring to commit acts injurious to trade, and also affirming an order denying a motion for new trial. *Affirmed.*

Statement by Andrews, *Ch. J.*:

Appeal from the affirmance by the general

term, fifth department, of judgment of conviction in the Niagara county sessions on indictment for conspiracy. The indictment set forth an agreement between the defendants and others, comprising all the retail coal dealers in the city of Lockport, except one, entered into in March, 1892, to organize the Lockport Coal Exchange, which agreement was as follows:

"Constitution and By-Laws,

"Name. The name of this exchange shall be the Lockport Coal Exchange.

"Objects. The objects of this exchange shall be to foster trade and commerce in coal, wood, and all the products appertaining to the same; to protect and secure freedom from unjust and unlawful exactions; to diffuse accurate and reliable information as to the retail coal trade, and of the responsibility and standing of customers, and other matters, among its members, for their mutual protection and benefit; to settle differences between its members; to produce uniformity and certainty in the customs and usages of such trade; to promote a more enlarged and

NOTE.—In connection with the valuable discussion in the above case of the criminal law as to conspiracy to affect trade, see the extensive discussion L. R. A.

on the same question in *Queen Ina. Co. v. State (Tex.)* 22 L. R. A. 438; and *State v. Philippe (Kan.)* 18 L. R. A. 657.

friendly intercourse between merchants and dealers in coal and wood; and to provide, establish, and maintain such rules and regulations as may be proper and necessary for the mutual co-operation, interest, and protection of the retail dealers in coal and wood in the city of Lockport, and in furthering the coal trade interests generally. It shall be the duty of all members to strictly obey all the provisions of the constitution, by-laws, and resolutions of the exchange, and permit to the secretary the free exercise of the duties imposed upon him in enforcing them.

"Officers. The officers of the exchange shall be a president and a vice-president, who shall be elected by the exchange, and who shall be members of the exchange, and also a secretary and treasurer, elected by the exchange. The officers shall hold office for the term of one year, and until their successors are elected and shall have duly qualified; and any officer may be removed from office by the five-sixths vote of all the members of the exchange, at any regular or special meeting thereof.

"Committees. There shall be such committees as the president or the board of trustees may from time to time designate.

"President and Vice-President. The president shall preside at all meetings of the exchange, or, in his absence, the vice-president. In the absence of the president and vice-president, a presiding officer shall be chosen from the members of the exchange. The president shall be, *ex officio*, a member of all committees.

"Secretary. The secretary shall not be a member of the exchange, nor in any manner personally interested in the coal trade. He shall be elected by at least a five-sixths vote of all the members of the exchange at a regular or special meeting, due notice of said intended election having been sent by mail to each member, at his regular business address, at least five days previous to the meeting. The secretary shall keep a record of the meetings of the exchange, a register of its members, officers, and committees, and conduct all correspondence of the exchange, and perform such other duties in connection with his office as may be imposed upon him by the exchange. He shall instantly investigate all charges preferred against the members of the exchange, on all well-founded suspicions, without fear or favor, and conduct the investigation, both to obtain proof, and when presented before the exchange, and shall render his decision in each case to the exchange within ten days from the date on which charges are made, unless further time is given him by the exchange. He shall be permitted to see any portion of the books of any member, when in pursuit of evidence of wrongdoing, and may demand an affidavit, when he thinks necessary to refute or sustain a specific charge. He shall also collect material for, and compile, a list of persons who are poor pay, for the mutual protection and benefit of the members of the exchange. He shall also be the keeper of the seal of the exchange, and receive such salary as may be determined upon by the exchange. Before the secretary shall enter upon the duties of

his office, he shall make oath that he will honestly and fearlessly perform the duties prescribed by the constitution and by-laws, and that he will keep, in honor and secrecy, any and all information by him acquired, regarding the business of the various members, as he from time to time may investigate them, except any facts connected with any violation of the laws of the exchange which the exchange or any member is entitled to know. If practicable, the secretary shall be a notary public. The secretary shall not disclose to any member of the exchange any information regarding any investigation, while he is making the same.

"Treasurer. The treasurer, who shall also be the secretary, shall have charge of the funds of the exchange, disburse the same on the order of the board of trustees, countersigned by the president, and shall report at all regular meetings, and his accounts shall be open for proper inspection at all proper times. He shall give bonds for the proper protection of the exchange.

"Membership. The exchange shall be composed of active and associate members. Active members shall comprise any retail coal dealer, firm, or company who has a yard or dock, and the usual appliances for doing a coal business, in the city of Lockport. Associate members shall comprise any individual, company, or firm that sells coal in the villages around Lockport, and who approves the objects of, and agrees to co-operate with, the exchange. Associate members shall pay an annual fee of five dollars, and shall have all the privileges of active members, except the right of voting.

"Discipline. If a member is charged with violating any provision of these by-laws, or any rule or resolution of the exchange, or of being guilty of conduct unbecoming a member, or prejudicial to its interests, or of giving short weight or overweight, he shall be summoned before the secretary to answer the charge. If, upon the charge and defense being heard by the secretary, he shall decide to sustain the charge, the member shall be declared 'in default;' and the member shall be considered to be 'in default' until five sixths of all the members, at a regular or special meeting, shall vote to reinstate him as a member of the exchange, in good standing. A member who shall be declared 'in default' shall absolutely and irrevocably forfeit all rights to all money, property, or other value held by the exchange, as its own or in trust, and shall also forfeit all rights of membership in the exchange, unless he be reinstated in good standing; and no member shall be so reinstated except by a five-sixths vote of all members of the exchange at a regular or special meeting assembled after proper notice, and only after depositing with the treasurer \$100 as fee for renewal of membership. When a member shall be accused by the secretary, in any open meeting of the exchange, of having violated any provision of this constitution and by-laws, or of any resolution, and evidence is lacking to absolutely refute or sustain the charge, it shall be obligatory upon such member to make proper affidavit that he has in no instance sold or delivered

coal for which he has not received the full price at which the majority of the other members were selling coal of the same size at the same time, and that he has not, directly or indirectly, given any rebate, commission, or other concession equivalent to cash, thereby actually reducing the established market price made by the Lockport Coal Exchange, and that not less than two thousand and not more than two thousand pounds have, in his knowledge, been sold by himself, his partner, or his employes, or delivered as a ton. Resignations shall be made in writing to the president or secretary, and be referred to the board of trustees for their action; but no resignation will be accepted until all dues, fines, charges, and penalties against such member shall have been paid and settled. When the exchange, or secretary thereof, shall declare a member 'in default,' the secretary shall notify every member of the exchange by mail, and such notice shall be authoritative. When a member defies the exchange by persistent wrongdoing, and is declared 'in default' and persistent, the secretary shall notify the shippers of coal to the Lockport market that the said member is 'in default' and persistent, and for this reason is not entitled to the privileges of membership in the Lockport exchange.

"Election of Members. A candidate for membership shall be proposed in writing by a member at a regular meeting of the exchange, and be recommended by two members in good standing, and at the next succeeding regular meeting be voted upon. A two-thirds vote of the members of the exchange shall be requisite to elect.

"Price of Anthracite Coal. The price of coal at retail shall, as far as practicable, be kept uniform, and it shall require a five-sixths vote of all members of the exchange, at any meeting, to advance or reduce the retail price of coal, and no price shall be made at any time which amounts to more than a fair and reasonable advance over wholesale rates, or that is higher than the current prices of the exchanges at Rochester or Buffalo, when figured upon corresponding freight tariff; but at no time shall the price of coal at retail exceed one dollar above the costs of the same at wholesale, except by the unanimous vote of all the members of the exchange. All votes upon the price of coal shall be *en bloc*. The sale of coal shall be through the nominal channels of the trade. Soliciting shall be discouraged, and no club orders of associated buyers, to reduce prices, shall be considered or accepted. No member shall employ any person temporarily to solicit orders, either on salary or on commission, and no signs indicating, 'Orders taken for coal,' shall be displayed at groceries or other 'outside places,' and no habitual orders for second parties shall be received or filled when sent in by such agencies, whether on commission or other form of reciprocity, or only as a matter of friendship. Except that each member may have one place for taking orders, in addition to his regular yard office.

"Meetings. The annual meeting of the exchange shall be held on the first Monday of April of each year. The regular meeting

shall be held on the first Monday of each month. Special meetings may be called by the president, or upon the written request of three members, which request shall be sent to the secretary, stating the object of such meeting; and the notices of any special meeting shall state the object of the same, and no other business shall be transacted at such meeting. At all meetings of the exchange, seven members shall constitute a quorum; but this shall not authorize them to transact any business which, under the constitution and by-laws, requires the vote of a greater number of the members. Any member may be represented at a meeting by an authorized person connected with his business, and such person shall be entitled to the privileges of such member. Any vacancies in any of the official positions of the exchange shall be filled by the board of trustees, when ordered by the president (or in his absence by the vice-president), within two weeks after such vacancy occurs, or as soon thereafter as practicable.

"Membership Fee. There shall be a membership fee of one hundred dollars to be paid to the secretary by each member at the time of signing the constitution and by-laws, and during the first week of each month the further sum of five dollars for current expenses. At the end of the year, upon vote of the exchange, there shall be returned to such member the full amount of such monthly payment, so paid in by the members, less the proper proposition due for each member for the current expenses of the exchange, which amount shall be deducted from each by the secretary. Any member of the exchange, retiring from the coal business in Lockport in good standing with the exchange, shall be entitled to receive from the treasurer the original amount paid in by said member for membership,—that is, one hundred dollars,—less any assessment for expenses or dues that may properly belong to such member to pay, upon filing an affidavit with the secretary that the said member has absolutely withdrawn from all direct or indirect interest in coal business in Lockport, and that during his term of membership he has not violated any of the provisions of the constitution and by-laws or resolutions of the Lockport Coal Exchange.

"Order of Business. At all meetings of the exchange, the order of business shall be: Calling of roll; reading of minutes; proposal of membership; reports of committees; communications, bills, or notices; unfinished business; miscellaneous business. This order of business may be suspended at any meeting of the exchange by a vote of two thirds of the members present.

"Records and Minutes. The minutes and records of the exchange shall be open at all times to the inspection of members.

"Amendments. This constitution and by-laws may be amended by an affirmative vote of five sixths of the members of the exchange at a regular meeting, provided that notice of such proposed amendment shall have been presented in writing at a previous regular meeting.

"We, the undersigned, agree to abide by the above constitution and by-laws of the

Lockport Coal Exchange. James Lennon & Son. Angevine & Hoover. P. H. Tuohy. Charles Whitmore & Co. J. Marc. Fowler. Sheldon N. Cook. Upson & Stevens. E. S. Brown. M. W. Carr. Ferrin Bros. Co., Inc. M. McManus. Edward B. Jelly."

The indictment, among other things, alleged that the agreement constituted an unlawful conspiracy to raise, increase, and augment the rates and prices of coal, at retail, in the city of Lockport, and to destroy free competition among the signers of the agreement and others, in the sale of coal in said city, and to compel the consumers of coal to pay therefor the prices fixed by the coal exchange. It alleged that, in pursuance of said conspiracy, the defendants and others, members of said exchange, organized the same, elected officers, and by resolution did "fix, determine, and establish the rate and price of anthracite coal at retail, in said city, at four dollars and seventy-five cents per ton for egg, chestnut, stove, and grate coal, and three dollars and seventy-five cents per ton for pea coal, and other higher rates for small quantities of the same; said rates and prices so fixed, determined, and established being over seventy-five cents per ton higher and in advance of the then market price of such coal at retail in said city." The indictment alleged an unlawful intent, and concluded by an averment that the "conspiracy as aforesaid, so carried into execution as aforesaid, is of grievous injury to trade and commerce, prejudicial to the public good and welfare, against the form of the statute," etc. The proof established the execution of the agreement as alleged; the organization of the exchange by the election of officers; the fixing of the price of coal at an advance beyond the then market price, which price was thereafter charged therefor; the notification of the wholesale dealers, by the secretary, of the organization of the exchange, with the names of the members. Other facts are set forth in the opinion.

Mr. E. M. Ashley, for appellant:

The agreement between the members of the Lockport Coal Exchange sought to regulate the prices merely, for which the members of that association should sell coal. They did not seek to limit the supply, they did not endeavor to close the field of operation against the public. They employed no coercive measures. They did not interfere with the rights of any person outside their association, who was trading in coal. It was no combination to prevent any other dealer from exercising his right to sell for less than the price fixed for them. It was a mutual agreement amongst themselves to stop a cutting of prices which threatened them all with ruin, and restore the condition of affairs that existed before the war of prices had begun. Such an agreement carried out is not a conspiracy.

Master Stovedore's Assn. v. Walsh, 2 Daly, 1.

A partnership would not be illegal on account of any number of associates, no matter how great, or a large number of persons unconnected in business might legally agree to charge uniform prices.

23 L. R. A.

Richardson v. Mellish, 2 Bing. 229; *Chuppel v. Brockway*, 21 Wend. 157.

Upon the old cases an additional element has been engrafted, in effect that no such agreement shall contemplate the withdrawal from market, or the limiting of the supply, of any article of necessity which is the subject of general trade. The reason of this rule is, that such an agreement, when carried out, affects the trade, not only of those who agree together, but of all persons engaged in the business, and as it shortens or limits the general supply, it is a general restraint of trade and affects the entire field of operations.

Diamond Match Co. v. Roeber, 106 N. Y. 473, 60 Am. Rep. 464; *Leonard v. Poole*, 4 L. R. A. 728, 114 N. Y. 371; *Arnot v. Pittston & E. Coal Co.* 68 N. Y. 558, 23 Am. Rep. 190.

Where the provision of a noncompetitive agreement, although extending to all branches of the business, do not tend beyond measures of self protection, or threaten the public interest in a distinctly appreciable manner, the statute is not infringed.

Leslie v. Lorillard, 1 L. R. A. 456, 110 N. Y. 519.

Mr. P. F. King, Dist. Atty., for respondent:

When any two or more persons combine to do any act injurious to trade and commerce, they are each guilty of a misdemeanor. These defendants confessedly combined to overthrow and destroy competition among themselves in the retail coal business in the city of Lockport, and are each, therefore, properly convicted of conspiracy.

Penal Code, § 168, subd. 6; *People v. Fisher*, 14 Wend. 19, 28 Am. Dec. 501; *Hooker v. Vandewater*, 4 Denio, 849, 47 Am. Dec. 258; *Arnot v. Pittston & E. Coal Co.* 68 N. Y. 558, 23 Am. Rep. 190; *Clancey v. Onondaga Pine Salt Mfg. Co.* 62 Barb. 89; *Watson v. Harlem & N. Y. Nav. Co.* 52 How. Pr. 348; *Murray v. Vanderbilt*, 39 Barb. 141; *People v. North River Sugar Ref. Co.* 9 L. R. A. 33, 121 N. Y. 582; *Keene v. Kent*, 4 N. Y. S. R. 431; *Wright & Carson, Criminal Conspiracy*, 180; *De Witt Wire-Cloth Co. v. New Jersey Wire-Cloth Co.* 16 Daly, 529; *Marsh v. Russell*, 66 N. Y. 292; *Leonard v. Poole*, 4 L. R. A. 728, 114 N. Y. 371.

The courts of our sister states recognize the value and importance of free competition in articles of trade and emphatically condemn any combination formed for the purpose of overcoming and destroying it.

Central Ohio Salt Co. v. Guthrie, 35 Ohio St. 666; *St. Louis v. St. Louis Gaslight Co.* 70 Mo. 69; *Santa Clara Valley Mill & Lumber Co. v. Hayes*, 76 Cal. 387; *Anderson v. Jett*, 6 L. R. A. 390, 89 Ky. 575; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 173, 8 Am. Rep. 159.

There was nothing to prevent that exchange from gradually, from time to time, forcing up the price of coal, little by little, that it might not attract public attention or put the people in alarm, until it reached an exorbitant figure; and in cold winter weather, when everybody must have fuel to live, there was nothing to prevent this combination from committing the

most outrageous extortion upon the people in the price of coal. They destroyed competition; and thereafter trade in coal did not freely exist. This was sufficient to invoke the power of the law.

United States v. Goldberg, 7 Biss. 175.

The unlawful combination is the gist of the crime of conspiracy, and proof of any act toward carrying the conspiracy into effect is an overt act.

Com. v. Hunt, 4 Met. 111, 88 Am. Dec. 847;

United States v. Goldberg, *supra*.

Andrews, Ch. J., delivered the opinion of the court:

Section 168 of the Penal Code makes it a misdemeanor for two or more persons to conspire (subd. 6) "to commit any act injurious to the public health, to public morals, or to trade or commerce, or for the perversion or obstruction of public justice, or of the due administration of the laws." The Revised Statutes contained a similar provision. 2 Rev. Stat. p. 692, § 8, subd. 6. The fact that the defendants subscribed the constitution and by-laws of the Lockport Coal Exchange, and participated in its management, was not controverted on the trial. Nor was there any dispute that the object of the organization was to prevent competition in the price of coal among the retail dealers, acting as the Lockport Coal Exchange, by constituting the exchange the sole authority to fix the price which should be charged by the members, individually, for coal sold by them. Nor is there any dispute that, in pursuance of the plan, the exchange did proceed to fix the price of coal, and that the parties to the agreement were thereafter governed thereby in making sales to their customers. Nor is it questioned that the price first established was 75 cents in advance of the then market price, and that there was afterwards a still further advance. The defendants gave evidence tending to show (and of this there was no contradiction) that before and at the time of the organization of the exchange the excessive competition between the dealers in coal in Lockport had reduced the price below the actual cost of the coal and the expense of handling, and that the business was carried on at a loss. It was not shown that the prices of coal, fixed from time to time by the exchange, were excessive or oppressive, or were more than sufficient to afford a fair remuneration to the dealers. The trial judge submitted the case to the jury upon the proposition that if the defendants entered into the organization agreement for the purpose of controlling the price of coal, and managing the business of the sale of coal, so as to prevent competition in price between the members of the exchange, the agreement was illegal, and that if the jury found that this was their intent, and that the price of coal was raised in pursuance of the agreement to effect its object, the crime of conspiracy was established. The correctness of this proposition is the main question in the case.

If the confederacy into which the defendants entered was an act "injurious to trade or commerce," irrespective of its results in

the particular case, then there is no difficulty in maintaining the conviction. If a combination between independent dealers, to prevent competition between themselves in the sale of an article of prime necessity, is, in the contemplation of the law, an act inimical to trade or commerce, whatever may be done under and in pursuance of it, and although the object of the combination is merely the due protection of the parties to it against ruinous rivalry, and no attempt is made to charge undue or excessive prices, then the indictment was sustained by proof. On the other hand, if the validity and legality of an agreement having for its object the prevention of competition between dealers in the same commodity depend upon what may be done under the agreement, and it is to be adjudged valid or invalid according to the fact whether it is made the means for raising the price of a commodity beyond its normal and reasonable value, then it would be difficult to sustain this conviction, for it affirmatively appears that the price fixed for coal by the exchange did not exceed what would afford a reasonable profit to the dealers. It was said by Parker, Ch. J. (*Lord Macclesfield*), in his celebrated judgment in *Mitchel v. Reynolds*, 1 P. Wms. 181, which was the case of a bond taken from the defendant on the sale by him to the plaintiff of the lease of a bake house, claimed to be void as in restraint of trade: "In all restraints of trade, where nothing more appears, the law presumes them bad. But if the circumstances are set forth that presumption is excluded, and the court is to judge of these circumstances, and to determine accordingly; and if, upon them, it appears to be a just and honest contract, it ought to be maintained." If this agreement, and what was done under it, is to be judged as an isolated transaction and its rightfulness is to be determined alone upon the particular circumstances, whether it did or did not produce an injury to trade, we might well hesitate. The obtaining by dealers of a fair and reasonable price for what they sell does not seem to contravene public policy, or to work an injury to individuals. On the contrary, the general interests are promoted by activity in trade, which cannot permanently exist without reasonable encouragement to those engaged in it. Producers, consumers, and laborers are alike benefited by healthful conditions of business. But the question here does not turn on the point whether the agreement between the retail dealers in coal did, as matter of fact, result in injury to the public, or to the community in Lockport. The question is, Was the agreement one, in view of what might have been done under it, and the fact that it was an agreement, the effect of which was to prevent competition among the coal dealers, upon which the law affixes the brand of condemnation, and which it will not permit? It has hitherto been an accepted maxim in political economy that "competition is the life of trade." The courts have acted upon and adopted this maxim in passing upon the validity of agreements, the design of which was to prevent competition in trade, and have held such agreements to

be invalid. It is to be noticed that the organization of the "exchange" was of the most formal character. The articles bound all who became members to conform to the regulations. The observance of such regulations by the members was enforced by penalties and forfeitures. A member accused by the secretary of having violated any provision of the constitution or by-laws was required to purge himself by affidavit, although evidence to sustain the charge should be lacking. The shippers of coal were to be notified, in case of persistent default by the member, that "he is not entitled to the privileges of membership in the exchange." No member was permitted to sell coal at less than the price fixed by the exchange. The organization was a carefully devised scheme to prevent competition in the price of coal among the retail dealers, and the moral and material power of the combination afforded a reasonable guaranty that others would not engage in the business in Lockport except in conformity with the rules of the exchange. The cases of *Hooker v. Vandewater*, 4 Denio, 349, 47 Am. Dec. 258, and *Stanton v. Allen*, 5 Denio, 434, 49 Am. Dec. 282, are, we think, decisive authorities in support of the judgment in this case. They were cases of combinations between transportation lines on the canals to maintain rates for the carriage of goods and passengers, and the court, in those cases, held that the agreements were void, on the ground that they were agreements to prevent competition; and the doctrine was affirmed that agreements having that purpose, made between independent lines of transportation, were, in law, agreements injurious to trade. In those cases it was not shown that the rates fixed were excessive. In the case in 5 Denio, the judge delivering the opinion referred to the effect of the agreement upon the public revenue from the canals. This was an added circumstance, tending to show the injury which might result from agreements to raise prices or prevent competition. See also, *People v. Fisher*, 14 Wend. 10, 28 Am. Dec. 501; *Arnot v. Pittston & E. Coal Co.* 68 N. Y. 558, 23 Am. Rep. 190.

The gravamen of the offense of conspiracy is the combination. Agreements to prevent competition in trade are, in contemplation of law, injurious to trade, because they are liable to be injuriously used. The present case may be used as an illustration. The price of coal now fixed by the exchange may be reasonable, in view of the interests both of dealers and consumers, but the organization may not always be guided by the principle of absolute justice. There are some limitations in the constitution of the exchange, but these may be changed, and the price of coal may be unreasonably advanced. It is manifest that the exchange is acting in sympathy with the producers and shippers of coal. Some of the shippers were present when the plan of organization was con-

sidered, and it was indicated on the trial that the producers had a similar organization between themselves. If agreements and combinations to prevent competition in prices are, or may be, hurtful to trade, the only sure remedy is to prohibit all agreements of that character. If the validity of such an agreement was made to depend upon actual proof of public prejudice or injury, it would be very difficult, in any case, to establish the invalidity, although the moral evidence might be very convincing. We are of opinion that the principle upon which the case was submitted to the jury is sanctioned by the decisions in this state, and that the jury were properly instructed that, if the purpose of the agreement was to prevent competition in the price of coal between the retail dealers, it was illegal, and justified the conviction of the defendants.

There is a single remaining question. The trial judge was requested by the defendants' counsel, in substance, to charge that the overt act required to be proved to sustain a conviction for conspiracy must be one which might injuriously affect the public, and that the act of the defendants in raising the price of coal was, of itself, not such an overt act as was required. The request was, we think, properly refused. The offense of conspiracy was complete at common law on proof of the unlawful agreement. It was not necessary to allege or prove any overt act in pursuance of the agreement. 3 Chitty, Crim. L. 1142; *O'Connell v. Reg.* 11 Clark & F. 155. In this state this rule of the common law was changed by the Revised Statutes; and, with certain exceptions, it was provided that no agreement should be deemed a conspiracy "unless some act beside such agreement be done to effect the object thereof by one or more of the parties to such agreement." 2 Rev. Stat. p. 692, § 10. And this principle was re-enacted in the Penal Code, § 171. The object of the statute was to require something more than a mere agreement to constitute a criminal conspiracy. There must be some act in pursuance thereof, and done to effect its object, before the crime was consummated. A mere agreement, followed by no act, is insufficient. The overt act charged in the indictment, and proved, was the raising of the price of coal. The raising of the price of coal by a dealer, unconnected with any conspiracy, is not unlawful; but if there is a conspiracy to regulate the price, and that conspiracy is unlawful, then raising the price is an act done to effect its object, whether the price fixed is reasonable or excessive. The object of the statute is accomplished when it is shown that the parties have proceeded to act upon the agreement, and done anything towards effecting its object. We think there is no error in the record, and the conviction should therefore be affirmed.

All concur.

CONNECTICUT COURT OF COMMON PLEAS (Fairfield County).

Frederick MEAD

v.

Hugh STIRLING.

(63 Conn. 584.)

1. The remedies afforded by the Constitution, laws, and regulations of the order must be exhausted before a worshipful master and presiding officer of a local lodge of ancient, free, and accepted masons can invoke the aid of the courts against the grand master of the grand lodge of the state to prevent suspension.
2. Wrongful acts for the prevention of which injunctions will be granted are those which affect property or its healthful and beneficial use, and never those which affect reputation merely.
3. An allegation of irreparable injury, without stating the facts on which it is based, is not sufficient for an injunction.
4. An allegation of irreparable injury to financial credit, without stating that plaintiff has any credit, or needs any credit, or is engaged in any occupation in connection with which credit would be convenient, is insufficient to obtain an injunction.
5. The fact that a person cannot be reinstated in his office in the masonic order by reversal of a judgment of suspension until after the term of his office has expired is not ground for an injunction against the suspension, the office not being one of profit.
6. The fact that the grand master of a lodge, who is to try the question of misrepresentation as ground for the suspension of a worshipful master of a local lodge, is also the complainant, is not sufficient ground for an injunction from the courts to prevent the exercise of such quasi judicial authority.

(November Term, 1892.)

ON DEMURRER to an application for an injunction to restrain defendant from suspending petitioner from his office as worshipful master of a masonic lodge. *Demurrer sustained.*

The facts are stated in the opinion.

Messrs. L. Warner and J. B. Hurlbutt for plaintiff.

Messrs. M. W. Seymour and G. W. Wheeler for defendant.

Perry, J., delivered the opinion of the court:

The complaint herein alleges, in substance, that the plaintiff is worshipful master and presiding officer of a local lodge of ancient free and accepted masons, to which office he was elected on an undesignated day in December, 1891, for the term of one year thereafter, and until his successor should be chosen. That said office is one "of honor and position in the lodge and in the order generally outside of the lodge." That the defendant is grand master of the Grand Lodge

of Masons of Connecticut, within the jurisdiction of which said local lodge is. That the plaintiff, at a communication of his lodge, truthfully and fairly stated to its members the substance of a certain important conversation relative to their order which he had theretofore held with the defendant, and received and submitted for their consideration, as he believed he was bound to do, certain resolutions, with preambles, which were thereupon offered. That on the day of the date of the complaint, between the hours of 11 and 12 o'clock in the forenoon, the plaintiff received a summons from the defendant, acting as grand master, to appear before him on the next day at 10 o'clock in the forenoon, to show cause why he should not be suspended from his said office "for having made the statement and receiving said resolutions, charging said statement to be a willful misrepresentation of said conversation." That the defendant proposes to himself determine the question of veracity between them, and "to judge the plaintiff upon such finding, and suspend him from his said office; in other words, to act as judge in his own cause, and further the carrying out" of an ulterior point which he had in view. That, in making the statement complained of, the plaintiff violated no masonic obligation or pledge or any rule of gentlemanly and proper conduct or intercourse. That the defendant has no authority by any masonic law, constitution, or by-law of the grand lodge to try and depose the plaintiff from his said office of honor and trust. That by masonic rules and law the plaintiff is entitled to a trial before an unbiased tribunal of his peers, upon testimony of competent witnesses, and upon charges properly preferred. That no charges have been preferred against the plaintiff or served upon him, as masonic law and rules require. That until charges have been preferred, the defendant, neither as grand master nor in any other capacity, has jurisdiction or authority to suspend the plaintiff as he threatens to do. That the plaintiff has no remedy except by injunction from a court of equity. That the only redress which the plaintiff would have from a decision of the defendant, acting in his capacity of grand master, would be by an appeal, through him, to the Grand Lodge of Connecticut, over which he presides, which "would not, by reason of the bias and determined disposition of the defendant to accomplish his purpose, have before it, to give the plaintiff that fair position before his fellows in his order that he is entitled to, the full question and attendant circumstances which the grand master and himself propose to try, but simply the decision of the grand master." That the grand lodge does not meet until January, 1893, after the plaintiff's term of office has expired; "so that no order of reinstatement upon an overruling of the decision of the

NOTE.—The above is a somewhat novel application of the doctrine of exclusiveness of the remedies afforded by voluntary associations.

23 L. R. A.

For a collection of cases upon this subject see note to *Canfield v. Knights of Maccoabees* (Mich.) 13 L. R. A. 625.

grand master can be made, or adequate relief to the plaintiff be granted." And the apprehended damage is then stated as follows: "That an order of suspension of the plaintiff by the defendant would disgrace the plaintiff in the opinion of all regular masons, work him an irreparable injury to his reputation, character, and business, and be published in masonic circles, and otherwise most extensively circulated, injuring his financial credit, and be an impeachment of veracity." An injunction is claimed restraining the defendant from hearing and determining as to the guilt of the plaintiff, and from suspending him from his said office. It will be observed that no specific allegation is made that a grand master has jurisdiction to suspend a worshipful master. On the contrary, the opposite would seem to be really claimed in the complaint. But the case was argued by both parties upon the assumption that such jurisdiction in fact existed, and as if it had been so alleged. The questions herein will therefore be considered as if it affirmatively appeared that the defendant had jurisdiction over the subject-matter in dispute, or, in other words, that he had authority to suspend the plaintiff for a sufficient cause properly proved. If the defendant had no jurisdiction in the premises in any event, then, of course, an injunction would be plainly unnecessary, and should not be granted. To this complaint the defendant demurs, virtually, on three grounds: (1) Because the plaintiff and defendant are bound to conform to the constitution, laws, and regulations of the order to which they both belong; and the remedies thereby afforded, as indicated in the complaint, must first be exhausted before recourse can be had to this tribunal. (2) Because no property rights of the plaintiff are alleged to be threatened by the defendant, and, this being so, the first ground of demurrer is certainly valid, even if invalid otherwise. (3) Because no facts showing such irreparable damage as would warrant an injunction are set forth in the complaint.

Although the circumstances in which the civil courts can be called upon to afford relief where property rights are not threatened must be rare indeed, still it seems to be well settled that, if any such in fact exist, the remedies within the order must first have been exhausted before other relief can be obtained. Accordingly, inasmuch as the plaintiff expects to be deprived merely of "an office of honor and position" in his order, with which no pecuniary emoluments or property benefits are alleged to be connected, the first ground of demurrer might well be disregarded, and the second considered in its place. But a few cases decided by tribunals in high repute hold that the same is true even where property rights are involved, and that, therefore, the first ground of demurrer is well taken also. If the first be sound, the second certainly must be, and therefore those cases will be briefly considered.

Bacon, in his work on *Benefit Societies & Life Insurance* (sec. 104, top of page 127), says: "There is a great array of judicial authority in favor of the proposition that,

where members are expelled from religious societies, social clubs, benevolent societies, and other voluntary organizations incorporated or unincorporated, the judicial courts will not interfere to reinstate them, or to revise the judgment of expulsion, until the expelled member has exhausted all the remedies available to him within the organization itself, by appealing to a higher judicatory provided by the rules of the society, or otherwise." The same rule would of course apply with far greater force to a case of threatened suspension from a mere office in the order, and therefore authorities sustaining the proposition just quoted will control the case at bar. In the case of *Lafond v. Deems* (1880), 81 N. Y. 507, it was sought to dissolve a voluntary charitable association, and divide its assets, on the ground that the misconduct of its members and their mutual bitterness of feeling and irreconcilable hostility made a winding-up of its affairs and division of its assets necessary. The rules of the order provided for the trial of its members for misconduct, and in that connection for appeals from one tribunal to another within the order. These remedies have not been tried. The court denied the application, and said: "As the members who are claimed by the plaintiffs to have been chargeable with a violation of the rules of the association were not called upon to answer so as to correct the evils complained of, and as the power to remedy the same was ample and complete, the plaintiffs are not in a position to seek the interposition of a court of equity."

Courts should not, as a general rule, interfere with the contentions and quarrels of voluntary associations so long as the government is fairly and honestly administered, and those who have grievances should be required, in the first instance, to resort to the remedies for redress provided by their rules and regulations. This had not been done in the case considered, and under such circumstances no action lies. None of the authorities cited by the plaintiff's counsel sustain the position that the remedy is at law or in equity, unless there is well-grounded cause for complaint; and even then an opportunity should be given to correct the cause of complaint within the organization where it can be properly done." I understand this to mean that, even if there is "well-grounded cause for complaint" on account of the methods adopted or the result reached by the first tribunal, still the means provided by the rules of the organization for the correction of such errors must first be pursued, before recourse can be had to the courts of the state. And if it be answered that the complaint shows that an appeal from the threatened action of the defendant to the grand lodge could not avail the plaintiff, because of the defendant's "bias and determined disposition" to be unfair to the end, still it surely must be an adequate and proper reply to say that the demurrer cannot be taken to admit that such a court of appeals is unable to and will not rectify any unfairness of the defendant at any stage of the case. Its disposition and ability to do so will be presumed, and, according to this authority must first be

tested. In *Poultney v. Bachman* (1888), 81 Hun, 49, the plaintiff sued the treasurer of a lodge of odd fellows to recover benefits, and recovered judgment in the lower court. The general term, in reversing this judgment, says (page 58): "Again, there is another very important question, namely, whether the plaintiff has any right to bring this action until he has exhausted all remedies by appeal to the superior authorities of the society. . . . It may well be said that the contract, whatever it may be on the part of the lodge, includes in itself a provision for the decision by the appellate tribunals of the society of the matter in dispute; and therefore it may be argued that not until these appellate tribunals have decided against the plaintiff can he say that he has been injured. . . . Without discussing the question whether or not the decision of the highest appellate tribunals of the society is conclusive, we are of the opinion that the contract into which the plaintiff entered requires him first to seek redress within the society itself by carrying the question to the highest tribunal, for it is evident that every part of the constitution and lawful by-laws enter into his contract, and are to be considered therewith." It should be noticed that the rules of the order in this case, as stated and referred to in the report, do not require dissatisfied members to appeal. They only provide for and permit appeals, which the case, in common with others, treats as equivalent to a requirement. In *Oliver v. Hopkins* (1887), 144 Mass. 175, the plaintiffs, as members of a subordinate council of the Order of United American Mechanics, sued the defendants in equity, as officers of the state council, to recover possession of certain property formerly belonging to the subordinate council, which had been appropriated by the state council after a decree, by annulling the charter of the subordinate council, which decree was claimed to be illegal. An appeal from this decree of the state council was allowed by the rules of the order to the national council, but no appeal had been taken. The court says: "Until the plaintiffs have exhausted the remedies prescribed in the constitution and laws of the national council, this bill in equity cannot be maintained. . . . We are of opinion that the judgment of this court cannot be invoked by the plaintiffs until they have first sought the relief for which they pray from the tribunal provided by the association to try and determine questions of this nature." The case of *Chamberlain v. Lincoln* (1880), 129 Mass. 70, is an action of the same general character as the above, relates to property rights, and is similarly decided. In *McAfee v. Supreme Sitting Order of The Iron Hall* (Pa. 1888), 18 Atl. Rep. 755, a member of the defendant order sued it for benefits without first exhausting the remedies provided by the rules of the order in that connection. The court says: "We have often held that a member of a beneficial society must resort for the correction of an alleged wrong to the tribunals of his order, and that the judgment of such tribunals, when resulting fairly from the application

of the rules of the society, is final and conclusive." This, of course, means that the society remedies must be pursued to their very end first, and that ultimate unfairness alone can be remedied by outside tribunals. In a dissenting opinion in a similar case in the same court, *Mr. Justice Green* and an associate say (agreeing in this particular with the majority of the court) that "it is, of course, the duty of the members to exhaust the remedies afforded by the constitution and by-laws of his order or association before resorting to the courts." *Sperry's App.* 116 Pa. 891. Actions brought by a shareholder against the officers of his corporation are in important respects akin to the cases under consideration, and in such actions it is held that he "must show to the satisfaction of the court that he has exhausted all the means within his reach to obtain within the corporation itself the redress of his grievances or action in conformity to his wishes." *Haves v. Oakland* (1881), 104 U. S. 450, 26 L. ed. 827.

It ought to be added to what has already been said that respectable adjudications exist wherein it appears to be held that, even when property rights are involved, the ultimate decision of the tribunals of the order having jurisdiction not only must be sought, but, when obtained, is final and binding upon the party, even if "not in accordance with its by-laws, or for causes that had no foundation in fact." *Schmidt v. Abraham Lincoln Lodge* (1886), 84 Ky. 490; *Hall v. Supreme Lodge K. of H.* (1885), 24 Fed. Rep. 450.

The cases above cited, together with many others in them referred to, are usually quoted as precedents for the doctrine that all remedies within the order must be first exhausted, even if property rights are involved. If they are good law, the first ground of demurrer is, of course, well taken. But although of great, and possibly of controlling, weight, they are not everywhere followed. The doctrine, however, that, where property rights are not threatened, the remedies within the order must first be exhausted, seems to be universally accepted (as has been already stated), which would make the second ground of demurrer unquestionably effective. No decision to the contrary was referred to by the plaintiff. A leading case in which the doctrine of the cases hereinbefore cited is questioned, but the rule relied upon in the second ground of demurrer conceded, is *Bauer v. Samson Lodge, K. of P.* (1885), 103 Ind. 262, in which the plaintiff sued for benefits. The defendant claimed that he should have first proceeded through its committee on appeal and grievances, which had jurisdiction to grant him the relief asked for. The court says: "The reasonable rule is that such an organization may provide methods for redressing grievances and deciding controversies, and may compel members to resort to the prescribed method of procedure before invoking the power of the courts, but that it may not entirely prohibit members from suing to recover benefits accruing to them under the by-laws of the organization. Men voluntarily enter such organizations, and, in becoming members, subscribed to their laws;

and, if these laws make provision for trying controversies, the member aggrieved must pursue the course prescribed before resorting to the courts to enforce his claims. There is no valid reason why he should not be compelled to do what he has agreed, and the harmony and efficiency of such organizations require that all measures provided and required by their by-laws should be exhausted before appealing to the courts to settle the controversy. . . . Claims for money due by virtue of an agreement are unlike mere matters of discipline, or questions of doctrine or of policy, and are not governed by the same rules. . . . One who asserts a claim to money due upon a contract occupies an essentially different position from one who presents a question of discipline or of policy, or of doctrine of the order or fraternity to which he belongs. All the decisions, from first to last, recognize a broad distinction between the two classes of cases, and the one before us belongs to a class where property rights are involved, and is a member of a class cognizable by the courts." The case of *People v. Board of Trade* (1875), 80 Ill. 184, a leading case in that state, seems to hold, not only that, unless property rights are involved, the plaintiff must pursue his remedy within the order first, but also that he is confined to that. The question under consideration does not appear to have been decided in our own state. The general subject was incidentally referred to in *Connolly v. Masonic Mut. Ben. Assn.*, 58 Conn. 557, 9 L. R. A. 423, but none of the expressions therein used contravene the position taken in the second ground of demurrer.

To briefly recapitulate, then, we have a case in which it is alleged that a superior officer in the order of Masons, having jurisdiction over the subject of the removal of inferior officers, proposes to remove such an inferior officer in an irregular way, and after a partial trial, from which order of removal an appeal lies, by the rules of the order, to a superior tribunal, and to prevent which primary removal an injunction is sought. Upon authority and upon reason it would seem both necessary and eminently proper that the plaintiff should emerge into the domain of the state courts, if at all, from the confines of this order, and not *per saltum* from its midst. The diligence with which he searches in his complaint after the darkest possible colors in which to paint his impending future would seem to indicate that in all ordinary cases he himself conceives such to be the rule, but believes that the peculiar hardships of his case justify an exception. Right here the third ground of demurrer takes issue with him. The authorities which lay down the rule above proved do not exempt cases of exceptional hardship from it. If such an exception should be made, the defendant claims that this is not such a case, and, further, that, to justify the extraordinary remedy prayed for herein, a case of threatened irreparable injury must be alleged, whatever the rule in other cases may be. While it is difficult to understand how the plaintiff can possibly know what the grand master will eventually do, and while

it is impossible to believe that the grand lodge cannot accord to him a fair trial upon appeal if it wishes so to do, which wish is not denied, still certain broad and definite assertions are made in that connection, which to some extent, although I think not to all, must be taken to be admitted *pro forma* by the demurrer. Even then the defendant claims that a case of "great and irreparable mischief, where adequate relief cannot be had at law" (*Whittlesey v. Hartford, P. & F. R. Co.* 28 Conn. 433), is not made out. I am also of that opinion. The wrongful acts for the prevention of which injunctions will be granted are those which affect property, or its healthful or beneficial use, and never those which affect reputation merely. The only allegations of an apprehended injury to property are that the threatened act will (1) "work him an irreparable injury to his . . . business;" and (2) "be published in masonic circles, and otherwise most extensively circulated, injuring his financial credit." As to the first, it is enough to say that an allegation of "irreparable injury" is never sufficient. "It is well established that the mere allegation of irreparable injury will not suffice to warrant an injunction, but the facts must appear on which the allegation is predicated, in order that the court may be satisfied as to the nature of the injury." High, Inj. § 34; *Carlisle v. Stevenson*, 3 Md. Ch. 499; *Waldron v. Marsh*, 5 Cal. 119. As to the second, it should be remarked at the outset that the allegation is argumentative, and not direct, and "merely argumentative allegations or inferences from the facts stated will not suffice to meet the requirements of the rule." High, Inj. § 34. It is nowhere alleged that the plaintiff has any credit, or needs any credit, or is engaged in any occupation in connection with which credit would be even convenient. That he has in fact ample credit is doubtless true. It simply is not so alleged, and therefore does not legally so appear. Clearly, such allegations of apprehended injury are insufficient to bring the plaintiff within the familiar rule relative to injunctions, or to take him without the rule first above considered. If it be sought to infer the danger of substantial or exceptional damage from the earlier allegations of the complaint, it is not easy to see how the publication of the exact facts could possibly injure the plaintiff, or why a garbled or untrue statement of them—the probability of which is not alleged—might not be adequately offset by a counter publication of the truth, while the knowledge that the decree of suspension had been appealed from should, and doubtless would, operate to suspend the judgment of those whose conclusions could ever be of weight or work an injury. The fact that a judgment of reversal by the grand lodge, owing to lapse of time, could not reinstate him in his former office, affects his enjoyment of that office only, which is not one of profit.

The defendant, in his argument, claimed that the position and character, from acting in which he was sought to be enjoined, was judicial, or at least quasi judicial, and that

injunctions will not be granted to restrain one so acting. This aspect of the matter is not presented by the demurrer, but was considered by the plaintiff, and merits notice. In *Gregg v. Massachusetts Medical Soc.* (1872), 111 Mass. 185, 15 Am. Rep. 24, the plaintiff sought to restrain the officers and "Board of Trial" of the defendant society from trying and expelling him from its membership, whereby pecuniary injury would be inflicted upon him. The court, in the course of its opinion, says: "Injunctions issue against parties, and not against courts. And the jurisdiction in this respect has legal limits which apply to proceedings in all courts and tribunals. The general principle is that a court of chancery is not the proper tribunal to correct the errors and irregularities of inferior tribunals, and that in ordinary cases the court should not interfere. . . . The plaintiffs have cited no authority, and we have not been able to find any, which extends to a case like the present, where the inferior tribunal has jurisdiction of the subject-matter, and the object of the bill is to correct and restrain alleged irregularities in

the pleadings and procedure, or in the constitution of the body of triers. In this respect a court of chancery has no more power over the proceedings of a court of special and limited jurisdiction than over the proceedings of courts of general jurisdiction. They might as well issue an injunction to restrain and correct irregularities that are alleged to have occurred in the superior court . . . as in this case." This case, with those herein cited and others of a similar character which may readily be found, would seem to substantiate the defendant's claim. Whatever the remedy may be, it does not seem to be by injunction against the trier. If it be said that in the case at bar the complainant and the trier appear to be one and the same person, it may be applied that such must often be practically the case in contempt proceedings in our state courts, where it would hardly be claimed that irregularities of procedure could be restrained by injunction.

The demurrer is sustained and the foregoing reasons therefor, by request of the defendant, are ordered on file.

INDIANA SUPREME COURT.

CHICAGO & INDIANA COAL R. CO.,
Appt.,
v.
Joseph R. HALL.
(.....Ind.....)

1. A railroad company formed by consolidation of others, one of which was organized by purchasers of a railroad on fore-

closure, is bound by the obligation of the original company to pay for land which it appropriated under a parol license and agreement to pay therefor.

2. A license and agreement under which land is taken for a railroad, with agreement to pay its value, dispense with the writ of *ad quod damnum*, allowed by Rev. Stat. 1881, § 3803, even if this remedy would otherwise be exclusive.

NOTE.—*Liability of a consolidated railroad company for the debts of its predecessor.*

A consolidated railroad company is liable on an implied assumption, for the debts and obligations and torts of the constituent companies. *Louisville, N. A. & C. R. Co. v. Boney*, 3 L. R. A. 435, 117 Ind. 501; *Paine v. Lake Erie & L. R. Co.* 31 Ind. 268; *Indianapolis, C. & L. R. Co. v. Jones*, 29 Ind. 465, 95 Am. Dec. 654; *Columbus, C. & I. Cent. R. Co. v. Powell*, 40 Ind. 87; *Chicago, R. I. & P. R. Co. v. Moffitt*, 75 Ill. 524; *Coggin v. Central R. Co.* 62 Ga. 685; *State v. Baltimore & L. R. Co.* 77 Md. 459.

Other cases also hold that the consolidated company is liable for the obligations of the original companies, without giving the reasons for imposing such liability. *Philadelphia v. Ridge Ave. Pass. R. Co.* 143 Pa. 444; *Root v. Oil Creek & Allegheny River R. Co.* 31 Phila. Leg. Int. 140; *Lake Shore & M. S. R. Co. v. Hutchins*, 37 Ohio St. 232.

Where there was a transfer by one to the other, and a creditor claimed a consolidation and liability, it was held that the first was dissolved, and that a court of equity would consider the assets as a trust fund, to be followed into the hands of a purchaser if he was not bona fide for a good consideration. *Powell v. North Missouri R. Co.* 42 Mo. 68.

And under an act authorizing "a complete or partial union, and either of joint or separate or absolute, or limited liabilities to third parties," and the union made no provision limiting liabilities to third parties, the effect would be that the new company assumed all the liabilities of the old. 33 L. R. A.

Cayley v. Cobourg P. & M. R. & Min. Co. 14 Grant, Ch. 571.

And in *Cashman v. Brownlee*, 128 Ind. 206, it was stated that the consolidated company assumes all the liabilities of the original companies; but this was not the question involved in that case.

And a part of a statute of consolidation, repealing all the provisions of their charters not included in the act, which charters imposed a liability for care of streets, was held invalid as not embraced in the title of the act and the liability of the former attached to the new company. *Ridge Ave. Pass. R. Co. v. Philadelphia*, 124 Pa. 219.

A railroad employing an attorney for services in relation to the construction of the connecting line, built with a view to consolidation or operation by the former, will be liable for the same. *St. Louis & S. F. R. Co. v. Kirkpatrick* (Kan.) Oct. 7, 1893.

As to implied liability, see also *Berry v. Kansas City, Ft. S. & M. R. Co.* *infra*, and heading "Pleading and practice."

Although a purchaser of a consolidated road under decretal sale takes the same free from the conditions, imposed by a county in granting aid to one of the companies, that trains should stop at a station, the new company, by common law and statute, is bound to stop sufficient trains to do the business required. *People v. Louisville & N. R. Co.* 120 Ill. 48.

These cases fully sustain the doctrine of liability asserted in the main case.

3. A common-law remedy is not taken away by a statutory remedy for the same right, unless the statute expressly denies it, or is so clearly repugnant to the exercise of it as to imply a negative.
4. A license coupled with an interest is irrevocable.

(September 22, 1893.)

A PPEAL by defendant from a judgment of the Circuit Court for Tippecanoe County in favor of plaintiff in an action brought to recover compensation for land taken from plaintiff, over which defendant's road was built. *Affirmed.*

The facts are stated in the opinion.

Meers. S. H. Spooner and W. H. Lyford, for appellant.

This case was a common-law action for damages resulting from the alleged tortious act of the defendant. Unless the allegations of the complaint establish the wrongdoing of appellant, this action, which presupposes a wrong, cannot be maintained.

Defendant's predecessor was put in lawful possession of appellee's land, under an express license, appellee postponing damages until after the road was constructed.

Could plaintiff revoke a license granted as this was, and after the expenditure of large sums of money, and the building of a railroad under such license? If he could not, then the license was a continuing, irrevocable, valid authority for all acts done by the original company or its successors, in consonance with that license. Where a licensee relying upon the

grant, has with the knowledge of the licensor expended large sums of money, although the license was a naked parol one, it cannot be revoked.

Buchanan v. Logansport, C. & S. W. R. Co. 71 Ind. 265; *Miller v. State*, 89 Ind. 267; *Lane v. Miller*, 27 Ind. 534; *Ogle v. Dill*, 55 Ind. 180; *Snouden v. Wilas*, 19 Ind. 10, 81 Am. Dec. 870; *Stephens v. Benson*, 19 Ind. 867.

Can a suit be maintained that is predicated upon a wrong, which this rule says under the facts of this case cannot exist? We say: If there was a contract for the damages which would accrue to you by the building of this road, sue on the contract; or, if there was no contract, then proceed under the *ad quod damnum* statute, and have your damages assessed in the way provided by the statute.

Stowell v. Flagg, 11 Mass. 864; *Summy v. Mulford*, 5 Blackf. 202.

The consent of defendant in this case was as effective as a legislative authority would have been, and is as perfect a protection to appellant as though it had taken this land without prior compensation under a constitutional statutory authority. The doing of what the law gives one the right to do cannot be imputed as a tort.

Dill v. Bowen, 54 Ind. 208.

If the theory of the complaint was not to recover damages for tort, but was for the recovery of a debt created by an agreement between plaintiff and defendant, then under the well-settled rules of law, from the facts alleged in the complaint, he could not recover against this defendant. The agreement for the pay-

Assumption of liability by contract.

A consolidated railroad company assuming the debts of the original companies is liable thereon for damages to lands caused by one of the constituent companies. *Smith v. Los Angeles & P. R. Co.* 99 Cal. 210.

Or for labor performed for a prior company. *Western U. R. Co. v. Smith*, 75 Ill. 497.

And it is bound by an agreement, allowing other roads to use a right of way. *Joy v. St. Louis*, 138 U. S. 1, 34 L. ed. 843.

Where the contract of consolidation provided that the new company shall not be liable but that the property received by it shall be liable and that the original companies shall continue in existence in order to adjust all claims, a creditor of one of the original companies must reduce his claim to a liquidated demand before he can enforce such claim against the consolidated company. *Whipple v. Union Pac. R. Co.* 28 Kan. 474.

But under such a consolidation, a contract for the exchange of land, entered on the books of the constituent company, is binding on the new company. *McAlpine v. Union Pac. R. Co.* 23 Fed. Rep. 184, affirmed *Union Pac. R. Co. v. McAlpine*, 129 U. S. 305, 32 L. ed. 673.

And this consolidated company is liable in equity for the debt of the former to the extent of assets received, where the former has ceased to exist. *Harrison v. Union Pac. R. Co.* 13 Fed. Rep. 522; *Harrison v. Arkansas Valley R. Co.* 4 McCrary, 264.

And an agreement of consolidation that the bonds of one of the constituent companies shall be "protected" gives a lien good against all persons except subsequent purchasers without notice. *Tylen v. Wabash R. Co.* 15 Fed. Rep. 763; *Compton v. Wabash, St. L. & P. R. Co.* 45 Ohio St. 522.

But where the consolidated company had previously purchased a franchise and roadbed under a

deed of trust, assuming only liability on a construction contract, it was not liable for other debts. *Houston & T. C. R. Co. v. Shirley*, 54 Tex. 123.

And a contract made by the former Missouri Pacific Railroad Company to use Pullman cars on its road and on roads controlled by it, is binding on the present Missouri Pacific Railroad Company, only as to all roads owned or controlled at the time of consolidation. *Pullman Palace Car Co. v. Missouri Pac. R. Co.* 115 U. S. 587, 29 L. ed. 499.

A creditor of one of the constituent companies cannot attach a debt due to it, where his claim accrued after consolidation, and the contract of consolidation bound the new company for the debts of the former companies. *Bishop v. Brainerd*, 23 Conn. 289.

Statutory liability.

Where the statute of consolidation preserves the rights of the creditors of the constituent companies, the new company is liable for the debts and torts of the original companies. *Warren v. Mobile & M. R. Co.* 49 Ala. 582; *New Bedford R. Co. v. Old Colony R. Co.* 120 Mass. 397.

And in adding to the liability imposed on a consolidated company by Taylor's Kan. Stat., par. 1293, such company is liable for the debts and torts of the old companies in the absence of stipulations to the contrary. *Berry v. Kansas City, Ft. S. & M. R. Co.* (Kan.) Nov. 11, 1893.

And a successor of a railroad company cannot claim the benefits of the acts of succession without also being subject to the liabilities imposed by the act. *Montgomery & W. P. R. Co. v. Boring*, 51 Ga. 582.

Bondholders of the consolidated company are bound by an unrecorded contract of an original company, to have a flag station and allow use of land to grantor of right of way, where the statute

ment of damages was with the agents of this company's predecessor, and this company is not liable for the ordinary debts of that company.

Lake Erie & W. R. Co. v. Griffin, 92 Ind. 487; *Gilman v. Sheboygan & F. du L. R. Co.* 87 Wis. 817; *Lake Erie & W. R. Co. v. Griffin*, 107 Ind. 471; *Indiana, B. & W. R. Co. v. Allen*, 118 Ind. 581; *Midland R. Co. v. Smith*, Id. 233; *Campbell v. Indianapolis & V. R. Co.* 110 Ind. 490; *Chicago & G. S. R. Co. v. Jones*, 103 Ind. 336; *Buchanan v. Logansport, C. & S. W. R. Co.* 71 Ind. 265; 2 Rorer, Railroads, §§ 741, 750, 751.

Appellee has mistaken his remedy, assuming he has a cause of action as alleged, and should have proceeded, if he had a valid claim, by the writ of *ad quod damnum* as provided by the statute.

The statutory remedy was exclusive.

Kimble v. White Water Valley Canal Co. 1 Ind. 287; *Conwell v. Hagerstown Canal Co.* 2 Ind. 589; *Null v. White Water Valley Canal Co.* 4 Ind. 485; *Lafayette & I. R. Co. v. Smith*, 6 Ind. 249; *Levinson v. Junction R. Co.* 7 Ind. 599; *New Albany & S. R. Co. v. Connelly*, Id. 32; *Pittsburgh, Ft. W. & C. R. Co. v. Srinney*, 97 Ind. 599; *Lake Erie & W. R. Co. v. Kinney*, 87 Ind. 514.

Where the railroad company, without the consent of the owner, takes possession of his real estate, the owner may resort to any or all the usual remedies known to law, and where the owner does consent, and the company takes possession under his license, he cannot avail himself of all of these remedies; and if this

is true, then he must be restricted to some one remedy. The remedy provided by the statute under the *ad quod damnum* act is ample, and will protect to the fullest extent the interests of the landowner. This being true, he is not remediless, if he is not permitted to avail himself of any but this ample and sufficient remedy.

Louisville, N. A. & C. R. Co. v. Beck, 119 Ind. 124; *Louisville, N. A. & C. R. Co. v. Soltwedde*, 116 Ind. 258; *Graham v. Columbus & I. Cent. R. Co.* 27 Ind. 280, 89 Am. Dec. 498; *Bravard v. Cincinnati, H. & I. R. Co.* 115 Ind. 1; *Lewis, Em. Dom.* § 607, and cases cited.

Mr. John R. Coffroth, for appellee:

In *Lake Erie & W. R. Co. v. Griffin*, 107 Ind. 464, the court said: "In such case, the appellant's liability does not rest upon the judgment against the old corporation, but upon the principle that, having adopted and ratified the original appropriation, it is bound in equity and good conscience to make compensation."

"He who derives the advantage ought to sustain the burden."

Broom, Legal Maxims, 706.

The original company had acquired, by license, the right to build its road upon the land in question, without being guilty of trespass, or remitted to the writ of *ad quod damnum*; and the measure of damages was afterwards to be ascertained by agreement; and when appellant took possession of appellee's land, it affirmed the agreement, and, in equity, made itself liable to pay the damages.

Lake Erie & W. R. Co. v. Kinney, 87 Ind. 514; *Bloomfield R. Co. v. Grace*, 112 Ind. 128;

consolidating preserves all the rights of the creditors of the original companies. *Mobile & M. R. Co. v. Gilmer*, 35 Ala. 422.

The New York Act of 1890 saved the rights of all creditors and bondholders of any company embraced in the consolidation authorized by the act, and the respective status of each separate company as respects creditors and bondholders was unimpaired. *Vilas v. Page*, 106 N. Y. 439.

A consolidated railroad company is personally liable on a mortgage bond and coupon of the former company, under N. Y. Laws 1890, chap. 917, providing that the rights of all creditors and liens upon the property of either shall be preserved, and all debts and liabilities incurred by either of said corporations, except mortgages shall attach to the new one as if it had incurred the debt. *Polhemus v. Fitchburg R. Co.* 128 N. Y. 502, affirming 50 Hun, 397, in effect overruling *Janes v. Fitchburg R. Co.* 50 Hun, 310.

In *Miller v. Lancaster*, 5 Coldw. 514, it was stated that the consolidation of companies pursuant to an act of the legislature imposing liabilities on the new, implies as between the companies the acceptance of the liabilities as declared by the act. But this was not the question involved in that case.

But where a statute protects the creditors of the old company in consolidation, the creditor having a remedy at law, cannot sue in equity to enforce a mere legal right. *Arbuckle v. Illinois Midland R. Co.* 81 Ill. 429.

In *Shaw v. Norfolk County R. Co.*, 16 Gray, 407, it was held that a statute providing that a constituent company shall not be released from liabilities by consolidation, and providing that all the privileges, property, and liabilities imposed on the two shall appertain to the united corporation as if acquired under an original charter, does not require the assumption of liabilities incurred by the former com-

panies, but confers the privileges and imposes the obligations of all railroad companies under the general law, and the company acquiring the franchise of another, subject to the rights of its creditors, might also purchase the outstanding bonds and hold them like any other creditor, or pay and discharge them to relieve their own from the mortgages.

And a consolidated company is not liable for the debts of a former company on an act passed after consolidation, which act made consolidated companies liable for prior debts of old companies, and where the company creating this debt had been sold under a deed of trust prior to consolidation. *Hatcher v. Toledo, W. & W. R. Co.* 62 Ill. 477, 6 Am. Ry. Rep. 405.

As to statutory liability, see "Liens and priorities."

Liens and priorities.

A prior lien against an original company is not lost or prejudiced by consolidation. *Hamlin v. Jerrard*, 72 Me. 62; *Rutten v. Union Pac. R. Co.* 17 Fed. Rep. 480.

And this is so where the consolidating act preserved their rights. *Spence v. Mobile & M. R. Co.* 79 Ala. 573.

And a vendor's lien on one of the original companies is binding on the property of the company in the hands of the consolidated company. *North Carolina R. Co. v. Drew*, 3 Woods, C. C. 662.

A purchaser of land at judicial sale, on a judgment against the consolidated company, will not acquire a superior title over a purchaser under a subsequent judgment on a prior unrecorded mortgage made by one of the original companies, of which the consolidated company had notice by implication, and assumed all the liabilities of the former. *Mississippi Valley Co. v. Chicago, St. L. & N. O. R. Co.* 58 Miss. 345.

Lake Erie & W. R. Co. v. Griffin, supra; *Bloomfield R. Co. v. Van Slike*, 107 Ind. 480; *Indiana, B. & W. R. Co. v. Allen*, 113 Ind. 308.

The remedy by *ad quod damnum* is not exclusive.

Cincinnati, H. & I. R. Co. v. Clifford, 113 Ind. 487; *Harshbarger v. Midland R. Co.* 131 Ind. 177; *Lane v. Miller*, 22 Ind. 104; *Summy v. Mulford*, 5 Blackf. 202; *Toney v. Johnson*, 28

Ind. 382; *Pittsburgh, Ft. W. & O. R. Co. v. Swinney*, 97 Ind. 586; *Indiana, B. & W. R. Co. v. Allen*, 113 Ind. 581; *Midland R. Co. v. Smith*, Id. 233; *Lewis, Em. Dom.* § 607, *note*.

Dailey, J., delivered the opinion of the court:

This suit was instituted in the Benton circuit court, but on change of venue was tried in the Tippecanoe circuit court. The first

A statute of consolidation providing that "all rights of creditors and all liens upon the property of either of said corporations shall be preserved unimpaired" clearly distinguishes debts secured by liens from debts not so secured, and does not create a lien in favor of bonds of one company not secured before consolidation and issued thereafter. *Wabash, St. L. & P. R. Co. v. Ham*, 114 U. S. 587, 29 L. ed. 235.

A sale of a consolidated railroad was ordered, as a whole, where mortgage liens were on the several original roads, the decree providing for an equitable distribution of the proceeds according to the liens. *Gibert v. Washington City, V. M. & G. S. R. Co.* 33 Gratt. 586.

As to liens, see also *Compton v. Wabash, St. L. & P. R. Co.* 45 Ohio St. 522; and *Tysen v. Wabash R. Co.* 15 Fed. Rep. 763.

Pleading and practice.

A complaint against a consolidated company on a debt of a prior company, alleging such liability and the consolidation and the resulting liability of the consolidated company, was sufficient. *Collins v. Chicago, St. P. & F. du L. R. Co.* 14 Wis. 492.

And the same was held, where it did not state the implied liability of the consolidated company. *Cleveland, C. C. & St. L. R. Co. v. Prewitt (Ind.)* 54 Am. & Eng. R. R. Cas. 198.

And failure to allege that the tort was committed by one of the constituent companies in a petition against the consolidated company will be disregarded on appeal. *Indianapolis, C. & L. R. Co. v. Jones*, 29 Ind. 465, 95 Am. Dec. 664.

After consolidation where the new company is liable for the debts of the old, an action therefor must be brought against the new one by name. *Indianola R. Co. v. Freyer*, 56 Tex. 609.

And an action on a note made by one of the prior companies may be against the new company by its new name, where the consolidation act so provides. *Columbus, C. & I. Cent. R. Co. v. Skidmore*, 69 Ill. 566.

But it was held in *Selma, R. & D. R. Co. v. Harbin*, 40 Ga. 708, and *Marquette, H. & O. R. Co. v. Langton*, 32 Mich. 251, that some showing must be made setting out such facts as will indicate a liability of the consolidated company for a debt of one of the prior companies.

Where companies are consolidated pending an action against one of them, and the new company is liable for the debts of such constituent company, the petition may be amended setting up the consolidation and alleging the liability of the new company. *Kinton v. Kansas City, Ft. S. & M. R. Co.* 36 Mo. App. 574; *Jeffersonville, M. & I. R. Co. v. Hendricks*, 41 Ind. 43.

And in the latter case it was held that such amendment did not state a new cause of action as affected by the statute of limitations. See *Boardman v. Lake Shore & M. S. R. Co. infra*.

And such an amendment was proper. *Texas & P. R. Co. v. Murphy*, 46 Tex. 360, 28 Am. Rep. 272.

This was on the ground that the presumption is that the new company succeeds to all the rights, powers, and privileges of the former,—citing *Stephenson v. Texas & P. R. Co.* 42 Tex. 162.

328 L. R. A.

And an order allowing plaintiff to file a supplemental complaint bringing in the new company, which had assumed all of the contracts, liabilities, and obligations of the original companies, was properly granted. *Prouty v. Lake Shore & M. S. R. Co.* 85 N. Y. 272.

Although an order made on a motion substituting a new company after a report of a referee as to liability of old, was error as the liability of the new one must be on its assumption of liabilities of others, and not by a summary process of a motion to insert the name as defendant—where such company did not participate in the proceedings before the referee. *Prouty v. Lake Shore & M. S. R. Co.* 52 N. Y. 368.

The writ was properly amended so as to show that the proper party defendant to an action against a railroad company as common carrier was the consolidated company, which was confessedly liable for the loss, as this amendment simply held in court the party already brought there under a wrong name. *Hosford v. New York Cent. & H. R. R. Co.* 47 Vt. 583.

An action against a company does not abate by reason of its consolidation with another company. *Baltimore & S. R. Co. v. Musselman*, 3 Grant, Cas. 348; *East Tennessee & G. R. Co. v. Evans*, 6 Heisk. 607; *Gale v. Troy & B. R. Co.* 51 Hun. 470.

And in Mississippi the plaintiff in an action pending is not prejudiced by a consolidation of the defendant with another company, as the original corporation exists as to him until after judgment, and he can take judgment against the same by its former name. After judgment *scire facias* may be the appropriate remedy to charge the new corporation on its legal obligation, but he cannot have *scire facias* until after judgment. *Schackelford v. Mississippi Cent. R. Co.* 52 Miss. 157.

But it was held in *Kansas, O. & T. R. Co. v. Smith*, 40 Kan. 182, that all proceedings by or against the original company by its original name after consolidation, in an action then pending, are void as the company ceases to exist, and an appeal by the original company in condemnation proceedings was dismissed; and section 40 of the Code providing that in case of transfer of interest the action may be continued in the name of the original party, was held inapplicable, as that part of the section only applies where such original party still exists.

The obligation to pay, by the consolidated company, does not give priority on the calendar of the court, under N. Y. Code, § 791, subsec. 8, giving priority to an action against a corporation founded upon a note or other evidence of debt for the absolute payment of money. *Polhemus v. Fitchburg R. Co.* 118 N. Y. 617.

A foreign corporation cannot plead the statute of limitations and where there is a consolidation, and in New York the statute does not run until the date of consolidation. *Boardman v. Lake Shore & M. S. R. Co.* 84 N. Y. 157. See *Jeffersonville, M. & I. R. Co. v. Hendricks*, 41 Ind. 43.

Matters relating to, "Liability of purchasing railroads;" "Liability of lessee;" "Rights of stockholders;" "Exemption from taxation,"—are omitted from this note.

L. T.

paragraph of complaint is a common action for ejectment. This was dismissed before trial. The second paragraph is substantially as follows: "And said plaintiff above named, further complaining of defendant above named, says that he is now, and for ten years last past has been, the owner in fee of the following real estate in Benton county, Indiana, to wit, the southeast quarter of section 7, township 24 north, range 7 west, containing 160 acres, and at the time of the happening of the grievances hereinafter complained of he was, and for a long time prior thereto had been, using all of said land as one farm; that on the — day of August, 1881, the Chicago & Great Southern Railway Company, a corporation organized under and by virtue of the laws of the state of Indiana in that behalf enacted, desired to construct its road through a part of said land, to wit, the southwest quarter thereof, and applied to plaintiff to pay him for a right of way through the same; that plaintiff then informed said company that it would be impossible for him to state what damage the construction of the road through his premises would be to him or his land until the same was constructed; that thereupon it was agreed between plaintiff and said company that the latter should construct its road across plaintiff's said land, and that as soon as said road was completed said company would pay him the damages occasioned; that pursuant to said agreement said company, in 1882, constructed its road over the southwest quarter of said real estate, occupying a strip fifty feet wide, beginning sixty-six and one-half rods north of the southwest corner of said 40-acre tract; thence in a southeasterly direction through said premises, leaving the same at a point 78½ rods east of the southwest corner thereof, which is now occupied and covered by the roadbed of this defendant; that defendant afterwards operated its trains over the same, thereby greatly injuring and damaging plaintiff, in this; that the strip of land is, and was at the time it was taken, of the value of \$300; that plaintiff's said farm of 160 acres is cut into two pieces, thereby decreasing the value thereof, and the fields are carved into odd and inconvenient shapes, requiring a large amount of additional fencing, greatly interfering with the use of said farm in raising and handling stock, and rendering the property liable to be burned, to plaintiff's damage in the sum of \$2,500; that said Chicago & Great Southern Railway Company refused to pay said damages, though he demanded the same, and said license theretofore given said company became and was revoked by plaintiff; that on November 1, 1890, and April 9, 1893, said company executed to John C. New, trustee, two certain deeds of trust upon all the franchises, rights, and privileges, and all the real and personal property of said company, of every kind and character, the first one to secure the payment of 2,000 bonds, each for the sum of \$1,000, which said mortgages were duly recorded in the Record of Mortgages in the recorder's office of said Benton county, the first one on November 28, 1891, in Record 11, page 455; that afterwards Henry H. Porter, holder of a majority of said

bonds so issued, brought an action against said maker and others, in the United States circuit court for the district of Indiana, to foreclose said mortgage, but this plaintiff was not a party thereto; that such proceedings were had in said court; that on February 16, 1886, a decree of foreclosure was entered, and on March 27, 1886, said Chicago & Great Southern Railway Company, its property, franchises, etc., was sold by William P. Fishback, master commissioner, under order of said court, at public auction, and that said Porter purchased the same, and received a deed thereto by order of said court, and said New, trustee as aforesaid, also conveyed the property covered by said deeds to said Porter on April 20, 1886; that afterwards Porter, together with others, organized a company for the purpose of operating the said railway, said company being organized under and by virtue of the laws of the state of Indiana in that behalf enacted, under the name of the Indiana Railway Company, and said Porter conveyed and transferred to the last-named company the property, rights, and privileges so purchased by him; that the Chicago & Indiana Railway Company was a railway company duly organized under the laws of Indiana in that behalf enacted; that afterwards said Indiana Railway Company and said Chicago & Indiana Coal Railway Company were consolidated, said consolidated company taking the name of the last-named company, and said company is now occupying the last above described real estate of plaintiff under and by virtue of said proceedings, and none other; that after said Chicago & Great Southern Railway Company had constructed its track across plaintiff's aforesaid land, it used, occupied, and enjoyed said premises, and operated its trains over the same, for more than two years, and that defendant company is now, and for more than one year last past has been, using, occupying, and enjoying the same, and operating its trains over it, without right, and during all of said time has unlawfully kept the plaintiff out of possession thereof; that said Chicago & Great Southern Railway Company is, and was at the time of the foreclosure and sale, and ever since has been, insolvent; that prior to the commencement of this suit he demanded of defendant the payment of said damages to his land, but it failed and refused to pay the same, and he then demanded possession of said real estate, and revoked the license under which it was using, occupying, and enjoying said land. Wherefore, plaintiff demands judgment for \$5,000, for the recovery of said land, and all other proper relief." To the second paragraph of complaint, appellant answered—Firstly, the statute of limitations of six years; and, secondly, a special plea. A demurrer to each of these answers was filed, overruled to the first, and sustained to the second. The record recites that the appellant did file answers and interrogatories; that appellee did file demurrers to these answers; but neither of them is in the record, and the record also recites the ruling of the court thereon. But subsequently the ruling upon the demurrer to these answers was vacated, and appellant thereupon filed

its two paragraphs of answer,—the only ones in the record. To those paragraphs a demurrer was filed, which was overruled as to the first, and sustained as to the second, but to this ruling there was no exception saved by appellant. The record reads as follows: "And the court, being sufficiently advised, now sustains the said demurrer to the fourth paragraph of answer to the second paragraph of complaint, to which ruling of the court the plaintiff then and there excepted. The court now overrules the demurrer to the second paragraph of answer to the first paragraph of complaint, and also now overrules the demurrer to the third paragraph of answer to the second paragraph of complaint, to which rulings of the court, and each of them, upon each of said demurrers, the plaintiff then and there excepted; and the plaintiff now files his reply to the second paragraph of answer to the first paragraph of complaint." The errors assigned are as follows: Firstly, the complaint does not state facts sufficient to constitute a cause of action; secondly, the court erred in overruling defendant's demurrer to the second paragraph of complaint; thirdly, in sustaining demurrer to fourth paragraph of answer to the second paragraph of complaint; fourthly, in overruling defendant's motion to set aside default taken against appellant, and to vacate judgment; fifthly, in overruling defendant's motion for a new trial. This cause was tried by the court, and judgment rendered on the second paragraph of complaint, the first paragraph having been eliminated from the cause before trial.

Counsel for appellant discuss the sufficiency of the complaint under its first assignment of error, and upon the overruling of the demurrer to the second paragraph of the complaint, on the theory that the complaint seeks to recover for a tortious appropriation of plaintiff's lands by defendant company, and as the facts disclosed by it clearly put defendant's predecessor in lawful possession of appellee's land, under an express license, appellee postponing damages until after the road was constructed, appellant was not a wrongdoer, and for the occupancy up to this time could not have been sued in an action founded upon tort, and that having entered upon a parol license, upon the faith of which appellant expended large sums of money in constructing and equipping the road, the licensor will be held estopped from revoking the license until the licensee can be placed *in statu quo*, and hence that at no time could appellant have become a trespasser. Counsel quote from *Indiana, B. & W. R. Co. v. Allen*, 118 Ind. 308, in which the court says: "What we affirm is that acquiescence after public rights have intervened will prevent a landowner from destroying the line of road by wresting possession of a part of it from the company. . . . A citizen who has stood by until after the completion of a line of road has involved public interests shall not be allowed to sever the line, and destroy its efficiency, by wresting possession of a part of it from the company." It is *stare decisis* that a license, coupled with an interest, is irrevocable. *Campbell v. Indianapolis & V. R. Co.* 110 Ind. 490; *Evansville* 23 L. R. A.

& T. H. R. Co. v. Nye, 118 Ind. 238; *Chicago & G. S. R. Co. v. Jones*, 103 Ind. 886; *Louisville, N. A. & C. R. Co. v. Soltsiedle*, 116 Ind. 257; *Buchanan v. Loganport, C. & S. W. R. Co.* 71 Ind. 265; *Lake Erie & W. R. Co. v. Michener*, 117 Ind. 465; 2 Rorer, Railways, §§ 741-751. "The doing of what the law gave her a right to do cannot be imputed as a tort." *Dill v. Bowen*, 64 Ind. 208. The authorities above cited and relied upon by appellant would be entirely pertinent to the first paragraph of complaint in ejectment, had it remained in the record, or to an action for trespass, but we think counsel are mistaken in their claim that appellant is charged as a trespasser, and by inadvertence misconstrue the pleading. The correct theory of the complaint is the one adopted by the trial court, viz.: it is a statement of facts to show the creation of an equity to damages for the taking and use of land to show that the old company entered, constructed, and operated its road over the land in dispute by consent of plaintiff, without payment of damages occasioned thereby, which were to be ascertained and paid when the road was built. The pleading negatives every fact inconsistent with the integrity of this equity, and shows circumstantially the relation of all the parties to this strip of land, and that plaintiff is without compensation. It does not seek to recover for a breach of agreement made by the old company and the plaintiff, but for a breach of equitable duty laid on the defendant by force of the facts that it has taken his land, and is using and holding it, in the same plight as its predecessor held it, and that plaintiff is entitled to, and is without, compensation. The new company is enjoying the easement under the conditions of the old company, and the benefits and burdens incident to its use are inseparable, in the absence of any relevant act or omission of the defendant. The equitable principle applicable here, as in many other cases, is that he who derives an advantage ought to sustain the burden. Mr. Brown says: "A man will be bound by that which would have bound those under whom he claims *quoad* the subject-matter of the claim, and no man can, except in certain cases, which are regulated by the statute law and the law-merchant, transfer to another a better right than he himself possesses. The grantee shall be in no better condition than he who made the grant." This doctrine was fully recognized in *Lake Erie & W. R. Co. v. Griffin*, 107 Ind. 464, in this statement: "On the former appeal of this cause we held that if this averment were true it showed the appellant's election to adopt the original appropriation of appellee's premises by its entry upon, use, and occupation of, such premises, for the purposes of its railroad." We then said: "In such case the appellant's liability does not rest upon the judgment against the old corporation, but, upon the principle of having adopted and ratified the original appropriation, it is bound, in equity and good conscience, to make compensation, for the right of the appellees for compensation for their property is protected by the constitution, and it will not do to say that their unsatisfied judgment

against the old, insolvent corporation affords them any compensation. The maxim applies '*Qui sentit commodum, sentire debet et onus.*' " In *Louisville, N. A. & C. R. Co. v. Bondy*, 117 Ind. 501, 8 L. R. A. 435, the court says: "Where a consolidation of railroad companies takes place, in pursuance of the statute, the corporation into which the original companies are merged becomes liable for all the valid debts and obligations of the consolidated company, and a judgment *in personam* may be rendered against it therefor." The same doctrine is declared in *Cleveland, C. C. & St. L. R. Co. v. Prewitt* (Ind.) 83 N. E. Rep. 867, and cases there cited. This is now settled law. The averments of the second paragraph of complaint, concerning what is styled a revocation of appellant's license and the demand for possession, are mere surplusage, in view of the chief line of averments to which we have referred.

But the learned counsel for appellant urge with much vigor another reason why this demurrer should have been sustained, viz., assuming that appellee has a cause of action, he should have proceeded by the writ of *ad quod damnum*, as provided by statute, and that, having misconceived his action, he must fail here; that it is a common-law remedy, and the statute provides an ample remedy, of which appellee could avail himself, to the exclusion of the common-law remedy. Counsel insist that he is probably restricted to the one specified in the statutes, and that it is exclusive. The statutory remedy is provided for in section 8953, Rev. Stat. 1881, and is in this language: "If, from any cause, there shall be any failure of the right of way, or when the title thereto has not been acquired, upon which any railroad of this state is now constructed, it shall be lawful for the company owning the road, or for the party owning such lands upon which any part of the road is constructed, to apply to the proper court for the writ for the assessment of damages, and have the damages which the owner of said property has sustained, or may sustain by reason of the taking, use, and occupancy thereof by the company for the construction and maintenance of said road; and upon the assessment and payment of the company of the damages which may be assessed or awarded, the title to such property shall vest absolutely in the company for the purposes of the said railroads," etc. In this case the appellant insists upon the broad proposition that, when any work of a public character is authorized by an act of the legislature, and a mode of obtaining compensation for private property to be taken for its construction is specifically pointed out, such compensation must be sought in the way prescribed by the act, and not otherwise. On the other hand, appellee contends that the method thus pointed out by the statute is cumulative, and does not defeat or take away the common-law remedy. It will be observed that the language of the statute is: "It shall be lawful for the company owning the road, or for the party owning such lands, upon which any part of the road is constructed, to apply to the proper court for the writ for assessment of damages," etc. It does not specify that it shall be so

done, but it designates no plan other than the writ for such assessment. In no analogous cases under this statute has the point ever been decided adverse to appellee, but the court has on several occasions expressed dicta in relation to the matter in ejectment suits and actions for trespass. In *Louisville, N. A. & C. R. Co. v. Beck*, 119 Ind. 124, which was a possessory action, the court says "that a landowner who stands by, without demanding compensation, until a railroad company has so far completed and put in operation its road as to involve the public interest, can neither enjoin the company, nor maintain ejectment to recover his land. The only remedy left to the landowner, in such a case, is to proceed, within the proper time, to have his damages assessed and enforced against the railroad company. This rule is founded upon the general principles of public policy, as well as upon the provisions of section 8953, Rev. Stat. 1881." In *Pittsburgh, Ft. W. & C. R. Co. v. Swinney*, 97 Ind. 599, the court says: "The accepted doctrine now is that where a railroad company, or other corporation possessing similar powers, takes possession and enters into the use of real estate without the consent of the owner, and without taking the necessary means to acquire the title it assumes to assert, the owner may resort to any or all of the usual remedies known to the law for the protection of his estate in the property." The doctrine thus expressed, appellant claims, leaves, by implication, the converse of the rule, namely, that where the owner does consent, and the company takes possession under his license, he cannot avail himself of all these remedies, but must be limited in his remedies to one or more of them. In *Cincinnati, H. & I. R. Co. v. Clifford*, 113 Ind. 487, also a possessory suit, the court says: "The counsel for appellant are in error in assuming that the only remedy to the landowner is that given by statute. He is not confined to that remedy, but, in the proper case, may prosecute an action for damages or possession." In *Harshbarger v. Midland R. Co.*, 181 Ind. 177, which was an action to recover for lands appropriated by defendant company, and acquiesced in by the owner, the court says: "It is a right of action existing in the owner at the time of the appropriation and the creation of the right of action separate and distinct from the land. The right of action occurred at the time when the ancestor might have maintained an action for damages, or instituted proceedings to have his damages assessed." In *Lane v. Miller*, 23 Ind. 104, the court says: "The objection made to the complaint is that, as the law on the assessment of damages has given a person whose lands are injured by the erection of a milldam a remedy by writ of assessment of damages, he is confined to that remedy, and cannot resort to his action at common law." In *Snowden v. Wilas*, 19 Ind. 10, 81 Am. Dec. 870, a query is raised whether he should not be confined to the statutory remedy, but the point has never been decided by this court. In *Summey v. Mulford*, 5 Blackf. 202, the point, after full examination, was ruled the other way. In *Toney v. Johnson*, 26 Ind. 882, a milldam

case, the court says: "It is insisted that the demurrer to the complaint should have been sustained, on the ground that the remedy provided by statute excludes any other proceeding. Such has not been the view taken by this court. From the organization of this court, actions like the present have been sustained. The distinction between statutes which are exclusive, and those which simply provide a cumulative remedy, is stated in *Tang v. Scott*, 1 Blackf. 405, 12 Am. Dec. 257. If a statute is introductory of new rights, which did not before exist in the country, and prescribes a penalty for their violation, the persons claiming under the act must depend for the security of the right thus claimed upon the provisions therein specified. When there is a pre-existing right at common law, and an affirmative statute intervenes, inflicting a new penalty, the law is otherwise." In *Indiana, B. & W. R. Co. v. Allen*, 118 Ind. 588, the court uses this language: "Our conclusion is, that acquiescence does defeat the action of ejectment, unless there are countervailing facts, or some element which nullifies the force of the acquiescence. We do not assert that it will defeat any action where only compensation is sought. . . . Compensation he may recover, possession he cannot. To the recovery of just compensation his rights are confined." These various opinions expressed by judges on points that did not necessarily arise in most of those cases, and were not directly involved in them, seem somewhat conflicting; but, taking the language employed in section 8953, "it shall be lawful for the company owning the road, or the party owning the lands, . . . to apply to the proper court for the writ of assessment," etc., excludes the idea that the common-law right of action for damages is abrogated, and supports the theory that the statute furnishes him this remedy in addition to the one with which he was vested under the common law. But, for the purposes of this case, we do not regard it necessary to decide this question. If appellant had preferred the writ of assessment, it also had a right to invoke the aid of the statute, from its very terms, and thereby avoid the direct suit for damages, of which it complains. The license, according to its theory, not having estopped appellee from asserting a claim under the writ, appellant would not be deprived of the benefits of the statutory remedy. To be denied by statute a remedy possessed before its enactment, its terms should be express, or so clearly repugnant to the exercise of it as to imply a negative. Parties are not compelled to avail themselves

of statutory privileges, where they agree among themselves to adjust their own controversies in a different manner. The law fosters and encourages compromises and settlements of questions in dispute, in lieu of litigation, where conscionable terms can be agreed upon. The machinery of statutory law is at times cumbersome and unwieldy, and the administration of justice under it quite expensive. If, to avoid costs of litigation, they waive its provisions, and agree on a cheaper and more direct plan, looking to equitable relief, courts should uphold and enforce its provisions. In this case, as stated, appellant's predecessor applied to appellee, before the road was constructed, to pay him for this right of way. Appellee then informed the company that he could not tell the extent of his damage until the road was constructed. Thereupon, it was agreed that the company might construct its road across appellee's land, and when completed it would pay the damage occasioned. It occurs to us that by force of this license and agreement the parties dispensed with the writ of *ad quod damnum*, and agreed that the damages should be ascertained by mutual stipulation. If the original company had remained in possession, it could have been compelled to pay. Appellant got no better title under the foreclosure proceedings than its predecessor had. Why should it not be compelled to do justice to the wronged landowner? The original company had acquired the right to build its road upon the land in question without being guilty of trespass, or remitted to the writ of *ad quod damnum*, and the measure of damages, as suggested, was afterwards to be ascertained by agreement. When appellant took possession of appellee's land, it affirmed the agreement, and, in equity, made itself liable to pay the damages. "Acquiescence on the part of the landowner, though acting as a waiver of his right to maintain ejectment, is by no means a waiver of his right to damages such as would have been recovered in a regular condemnation proceeding." 19 Am. & Eng. Encyclop. Law, 860. Appellant is possessed of a license which, being irrevocable, renders it as secure in its possession as an easement, and "an easement once acquired becomes a privilege in favor of the dominant estate, and a burden imposed upon the servient estate, and subsequent grantees take it subject to the privilege or burden." Ballard, Real Estate Statutes, § 866. The appellant does not discuss the sufficiency of the evidence to sustain the finding, and the question is therefore waived.

Judgment affirmed.

NORTH DAKOTA SUPREME COURT.

Julius ROSHOLT, *Appt.*,

v.

Thea MEHUS, *Resp.*

(.....N. Dak.)

*1. Where a married woman leaves the home of herself and husband, the title to which was in the husband, and remains away nearly three years before claiming any homestead interest in the property, but the husband remains in constant occupancy of the land, keeping his home thereon, such absence alone will not constitute abandonment by the wife of her home-

*Headnotes by BARTHOLOMEW, Ch. J.

Effect of divorce on homestead rights.

Husband's claim to homestead, where decree of divorce is silent.

A husband liable for the support of his children does not lose his homestead rights in his land by reason of a divorce. *Redfern v. Redfern*, 38 Ill. 509; *Byers v. Byers*, 21 Iowa, 268; *Biffle v. Pullam*, 114 Mo. 50.

And in *Doyle v. Coburn*, 6 Allen, 71, it was held that a husband does not lose his homestead rights even where the custody of the child is awarded to the mother, as he may adopt other members of his household; and it is not lost by death or absence of wife and children, and it is for the benefit of the husband as well as the wife.

And the same was held in *Woods v. Davis*, 34 Iowa, 264, where the custody of the children was awarded to the wife, but the husband was still liable for support of his children.

These cases fairly support the doctrine announced in the main case.

But where the homestead is given to a "head of a family," and the husband has no family of his own dependent on him residing on the land, and his wife has the care and support of their child, a finding that he has abandoned the idea of having a homestead for a family, and had ceased to be the head of a family after his divorce, will be sustained. *Cooper v. Cooper*, 24 Ohio St. 488.

And under N. H. Laws 1888, chap. 1, giving a homestead to a "wife, widow, and children" where the custody of the children was awarded to her, his interest was subject to levy for her judgment of alimony—as his or her family did not occupy the same. *Wiggin v. Buzzell*, 58 N. H. 329.

And under Indiana 2 Rev. Stat. 1878, providing for exemption on "a debt growing out of or founded upon a contract, express or implied," there is no exemption to the husband on a judgment for alimony in favor of the wife. *Menzie v. Anderson*, 65 Ind. 230.

After divorce, a husband may convey to his former wife his interest in the homestead, and a mortgage made by her on the same after such conveyance will be valid. *Grupe v. Byers*, 78 Cal. 271.

A husband who believed he was divorced, and married another woman and then made a mortgage on the homestead, and after foreclosure sale obtained a decree of divorce from his first wife, cannot claim his homestead as against the purchaser. *Trout v. Rumble*, 82 Mich. 202.

Wife's claim to homestead, where decree of divorce is silent.

A divorced wife has no claim on her husband's homestead where the decree of divorce makes no disposition of the same. *Heaton v. Sawyer*, 60 Vt. 495; *Stahl v. Stahl*, 114 Ill. 375.

23 L. R. A.

stead rights. Whether or not, in such a case, a wife could, under any circumstances, forfeit her homestead rights under our statute, not decided.

2. In divorce proceedings it is competent for the court to assign the homestead to the innocent party, either absolutely or for a limited period; but, where the decree in the divorce proceedings is silent upon the question, the homestead will, upon the dissolution of the marriage, remain in possession of the party holding the legal title thereto, discharged from all homestead rights or claims of the other party.

(January 8, 1894.)

APPEAL by plaintiff from a judgment of the District Court for Steele County in

And the same was held where she was in fault, and the statute provided that any estate granted by the laws of this state to the husband and wife in the property of the other, shall be forfeited by the party at fault, in a divorce. *Rendleman v. Rendleman*, 118 Ill. 257.

In this case the divorce was rendered in Kansas, but the jurisdiction of that court was sustained.

So where she had not made any homestead declaration, as required by the statute, she could not resist a mortgage foreclosure on the same. *Bunnel v. Stockton*, 53 Cal. 319.

But under Mo. Rev. Stat., § 2689, providing that a married woman may file her claim to a tract of land occupied as a homestead if she is abandoned by her husband, and after such claim the husband cannot sell it, a claim so filed will protect the rights of the wife as against the husband's creditors even if she afterwards obtains a divorce, where she is the head of a family. *Blandy v. Asher*, 72 Mo. 27.

And under Mass. Gen. Stat., chap. 107, § 40, providing that on dissolution of marriage for any cause except adultery, the wife shall be entitled to the possession of her estate, she may recover property deeded to her, and in the possession of her former husband, although the deed contained a statement that it was to be held by him as a homestead, but the habendum clause was to her and to her heirs. *Dunham v. Dunham*, 128 Mass. 34.

In *Whetstone v. Coffey*, 48 Tex. 209, it was held that a divorced wife is not precluded from asserting her claim to community property occupied as a homestead, and sold by her husband without her consent, although the decree of divorce did not dispose of the community property.

And under Tex. Rev. Stat., art. 2304, providing that in a decree of divorce the court may divide the estate of the parties, but that nothing shall be construed, to compel either party to divest him or herself of the title to real estate, and the court makes no order in regard to the community property occupied as a homestead, the divorced wife residing thereon may claim one half thereof as against her former husband's creditors. *Kirkwood v. Domnanu*, 80 Tex. 645.

And the same was held in *Craig v. Craig*, 81 Tex. 203, but the other part of the decree, awarding the other half of the property to the child, was erroneous.

It was held in *Sellon v. Reed*, 5 Biss. 125, that where the wife resided on the homestead at the time of divorce, and by the decree was awarded the care of the child, and thus continued as the head of the family, and alimony was not awarded in lieu of the homestead, she may retain the same as against a grantee of her former husband. This decision seems against the weight of authority.

favor of defendant in a proceeding to determine adverse claims to certain real estate. *Reversed.*

The facts are stated in the opinion.

Messrs. F. W. Ames and Carmody & Leslie, for appellant:

No order being made in the decree of divorce which dissolved the status, regarding the homestead, its disposition after the divorce must be as directed by statute, and Nelson having no lawful wife to join him in the deed, he was free to convey by his deed alone. This would certainly pass the legal title, even if a homestead right did exist.

Stahl v. Stahl, 114 Ill. 875; *Waples, Homesteads & Exemptions*, 265, § 6, and cases cited.

Our statute evidently contemplated that the homestead should remain with the owner of the fee simple, if he is in possession and continues his home thereon, or be disposed of by the court in the decree of divorce, as provided in section 2585 of Compiled Laws. If not so disposed of, the dissolution of the marriage dissolves all rights growing out of the relation of marriage, such as dower, etc., and they not being reserved in the decree are lost.

Wiggin v. Buzzell, 53 N. H. 329; *Heaton v. Sawyer*, 60 Vt. 495; *Kirkwood v. Domnau*, 80 Tex. 645.

No reason exists why all such rights could not be adjusted in the divorce suit.

Byers v. Byers, 21 Iowa, 268.

Mr. J. H. Bosard, for respondent:

although based on *Vanzant v. Vanzant* and *Bonnell v. Smith*, *infra*, but in these latter cases the wife was awarded the homestead in the divorce decree.

Decree awarding homestead.

Generally the court in rendering the decree of divorce may make an equitable distribution of the property, and may award the homestead to one of the parties. *Lowell v. Lowell*, 55 Cal. 316; *Snodgrass v. Snodgrass*, 40 Kan. 494; *Cole v. Cole*, 27 Wis. 531; *Harran v. Harran*, 85 Wis. 299; *Cole v. Cole*, 38 Iowa, 438; *Brandon v. Brandon*, 14 Kan. 342; *Webster v. Webster*, 64 Wis. 438.

And a decree of divorce awarding to the wife to "have and hold her present homestead as alimony, with the right to rent the same until the youngest child becomes of age," is valid, as the question of alimony is discretionary. *Jolliff v. Jolliff*, 32 Ill. 527.

And where the wife was awarded the custody and care of the children and the homestead, she was entitled to the same as against her husband's creditors. *Vanzant v. Vanzant*, 23 Ill. 536; *Bonnell v. Smith*, 53 Ill. 376.

And under Tennessee Code, § 2046, providing that the title to the homestead shall be vested, by decree of the court granting the divorce, in the wife, and after her death it shall pass to the children, where the property is held by husband and wife as joint owners as tenants by entireties, and the decree gives it to her, she may assert her claim to the same, as against his creditors. *Shelton v. Orr*, 12 L. R. A. 514, 89 Tenn. 63.

Under Texas constitution and statutes giving to a citizen, a homestead free from the power of any court to divest him of the same, the court may decree in divorce, that the wife may have the use of his homestead, but it cannot give her more than a life estate in the same. *Tiemann v. Tiemann*, 34 Tex. 522.

And the court has power to make a decree that the alimony awarded is a lien on the homestead, where it may give the homestead to the wife. *Blankenship v. Blankenship*, 19 Kan. 159; *Daniels v. Morris*, 54 Iowa, 309; *Hemenway v. Wood*, 53 Iowa, 21.

A homestead established on community property may be divided in decree of divorce by the court the same as other common property. *Trigg v. Trigg* (Tex.) Dec. 3, 1891; *Gimmy v. Doane*, 23 Cal. 635.

And in *Bichey v. Hare*, 41 Tex. 336, it was held that if community property decreed to be divided in a divorce was a homestead, it was not subject to sale by community creditors, but if not a homestead it was liable for community debts contracted before the institution of the divorce suit.

In *Zapp v. Strohmeier*, 75 Tex. 638, it was held that where the homestead was divided by the court, 33 L. R. A.

and the decree did not give the custody of the children to either, and the children except one remained with the mother, and this one sometimes visited his father, the part allotted to the father was exempt from execution for costs in the case, and the court said that "the head of the family, or the two heads of families that there may be after the divorce, are entitled to hold their homestead against the forced sale, without regard to the causes of divorce; provided, that as to creditors who were such at the date of the divorce not more than two hundred acres of the existing homestead will be included in the exemptions to both." This decision asserting that a homestead may be split in a divorce suit, and two homesteads then exist, is novel, although the reasoning of the court on the facts of the case appears plausible.

But in *Shoemaker v. Chalfant*, 47 Cal. 432, it was held that a decree dividing the homestead "severed the sort of joint-tenancy of the parties in the homestead premises, which had been created by the homestead declaration, the residence of the parties, etc., under the provisions of the homestead act. It also destroyed the right of survivorship. . . . The family, for whose benefit the provisions of the homestead act was mainly designed, was severed by the decree, and neither the husband nor the wife is entitled to reside on that portion of the homestead premises which was allotted to the other. All the principal qualities of the homestead estate, except that of exemption from liability for debts, etc., having been destroyed by the decree, the latter in our opinion, was also destroyed. The decree was as effectual in its results as would have been a declaration of abandonment." This evidently is on the ground that the homestead right in that state is a joint tenancy.

Under Cal. Code, § 146, providing that if the homestead has been selected from the community property, it may be assigned to the innocent party, either absolutely or for a limited period, the court cannot create a trust in assigning it but must assign it absolutely or for a limited period. *Simpson v. Simpson*, 80 Cal. 287.

Or if the wife has obtained the title and the decree is silent, she may retain the homestead. *Burkett v. Burkett*, 3 L. R. A. 781, 73 Cal. 610.

And under this statute the court may set aside to the innocent party the homestead, leaving to the other party all other property heretofore owned by the parties as community property. *Boyd v. Boyd* (Cal.) Jan. 14, 1893.

And the court may even award the homestead to the guilty party, where all claim to the same is released by stipulation of the other party in the case, decreeing divorce. *Stookton v. Knock*, 73 Cal. 423.

In this note cases where the parties had separated but no divorce was granted, are omitted. I. T.

When the respondent was divorced from her husband and given the custody of the children she became the head of the family. Thompson, Homesteads, & Exemptions, § 82.

A wife who has been granted a divorce and given custody of the child, is the head of the family, and as such is entitled to the homestead.

Sellon v. Reed, 5 Biss. 125, 21 Myer's Fed. Dec. 639; *Byers v. Byers*, 21 Iowa, 268; *Vanzant v. Vanzant*, 23 Ill. 536; *Bonnell v. Smith*, 53 Ill. 375; *Brandon v. Brandon*, 14 Kan. 342; *Rendleman v. Rendleman*, 118 Ill. 257.

Bartholomew, Ch. J., delivered the opinion of the court:

This action was brought to determine adverse claims to a quarter section of land in Steele county. It was heard on an agreed statement of facts, from which the court made two conclusions of law: First, that plaintiff was not the owner in fee simple of the land; and, second, that defendant was entitled to the possession of the land. The judgment simply dismissed the complaint on the merits, with costs. Plaintiff appeals, and assails the conclusions as not warranted by the facts. On June 10, 1892, one Torkel Mehus, husband of the respondent, Thea Mehus, obtained a patent to said land under the federal homestead law. Torkel Mehus and respondent continued to reside on said land as their homestead until May, 1887. At that time there were living three minor children, the issue of their marriage. In May, 1887, the respondent, Thea Mehus, taking her minor children with her, left the said Torkel Mehus, and has not lived with him since that time. Torkel Mehus continued in possession of the land, and made his home thereon until the sale thereof hereinafter mentioned. In January, 1890, the respondent, as the wife of Torkel Mehus, and in behalf of herself and her minor children, attempted to file a declaration of homestead under sections 2458 and 2459, Comp. Laws, and the declaration was recorded in the office of the register of deeds of Steele county. In October, 1890, she brought an action of divorce against Torkel Mehus, on the ground of his adultery; and in January, 1891, the district court granted her a decree absolute on that ground, and gave her the custody of the three children. In her complaint she prayed the allowance of a reasonable sum for maintenance of herself and children out of the property of her said husband. The decree gave her a gross sum of \$350, and \$20 per month for the support of herself and children. No order whatever was made relative to the homestead, nor was it mentioned in the complaint. On the 9th day of September, 1891, Torkel Mehus executed a warranty deed of said premises to the appellant, Rosholt. Appellant was a purchaser for value, with no notice of any claim of respondent upon the land, except the constructive notice given by the record of the homestead declaration and the record in the divorce proceedings. Appellant claims under the deed, and respondent claims a homestead interest in the land.

What was the condition of this land as to the homestead character at the time of the rendition of the divorce decree? We think it was the homestead of Torkel Mehus and his family, including this respondent. The legal head of the family had remained in constant occupancy of the land as his home. This preserved its homestead character. The actual presence of the wife is not required for the inception or preservation of the homestead right, so long as the husband is the head of the family. *Johnston v. Turner*, 29 Ark. 280; *Williams v. Sweetland*, 10 Iowa, 51; *Bradford v. Central Kansas Loan & T. Co.* 47 Kan. 587.

Without holding that a wife can forfeit her homestead interest in her husband's home, or estop herself from claiming the same by anything short of a contract, but assuming such to be the law, it is yet certain that this record shows no such forfeiture or estoppel. The record does not disclose when the adultery upon which respondent based her action for divorce occurred. If prior to her leaving home, her absence would not imperil her rights (*Earle v. Earle*, 9 Tex. 630); but, if subsequent, yet it does not appear that she left her home and abandoned all intention to return. It does not appear that she left the jurisdiction, or attempted to establish a home elsewhere. Her effort to file a declaration of homestead would indicate an intention to return. It has grown to be familiar law that, in the absence of express statutory provisions, absence from the homestead for any reasonable time will not amount to abandonment when the *animus revertendi* always exists, and no other home is created. We repeat, respondent's homestead right existed at the date of the rendition of the decree of divorce, but it so existed by virtue of the fact that she was a member of the family of Torkel Mehus, who, with his family, had established his home and their home thereon, and whose occupancy had been continuous. Her rights were in no manner strengthened by the fact that she attempted to place a declaration of homestead on record. Such declaration does not create homestead rights (*Cole v. Gill*, 14 Iowa, 527; *Yost v. Devault*, 9 Iowa, 60); nor do we think, although we do not find the point ruled, that it takes the place of continuous occupancy after the inception of the homestead, except where, as in Minnesota, there is an express statutory provision to that effect. But even then, we suppose, the statute in no manner affects the question of actual abandonment, but might, in a subsequent contest, shift the burden of proof. In this state, when the head of a family owns land in excess of the amount allowed by law for a homestead, and the land is in one body, and the family resides thereon, the homestead may be selected in any form that may be desired up to the quantity allowed by law as a homestead. Recording a declaration of homestead gives notice to all purchasers, and all parties dealing with or extending credit to the owner, of the exact land claimed as a homestead. This, we think, is the main, and perhaps exclusive, reason for the provision because a failure to make and file the declaration does not render the home-

stead liable in execution. It only devolves upon the officer holding the execution the duty of selecting, platting, and recording the homestead. But since respondent's homestead rights rested exclusively upon the fact that she was a member of the family of Torkel Mehus, and since the divorce effectually severed that relation, it follows that her homestead right was destroyed, unless preserved by the statute or the decree. That decree severed the family relation theretofore existing between Torkel Mehus and Thea Mehus. She was no longer a member of his family. She was neither his wife nor his widow, and could claim none of the homestead rights given by law to the wife or widow. The occupancy which created and had preserved for her a homestead right in that land ceased instantly when she ceased to be a member of the family of Torkel Mehus.

But it is claimed that, by virtue of a new relation then created, the homestead right devolved upon her. It is urged that when respondent was divorced from her husband, and given the custody of the minor children, she became the head of the family, and that under such circumstances, when the wife is the meritorious cause of the divorce, she does not, by obtaining a divorce, forfeit her homestead right. The position thus broadly taken does not meet our approval. Whatever support it has in the books originated in *Vanzant v. Vanzant*, 28 Ill. 586. In that case the complainant was the divorced wife, who had been given the custody of the minor children. After asserting her right to the homestead as against the defendant, who was a creditor of the husband, the court says: "The spirit and policy of the homestead act seem to demand this concession, and to regard the complainant, for this purpose, as a widow and the head of a family." The court immediately adds: "But there are other circumstances disclosed by the record which fortify the claims of the complainant to the enjoyment of this property. In the first place, it is abundantly proved that the property was purchased with her own means, and, in the next place, that the court decreeing the divorce assigned it to her as alimony, and for which she holds the deed of the master in chancery, executed under the decree of the court." It is proper to add, also, that the premises, at the time of the divorce, were in the possession of a tenant, who immediately attorned to the divorced wife, and the court held that to be equivalent to actual occupancy by her. This case was followed by *Bonnell v. Smith*, 58 Ill. 376, where, also, the wife obtained the divorce and custody of the children, and was decreed the homestead absolutely as alimony, and the court, without discussing the matter, stated: "She therefore held it in a double right,—as alimony, under the decree of the court, and as her homestead, by operation of the statute." In this state a decree of divorce which granted to the meritorious wife the homestead absolutely as alimony would forever protect her possession, except in the enumerated cases, where a homestead is liable, irrespective of any construction of the homestead law. But in *Sellon v. Reed*, 5 Biss. 125, also 91 Myer's Fed. Dec. 639, and which arose in Illinois, 23 L. R. A.

the decree in the divorce case made no such disposition of the homestead. The fee was in the husband, or we so gather from the case. In the divorce action the meritorious wife obtained custody of the child and alimony in gross. Nothing was said about the homestead. She was in possession, and remained in possession with the child, and she was held entitled to possession, as against her divorced husband's grantee. The case is ruled on the *Vanzant Case*. These cases have been pressed upon us with much confidence, as being a construction by able courts of a homestead law not materially different from our own. The question is now raised for the first time in this jurisdiction. Its decision will announce a rule of property to be followed hereafter. That rule should be supported by sound judicial reasons. We are forced to say, when it is sought to carry the rule indicated in *Vanzant v. Vanzant* to the extent that is here claimed, that it fails to find support in sound reason, and is entirely unnecessary for the protection of the family. It is true that the homestead estate is created for the benefit of the family, and not for the benefit of the husband and father. *Flora v. Flora*, 2 N. Dak. 260. And it is true that courts liberally construe homestead laws, for the purpose of effectuating their wise and beneficent intentions, to the end that no family, through the misfortune of poverty or the death of its legal head, may be deprived of shelter, and where the homestead consists of a farm, as in this case, of support. But all the reasons which have induced the law to favor the wife or widow in the matter of homestead rights are entirely absent in cases of divorce. There is no action known to the law wherein the entire property of both parties is brought more directly within the grasp and control of the chancellor than the action for divorce. In this action the chancellor reviews not only the marital rights and wrongs of the respective parties, but their financial status and financial needs. He requires absolute information as to the number, age, and condition of all minor children. He knows it is the duty of the husband and father to support the family and educate the children. He knows that, in case of the death of the husband and father, the law places its hand upon so much of his property as constituted his homestead, and devotes it exclusively to the accomplishment of those purposes which it was the duty of the husband and father to accomplish while living. Where a divorce *a vinculo* is granted to an innocent wife, and she is given the custody of minor children, it is the duty of the chancellor, so far as the circumstances will permit,—and his power in that respect is plenary,—to compensate the innocent family for every right it has lost by reason of the legal separation from an offending husband and father. Under our statute, the court may in such cases require the husband to give security for any payments ordered to be made to the wife, or for the maintenance of the family; or the court may place the entire estate of the husband in the hands of a receiver, in order to secure such payments or maintenance, and the homestead, as such, is specially placed in the control of the court.

The Statute says (Comp. Laws, sec. 2585): "The court, in rendering a decree of divorce, may assign the homestead to the innocent party, either absolutely or for a limited period, according to the facts in the case and in consonance with the law relating to homestead." It would appear from this language that the legislature, so far from intending that the homestead should pass to the innocent party by virtue of the statute alone, thought it necessary to give the court express power to so dispose of it by decree. We are entirely unable to see any good reason why, after the chancellor, in the exercise of the broad and liberal discretion in him vested, has given the innocent family every protection the circumstances admitted or their needs required, the law should then step in, and transfer to them, at the expense of the husband, another and very material estate, to wit, the homestead owned and theretofore occupied by him. Particularly must this be true when, as in this case, the decree of divorce casts upon the husband the continuing duty of supporting that family, by compelling him to pay a certain monthly payment. It is not to be believed that the law will then grasp the very property out of which the husband must realize the money to make those payments, and transfer it to the family, and yet hold him for the payments. We deem it better for the innocent party, better for the fee owner, better as a rule of property, that the interests of the respective parties in the homestead should be fixed by the decree in the divorce proceeding; and, when that decree is silent, the homestead, like all other realty, must remain in the possession of the party holding the record title, discharged of all homestead rights and claims of the other party; and this we deem the result of the better authorities. *Heaton v. Sawyer*, 60 Vt. 495; *Wiggin v. Buzzell*, 58 N. H. 329; *Biffle v. Pullam*, 114 Mo. 50.

The district court for Steele county will reverse its judgment, and enter a decree granting the relief prayed for in the complaint.

Reversed.

All concur.

Corliss, J., concurring:

The respondent, in effect, claims that she had the right, after she had ceased to be the wife of the owner of the property used by them both as a homestead, to eject her former husband therefrom, notwithstanding the fact that he owned the fee. A homestead right is not property which can be sold. It possesses no value independent of the right to possession. If the respondent has a homestead right in the property in question, she has a right to occupy the premises, and she has no other or different right. She can occupy them during the balance of her life. Her right of possession is inconsistent with the husband's right of occupancy. They are divorced. The family tie is broken. Unless they remarry, it is contrary to public policy that they should live together under the same roof. The divorce was granted because the court decided that they ought not to inhabit

the same home. The homestead right survives the divorce. *Doyle v. Coburn*, 6 Allen, 71; *Biffle v. Pullam*, 114 Mo. 50. In whom is it vested? It cannot belong to both parties. While the family was a unit, it belonged to the family; but, after the union of the family had been destroyed, the homestead right must then have vested exclusively in either the husband or the wife. How can it be claimed that the decree of divorce vested it exclusively in the former wife? That decree, so far from transferring the right from the husband to the wife, struck from under her the very foundation of her claim to a homestead right. This right was given to her as a wife, and after his death she might enjoy it as a widow. After the divorce, she was not his wife, and could never be his widow. The right was given to her because of the duty of the husband to provide her with a home. After the divorce the husband, as such, owed her no such duty. He thereafter owed her no duty whatever as husband. He had ceased to be her husband. Whatever a wife can claim from her former husband after divorce is not as his wife, but under the terms of the decree of divorce itself. If this gives her the homestead, she can have it. If this gives her alimony, she can have it. But she can have no more. If the decree gives her neither the homestead nor alimony, she is entitled to nothing. Her former husband is no longer bound to furnish her a home. But the decree of divorce in this case did in fact require the husband to pay the respondent monthly alimony for her support. The word "support" embraces not only food, fuel, and raiment; it also includes shelter,—a home to live in. The husband is ordered by the court not to provide her a home, much less to surrender up to her his own home. He is directed to furnish her with a certain amount of funds, with which she is to procure a home for herself. Must the husband, in addition, yield up to her his own home? The mere granting of a divorce cannot work a destruction of the husband's rights, and vest them exclusively in the former wife. Nor is it material that the divorce was for the husband's guilt. There is no statute which in the remotest manner warrants the rule that the husband's guilt should of itself, when followed by a divorce, work the destruction of his homestead right in favor of his former wife. His guilt is a circumstance which will weigh heavily with the chancellor in regulating, by his decree, the future duty of the guilty husband to the woman he has wronged. It will lead the chancellor to give the wife the amplest possible support out of the husband's estate and earnings. Frequently it will constrain the court to award to her the homestead, especially when, as in this case, the wife is given the custody of the children. Our statute expressly authorizes the court to do this: "The court, in rendering a decree of divorce, may assign the homestead to the innocent party, either absolutely or for a limited period, according to the facts in the case, and in consonance with the law relating to homesteads." Comp. Laws, § 2585.

This statute is conclusive against the the-

ory of respondent that the mere fact of a granting of a divorce assigns the homestead right to the innocent party. The statute declares that this assignment must be embodied in the decree itself. The best possible time to settle all such matters is when all the facts and circumstances are before the court granting the divorce,—the number, age, and sex of the children; the value of the estate of the husband; his capacity to earn money; the degree of his guilt; the position of the parties in society; and such facts as bear upon the questions who should have the custody of the children, and whether it will be better to allow the wife to live on the homestead, or be supported by the husband elsewhere. There is no danger that denying to the mere granting of a decree of divorce for the husband's guilt the effect to assign the homestead right to the wife will work her any injustice. She can and will be fully protected in and by the decree. There is nothing in the fact that the decree awarded to the respondent the custody of the children. When, in such a case, the decree is silent on the point, the father is bound to support the minor children in the wife's custody the same as before divorce. They are still his minor children. The divorce in this case recognized

this duty. It required the husband to pay the wife alimony for the support, not only of herself, but of the children intrusted to her care. She was to be paid money by the father to provide a home for them, as well as for herself. So far as the children themselves are concerned, it is clear that their rights depend upon the will of their parents, or the one who is entitled to the homestead. The consent of a child is not necessary to the alienation or abandonment of the homestead. The father having conveyed the fee to another, and thereby destroyed his homestead right, the derivative right of the children was by this conveyance destroyed; the consent of the mother to the conveyance being no longer necessary, she having ceased to be the father's wife. The statute gives the wife or widow the homestead right in her husband's real estate used by them as a home. When there is neither a wife nor a widow to claim a joint right with a husband, he is the sole owner of such homestead right when he is the owner of the property itself. This is true of the wife, also, as to property owned by her. Her husband's homestead rights in such property cease when he ceases to be her husband, unless continued in him by the decree of some court of competent jurisdiction.

INDIANA SUPREME COURT.

Harry M. SPRINGER, by His Next Friend,
William G. Springer, *Appt.*,
v.

Norman S. BYRAM *et al.*

(.....Ind.....)

1. On appeal from a general term decision, which held that the overruling of a motion for a new trial by the special term was erroneous, the court is not restricted to the particular points or reasons considered by the general term as the basis of its decision, but may uphold it on other grounds presented by an assignment of errors in the general term, if the conclusion was correct.
2. Disinterested bystanders may testify to statements of a party made in their presence, although they were made to his physician, in respect to the manner in which his injuries were received.
3. Slight differences between the phraseology of a motion for a new trial and that of a bill of exceptions relating to testimony will not prevent the consideration of a question as to the exclusion of the testimony, if the evidence be referred to with such certainty as to call the attention of the court to it and to the ruling in relation thereto, so that the judge cannot mistake the matter.
4. Statements of the brother of an injured person, made in his presence in an ambulance immediately after the injury as to the manner in which it was received and that it

was the fault of no other person, may be proved against the injured person in an action for such injuries.

5. Evidence that a newsboy had previously been refused permission to ride in an elevator is permissible in an action by him for injuries received on such elevator, claiming the rights of a passenger, where the rules of the establishment excluded newsboys from the elevator.
6. A newsboy who attempts to ride in a passenger elevator after he has notice of the rule that newsboys are not allowed to ride although they are permitted to enter the building to ply their vocation, is a trespasser as to any use of the elevator so as to defeat his right to recover for injuries received in such attempt.

(February 15, 1894.)

APPEAL by plaintiff from a judgment of the General Term of the Superior Court for Marion County reversing a judgment of the Special Term in his favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

*Messrs. William V. Rooker and Hese-
kiah Dailey*, for appellant:

The duty of the court at general term is thus defined by statute: It shall, if the judgment of the court at special term be not affirmed,

NOTE.—The question of the contributory negligence of children is one upon which courts will never get fully in accord. The above case is in some degree analogous to the case of children tres-
23 L. R. A.

passing on turntables upon which question the authorities are fully collated in a note to *Fort Worth & D. C. R. Co. v. Robertson* (Tex.) 14 L. R. A. 781.

enter of record the error or errors found therein and remand said cause to the special term with instructions as to said errors, etc. (Rev. Stat. 1881, § 1860). The statute is mandatory.

When this court is advised by the presence of the opinion of the court at general term or when the record is so made up as to show the error or errors found, it proceeds thereupon to consider the errors found by the general term. It considers nothing else.

McWhinney v. Briggs, 85 Ind. 585.

Since parties have the right of appeal from the general term they must exercise that right if they would not be bound. And if, having failed to make their objections in the statutory way, this court treats them as having acquiesced in the action of the general term they will not be heard to complain that their objections to the special term record were not sufficient without a proper appeal to carry through the general term judgment and into this court.

Bartholomew v. Preston, 48 Ind. 286; *McWhinney v. Briggs*, *supra*.

This appeal involves only so much of the special term record as the general term acted on in a way objectionable to the appellant.

A motion for a new trial on the ground that particular evidence was excluded cannot be supported by showing that other and different evidence was excluded.

Bruker v. Kelsey, 72 Ind. 56; *Pittsburgh, C. & St. L. R. Co. v. Wright*, 80 Ind. 185; *Seriel v. Graeter*, 112 Ind. 118; *Choen v. State*, 85 Ind. 212; *Powers v. State*, 87 Ind. 152; *Indianapolis & C. Gravel Road Co. v. Christian*, 93 Ind. 361; *Brown v. Muncie Nat. Bank*, 110 Ind. 323.

The bill of exceptions imports absolute verity.

Byam v. Burkam, 42 Ind. 525; *Jelley v. Roberts*, 50 Ind. 8; *Longworth v. Higham*, 89 Ind. 354.

And when any other part of the record conflicts with the bill of exceptions the bill of exceptions must prevail.

State v. Flemons, 6 Ind. 279; *Carmichael v. Shid*, 21 Ind. 68.

The court did not err in excluding the evidence of the brother because he was not shown to be the agent of the plaintiff (*Francis v. Edwards*, 77 N. C. 271; *Galbreath v. Cole*, 61 Ala. 139; *Central Branch Union Pac. R. Co. v. Hatham*, 22 Kan. 41); nor was it shown that the brother's declaration was any part of the *res gesta*.

Pittsburgh, C. & St. L. R. Co. v. Wright, 80 Ind. 184.

Nor was it shown that the declarations of the brother were in any manner binding on the plaintiff or such as that he should give to them any notice whatsoever.

Goetz v. Bank of Kansas City, 119 U. S. 560, 80 L. ed. 518; *Vicksburg & M. R. Co. v. O'Brien*, 119 U. S. 104, 80 L. ed. 801; *Union Ins. Co. of Philadelphia v. Smith*, 124 U. S. 423, 31 L. ed. 505.

An invitation in the technical sense of the word will be inferred where there is a common interest or mutual advantage; as, for instance, there is an implied invitation to the public generally to enter business houses for the purpose of transacting business.

Beach, Contrib. Neg. p. 55, citing cases. 23 L. R. A.

There could under all the circumstances of the case have been no doubt that the plaintiff was on the premises under such conditions that the defendants owed to him some obligation to exercise care.

Nave v. Flack, 90 Ind. 207, 46 Am. Rep. 205; *Hawkins v. Johnson*, 105 Ind. 33, 55 Am. Rep. 169; *Wabash, St. L. & P. R. Co. v. Locke*, 112 Ind. 410; *Bennett v. Louisville & N. R. Co.*, 102 U. S. 584, 26 L. ed. 237; *McKone v. Michigan Cent. R. Co.*, 51 Mich. 601, 47 Am. Rep. 596; *Bennett v. Louisville & N. R. Co.*, 102 U. S. 580, 26 L. ed. 236; *Low v. Grand Trunk R. Co.*, 72 Me. 313, 39 Am. Rep. 381; *Davis v. Central Cong. Soc. of Jamaica Plains*, 129 Mass. 367, 37 Am. Rep. 368; *Tobin v. Portland, S. & P. R. Co.*, 59 Me. 183, 8 Am. Rep. 415; *Shearm. & Redf. Neg. § 704*, cases cited; *Cooley*, Torts, 2d ed. pp. 356, 718; *Brosnan v. Sweetser*, 127 Ind. 5.

In the absence of such apparent danger as would deter a prudent man, one seeking admission to or egress from a moving car has a right to rely upon that superior knowledge which the law presumes those to possess who are placed in charge of cars and their passengers or of other dangerous machinery.

Louisville & N. R. Co. v. Kelly, 92 Ind. 371, 47 Am. Rep. 149; *Lake Erie & W. R. Co. v. Fix*, 88 Ind. 381, 45 Am. Rep. 464; *Nave v. Flack*, 90 Ind. 205, 46 Am. Rep. 205; *Pennsylvania Co. v. Hoagland*, 78 Ind. 203; *Beach*, Contrib. Neg. p. 72, §§ 52, 53; *Louisville & N. R. Co. v. Orunk*, 119 Ind. 542; *Cincinnati, W. & W. R. Co. v. Peters*, 80 Ind. 179; *Bennett v. Louisville & N. R. Co. supra*; *McIntyre v. New York Cent. R. Co.*, 37 N. Y. 287; *Pennsylvania R. Co. v. McCloskey*, 23 Pa. 526; *Foy v. London, B. & S. Coast R. Co.*, 18 C. B. N. S. 225; *Shearm. & Redf. Neg. 4th ed. § 520*.

Defendants cannot complain that we apply the rule to a machine so much less dangerous than a train of cars as that they deemed it justifiable on their part to place a boy without experience in charge thereof instead of requiring its operation to be done by a man of experience and tested prudence as railroads do.

See *Conner v. Citizens Street R. Co.*, 105 Ind. 67, 55 Am. Rep. 177.

While the plaintiff remained helpless on the floor in the position in which he fell, the car continued to ascend until it had gone up some seven feet and while it was so ascending it could have been stopped in any space of eight inches or at the utmost in eighteen inches with perfect ease and security. During all the time of the ascent, the plaintiff's situation was known to the elevator conductor yet he made no effort to stop the car until the boy began to scream and then he stopped in a space of six or eight inches.

The case comes clearly within the principle of "the proximate cause."

Wright v. Brown, 4 Ind. 95, 58 Am. Dec. 622; *Indianapolis & C. R. Co. v. Caldwell*, 9 Ind. 899; *Nave v. Flack*, 90 Ind. 211, 46 Am. Rep. 205; *Ohio & M. R. Co. v. Hecht*, 115 Ind. 449; *Terre Haute & I. R. Co. v. Buck*, 96 Ind. 865, 49 Am. Rep. 168; *Louisville, N. A. & C. R. Co. v. Lucas*, 6 L. R. A. 193, 119 Ind. 592.

In jure causa proxima non remota spectatur. Broom, Legal Maxims, 2d ed. 165; *Cooley*,

Torts, 2d ed. pp. 73, 816; Bishop, Non-cont. L. § 1086; Shearm. & Redf. Neg. 4th ed. 1, § 94, and notes; Beach, Contrib. Neg. § 10; 73 Am. & Eng. Encyclop. Law. p. 428, and cases; 4 Wait, Act. & Def. p. 718; *Williamson v. Barrett*, 54 U. S. 13 How. 109, 14 L. ed. 78; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. ed. 256; *Inland & S. Coasting Co. v. Tolson*, 189 U. S. 558, 85 L. ed. 272; *Radley v. London & N. W. R. Co. L. R. 1 App. Cas. 754*; *Scott v. Dublin R. Co.* 11 Ir. C. L. Rep. 377; *Austin v. New Jersey S. B. Co.* 43 N. Y. 82, 3 Am. Rep. 663; *Lucas v. New Bedford & T. R. Co.* 6 Gray, 72, 66 Am. Dec. 406; *Northern Cent. R. Co. v. State*, 29 Md. 490, 96 Am. Dec. 545.

The existence of knowledge that a thing may be dangerous does not bar recovery.

Toledo, W. & W. R. Co. v. Brannagan, 75 Ind. 490; *Huntington v. Breen*, 77 Ind. 29; *Murphy v. Indianapolis*, 88 Ind. 76; *Nave v. Flack*, 90 Ind. 205, 46 Am. Rep. 205; *Howard County Comrs. v. Legg*, 98 Ind. 525, 47 Am. Rep. 390; *Porter County Comrs. v. Dombke*, 94 Ind. 72; *Gosport v. Evans*, 112 Ind. 188; *Lake Shore & M. S. R. Co. v. Pinchin*, 113 Ind. 595; *Richmond v. Mulholland*, 116 Ind. 174; *Evansville & T. H. R. Co. v. Crist*, 2 L. R. A. 450, 116 Ind. 451.

Only proximate negligence will defeat a recovery.

16 Am. & Eng. Encyclop. Law, p. 428, topic 6 and cases cited.

Plaintiff had the right to presume when he undertook to enter the elevator that the defendants had done their duty in the selection of a competent elevator conductor, and that they would continue to do such acts as their duty in the premises imposed upon them.

Evansville & T. H. R. Co. v. Crist, *supra*; *Indianapolis, P. & C. R. Co. v. Pitzer*, 109 Ind. 186, 58 Am. Rep. 387.

The following persons shall not be competent witnesses:

Physicians as to matter communicated to them as such by patients in the course of their professional business or advice given in such cases.

Rev. Stat. 1881, § 491, par. 4; *Masonic Mut. Ben. Asso. v. Beck*, 77 Ind. 210, 40 Am. Rep. 295; *Pennsylvania Mut. L. Ins. Co. v. Wiler*, 100 Ind. 100, 50 Am. Rep. 769.

As to an insane person or a child less than ten years of age the statute bears upon the person; as to the physician it bears upon the subject-matter, to the end that "the secrets of the sick chamber cannot be revealed."

The law does not permit spies or detectives to hover about the sick chamber to obtain from the delirium or the incoherent utterances of the afflicted, material on which to fabricate a story that will do them service.

Pennsylvania Co. v. Marten, 7 L. R. A. 687, 123 Ind. 421.

The person of the physician is so remotely contemplated by the law that the physician cannot for himself use the rule of the statute as a personal prerogative.

Masonic Mut. Ben. Asso. v. Beck, 77 Ind. 207, 40 Am. Rep. 295; *Excelsior Mut. Aid Asso. v. Riddle*, 91 Ind. 87; *Pennsylvania Mut. L. Ins. Co. v. Wiler*, 100 Ind. 99, 50 Am. Rep. 769. See also *Williams v. Johnson*, 112 23 L. R. A.

Ind. 274; *Carthage Turnp. Co. v. Andrews*, 103 Ind. 139, 52 Am. Rep. 653; *Heuston v. Simpson*, 115 Ind. 62; *Alina L. Ins. Co. v. Deming*, 123 Ind. 391. See *Edington v. Mutual L. Ins. Co.* 67 N. Y. 185; *Edington v. Alina L. Ins. Co.* 77 N. Y. 564; *Pierson v. People*, 79 N. Y. 424, 85 Am. Rep. 524; *Grattan v. Metropolitan L. Ins. Co.* 92 N. Y. 274, 44 Am. Rep. 372; *Briggs v. Briggs*, 20 Mich. 84; *Grand Rapids & L. R. Co. v. Martin*, 41 Mich. 667; *Scripps v. Foster*, Id. 742; *Fraser v. Jennison*, 42 Mich. 224; *Page v. Page*, 51 Mich. 88; *Dutton v. Albion*, 57 Mich. 578; *Collins v. Mack*, 81 Ark. 684; *Johnson v. Johnson*, 14 Wend. 637; *Allen v. Public Administrator*, 1 Bradf. 231; *People v. Stout*, 8 Park. Crim. Rep. 670; *Gartside v. Connecticut Mut. L. Ins. Co.* 76 Mo. 446, 43 Am. Rep. 765, 16 Cent. L. J. 253.

The Supreme Court of the United States held that the statute looked to the subject-matter rather than to the persons.

Connecticut Mut. L. Ins. Co. v. Union Trust Co. of New York, 112 U. S. 253, 28 L. ed. 709.

The word "attorney" embraces an attorney's clerk.

Indianapolis v. Scott, 73 Ind. 203.

The rules of construction applicable to the paragraph as to physicians was the same as that which applied to attorneys.

Masonic Mut. Ben. Asso. v. Beck, 77 Ind. 210, 40 Am. Rep. 295; *Pennsylvania Mut. L. Ins. Co. v. Wiler*, 100 Ind. 99, 50 Am. Rep. 769.

The court has declared that the statute as to physicians was entitled to a broad construction.

Masonic Mut. Ben. Asso. v. Beck, 77 Ind. 209, 40 Am. Rep. 295.

If necessarily extended the rule of law to include the assistance of an attorney how reasonable that it should likewise extend the rule to include the assistance of a physician.

Messrs. Stubbs & Averill for appellees.

Dailey, J., delivered the opinion of the court:

This is an action for personal injuries alleged to have been sustained by the appellant while being transported in a passenger elevator in a public office building owned and operated by the appellees. The facts disclosed by the record in this cause, briefly stated, are these: In November, 1889, the appellees, Byram and Cornelia, were the owners of an office building situated on East Market street, in the city of Indianapolis. The north half of this building was four stories in height, including the basement, and the south half but three stories. The building was known as the "Thorpe Block," and was rented for office purposes to attorneys, and persons of other occupations. Each half of the block was provided with convenient stairways, giving access to each floor of the block; and in the north half was also situated a passenger elevator, in use for the convenience and benefit of appellee's tenants, and also giving access to each of the four floors of the block. The elevator was propelled by hydraulic pressure, and moved in a shaft built for that purpose, next to the west wall of the building. This shaft was

separated from the halls on the several floors by sliding doors of open wire, the rest of the opening off the several halls being protected by either wirework or paneled woodwork. The elevator was operated by a person employed by the appellees for that purpose, who controlled its movements by means of a rope which opened and closed the valves of the hydraulic apparatus, and which passed through the car near the door of ingress and egress. The appellant, Harry M. Springer, was a boy of the age of twelve years and six months, attending the public schools, and selling newspapers in the afternoons. On the 23d day of November, 1889, the appellant was in the Thorpe block, and on what is known as the "second floor," and attempted to enter the elevator. In making this attempt, he fell partly upon the floor of the elevator, and was carried up and against the framework over the door, receiving injuries, to recover damages for which this action was brought. Appellant's complaint is in three paragraphs: First, charging negligence of defendants in the use of their property and premises in the matter complained of; second, charging willful and wanton disregard of plaintiff's situation by the defendants while he was on and using their property and premises; third, charging defendants with negligence as carriers of the plaintiff. Each paragraph shows that plaintiff was rightfully on the premises, and each also charges a resulting injury to the plaintiff without his fault. A demurrer for want of facts was filed to the second and third paragraphs of the complaint, and overruled, and defendants answered in general denial. Upon these issues the cause was tried at the March term, 1891, of the superior court of Marion county, before a jury, which returned a verdict for the appellant. Appellees filed a motion for a new trial, which was overruled, and judgment was rendered and entered on the verdict. From this judgment at special term appellees appealed to the general term of the superior court, where the judgment at special term was reversed for error in overruling appellees' motion for a new trial. From this judgment of reversal at the general term the appellant has appealed to this court, and by proper assignment of error has presented for review the correctness of the decision of the court in general term in reversing the judgment of the special term, and directing a new trial of the cause.

From the opinion of the court in general term, it appears that the only question presented by the assignment of errors in general term, which was considered and determined by the court, was the action of the court in special term in overruling appellee's motion for a new trial. The overruling of that motion by the court in special term was held to be erroneous, and the assignment of error made in this court presents for review all matters properly assigned as errors in the motion for a new trial. Appellant's brief proceeds upon the theory that the only matters which this court can consider on this appeal are the particular points or reasons in the motion for a new trial, which the opinion of the court in general term shows were

expressly considered by that court, and which that opinion shows were the basis of the action of the general term in reversing the judgment at special term. To this theory we cannot give assent. Clearly, it was not incumbent upon the court in general term, after it had found an error for which the judgment in special term should be reversed, to investigate the sufficiency of the remaining reasons for a new trial, and pass upon the questions as to whether or not they were, severally, well taken. The instructions of the general term, as shown by its judgment, required the court in special term to sustain the defendant's motion for a new trial. This, we think, clearly indicates the error for which the judgment was reversed, and appellant's assignment of error in this court brings to us for review all the questions properly presented by appellees' motion for a new trial. In other words, the judgment of the court in general term sufficiently shows the decision of that court to have been that there was error of the court in special term, in refusing to sustain the motion, as stated, of the appellees for a new trial. A new trial was ordered upon a consideration of the errors assigned by the appellees in general term, viz.: "Third, the court in special term erred in overruling appellants' motion for a new trial of this cause." The general term found this assignment of error well taken, and sustained it as a whole, not in piecemeal, and there was no ruling of the court in general term upon which these appellees had any reason to assign cross-errors. The questions presented to the general term were those presented by the assignment of errors in that court.

In the case of *Wesley v. Milford*, 41 Ind. 416, it is said: "The appeal to this court being allowed from the judgment of the general term only, we think it must follow that whatever errors are assigned in this court must be predicated upon the assignment of errors in the general term, and the action of that court in general term thereon." This being so, it is clear that the action of the court in general term upon the errors assigned in that court is what this court passes upon, and not the several and particular matters which may have been embraced and covered by the assignments of error in the special term. To present to this court questions which were presented in the motion for a new trial, and to separate and set apart for the consideration of the court a portion of the reasons assigned in such motion, is equivalent to presenting to this court for the first time, as grounds for reversal, matters which must be assigned as reasons for a new trial. The appellant's assignment of error in this court, and his complaint here, is "that said general term of said court erred in reversing the judgment of the special term of said superior court, and remanding said cause for another trial to said special term." The question is not whether the reasons given by the court are sound or unsound, but rather, upon a consideration of the matters presented by the assignment of errors in the general term, did the court reach a right conclusion, and enter a judgment to which these appel-

lees were entitled upon the errors assigned in that court?

The first assignment in appellees' motion for a new trial embraces alleged errors of law occurring and excepted to by the defendants at the time, and comprised in subdivisions A to S, inclusive. The first three subdivisions each relate to the correctness of the ruling of the trial court in excluding the testimony of the two witnesses Scott and Goth with reference to a conversation sought to be proved between the appellant and Dr. Sutcliffe, in the ambulance, almost immediately after the accident, in the presence and hearing of the witnesses interrogated in reference thereto, and included the statement of the appellant as to the manner in which his injuries were received. The objection to the offered testimony was sustained upon the theory that it was incompetent to prove a conversation between a physician and his patient. In defining who are incompetent to testify, section 497, Rev. Stat. 1881, reads: "Third. Attorneys, as to confidential communications made to them in the course of their professional business, and as to advice given in such cases." "Fourth. Physicians, as to matter communicated to them, as such, by patients, in the course of their professional business, or advice given in such cases." It has been held that communications made through a third person from a client to a solicitor are privileged, if otherwise entitled to be so; also, whoever represents a lawyer in conference or correspondence with the client is under the same protection as the lawyer himself. The privilege extends to the attorney's clerk, interpreter, assistant attorney, or other agent, while in the discharge of his duty. 19 Am. & Eng. Encyclop. Law, 181, 182. At common law, confidential communications made by a patient to a physician are not privileged. The common law in this state has been changed by statute, *supra*. It was said in *Masonic Mut. Ben. Assn. v. Beck*, 77 Ind. 208, 40 Am. Rep. 295, that the object of these statutes seems to be to place the communications made to physicians in the course of their professional employment upon the same footing with communications made by clients to their attorneys in the course of their employment. "The privilege may attach notwithstanding the presence of third persons in the sick-room, where the consultation is had. *Cohen v. Continental Ins. Co.* 9 Jones & S. 296. If the attending physician calls in another physician for consultation, the communications made to the latter are privileged. *Aetna L. Ins. Co. v. Deming*, 123 Ind. 884; *Raymond v. Burlington, C. R. & N. R. Co.* 65 Iowa, 152; *Renihan v. Dennin*, 103 N. Y. 573, 57 Am. Rep. 770. Where there are two physicians, the patient does not, by calling one of his physicians as a witness, waive his privilege to object to the testimony of the other. *Pennsylvania Mut. L. Ins. Co. v. Wiler*, 100 Ind. 92, 50 Am. Rep. 769; *Mellor v. Missouri Pac. R. Co.* 105 Mo. 455, 10 L. R. A. 36; *Record v. Saratoga Springs*, 46 Hun, 448.

Communications made by a patient to his physician, for the purpose of professional

aid and advice, are privileged, because intended to be private and confidential, and can never be divulged without the consent of the patient; it being the privilege of the patient, and not of the physician. The privilege of exemption from testifying to declarations made and facts actually known is extended to a physician who derives his knowledge from the communications of a patient who applies and makes disclosures to him in his professional character. The immunity extends to all such facts, whether learned directly from the patient himself, or acquired by the physician through his own observation or examination. 7 Am. & Eng. Encyclop. Law, 508. Neither can disclosures be made by other persons whose intervention is strictly necessary to enable the parties to communicate with each other. In *Cotton v. State*, 87 Ala. 78, the court says: "The rule as to the inviolability of professional confidences applies, as between attorney and client, only to communications made and received for the purposes of professional action and aid; and the secrecy imposed extends to no other persons than those sustaining to each other the confidential relationship, except the necessary organs of communication between them, such as interpreters and their own agents and clerks." Further it does not extend. It is settled law that if parties sustaining confidential relations to each other hold their conversation in the presence and hearing of third persons, whether they be necessarily present as officers, or indifferent bystanders, such third persons are not prohibited from testifying to what they heard. *Cotton v. State*, 87 Ala. 75; *House v. House*, 61 Mich. 69; *Re McCarthy*, 55 Hun, 7; *Com. v. Griffin*, 110 Mass. 181; *Hoy v. Morris*, 13 Gray, 519, 74 Am. Dec. 650; *Oliver v. Pate*, 48 Ind. 132, on page 142; *Whart. Crim. Ev.* § 398; 1 Lawson, Rights, Rem. & Pr. § 147.

From the record it appears that the witnesses Scott and Goth, whose testimony was rejected or excluded by the court, were employes of one C. E. Kregelo, an undertaker of the city of Indianapolis, who sent an ambulance to convey the appellant to his home, and these witnesses were in charge of it. It does not appear from the transcript that they were in the employ of either the physician or the injured party, or that even their principal was attending him for hire. Scott and Goth were, for aught that appears, disinterested bystanders, and were competent to testify, and the weight of their statements was to be determined by the jury.

Counsel for appellant seek to shut out the consideration of this question because of slight differences between the phraseology of the motion for a new trial and that of the bill of exceptions relating to the testimony offered to be proved by the appellees. The offer on the trial is in these words: "Now, we offer to prove, may the court please, by this witness [Scott], that in the ambulance, in the presence of this witness and Dr. Sutcliffe and of Mr. Goth, this boy, the plaintiff in this case, stated that he attempted to get on the elevator while it was in motion, and that that was the way in which he got hurt,

and, further, that nobody was to blame; that his brother said that nobody was to blame except himself; that it was his own fault; that he tried to get on the elevator while it was in motion; and that he was playing in the halls at the time, and had been playing about the elevator." The words, as made in the motion for a new trial, are: "We offer to prove . . . that in the ambulance, in the presence of this witness and Dr. Sutcliffe and Mr. Goth, this boy [the plaintiff in this case] stated that he attempted to get into the elevator while it was in motion, and that that was the way he got hurt, and, further, that nobody was to blame except himself; that it was his own fault; that he was hurt in trying to get into the elevator while it was in motion; and that he was playing in the halls at the time, and had been playing about the elevator." In the late case of *Ohio & M. R. Co. v. Stein*, 133 Ind. 243, 19 L. R. A. 733, it is said: "It is not the practice, and it is not incumbent on a party, in a motion for a new trial, to set out in detail a verbatim copy of the evidence admitted over objection, or offered and refused, or a verbatim statement of the objections made to its introduction. It is sufficient if the evidence be referred to with such certainty as to call the attention of the court to it, and to the ruling in relation thereto, so that the judge could not mistake the matter, and the ruling alluded to and complained of by the party filing the motion." We also cite *Clark v. Bond*, 29 Ind. 556, 557; *Meyer v. Bohlfing*, 44 Ind. 238, 239. We think the statement of the offered evidence in the motion for a new trial was sufficiently explicit to inform the court of the question sought to be raised by the motion. The matter offered to be proved in the trial court was not objectionable because it sought to incorporate a statement of the brother, made in the ambulance in the presence of the appellant. "If statements are made in the presence and hearing of a person, affecting his rights, and under such circumstances as call for a reply, what he said, or if he failed to say anything, may be proven, as in the nature of an admission." *Pierce v. Goldsberry*, 35 Ind. 317; *Puett v. Beard*, 86 Ind. 104; *Surber v. State*, 99 Ind. 71; *Brayles v. State*, 47 Ind. 251; *Conway v. State*, 118 Ind. 482. In *Rice on Evidence* (vol. 1, p. 224), the author says: "The act or declaration of another person, and within the observation of a party, and his conduct in relation thereto, is relevant, if, under all the circumstances of the case he would have been likely to have been affected by the act or the declaration."

Subdivision F calls in question the ruling of the court in sustaining the appellant's objection to the following question propounded to Earl Spain, a witness called on behalf of appellees: "If, at any time,—say the week before the day he was hurt,—he tried to get into the elevator, tell the jury what you said to him." Appellees then offered to prove by the witness, in answer to the above question, that "about a week before this accident occurred the appellant did try to get in, and asked to get in the elevator, and was then told that he would not be allowed to, that newsboys were not allowed to ride in that elevator,

and that he could not, and that he did, in spite of that injunction, get in, and was put out." This evidence was excluded on the ground that it was not material and competent, under the issues in this case. The only issue tendered by the complaint was that of negligence. Under the allegations of the complaint charging negligence, it was incumbent upon the appellant, in order to charge the appellees with a breach of duty towards him, to show that he was rightfully attempting to use the elevator in the Thorpe block. If his attempted use of that elevator was wrongful, then, the only legal duty on the part of the appellees was not to willfully injure him. If it was necessary for appellant to show that he was rightfully attempting to use the same, then, clearly, appellees had the right to have any evidence which tended to show that appellant was not rightfully engaged in its use go to the jury, under the general denial. It will be observed, from a reading of the several paragraphs of the complaint, that it charges these appellees, as carriers of passengers, with a breach of duty on their part, as such, in this: that "plaintiff was invited by the defendants to enter said elevator, and be transported therein." Under the issue tendered by the complaint, it was only necessary for the appellant to show an implied invitation on the part of the appellees, for him to enter and be transported therein and, if this be true, then certainly it was competent for appellees to show that appellant was notified of the fact, prior to the accident, that newsboys were not allowed to ride in the elevator, and that he could not do so. If, as a matter of fact, he had been so warned,—if he knew that appellees did not allow newsboys to ride in the elevator,—in what respect was there a rightful attempt on his part to use the elevator contrary to the knowledge which he had? The mere fact that he was permitted to enter the building and ply his vocation as newsboy, cannot, alone, be held to bind the appellees to carry him in their elevator, whether they wished or not. It would be just as reasonable to conclude that if a person were admitted upon a train of cars as a passenger, and provided with a passenger car, he could insist upon and be at liberty to ride in the baggage car, or upon an engine, or occupy a berth in a sleeper without a permit. If the appellees had a rule with respect to their elevator, by which they required the person in charge to refuse its use to newsboys in the building, such a rule would have to be brought to the attention or knowledge of the boy, in some way, before he would be bound by such rule; but we think it is clear that, after he has been apprised of appellees' rule to the effect that he cannot be carried in their elevator, it would be binding upon him. This rule has been uniformly sustained in the case of common carriers of passengers, and where a passenger has taken a position upon a train contrary to known rules of the carrier to the contrary, and has been injured in consequence of the violation of such rule, it has been held, without exception, we believe, that there was no right of recovery. It has also been frequently held that, where a person

is invited to ride upon a train of cars by an employé who had no authority to give such invitation, the party accepting the same was either a trespasser or a mere licensee, to whom the carrier owed no duty to exercise care.

Waterbury v. New York Cent. & H. R. R. Co. 21 Blatchf. 814, 17 Fed. Rep. 671; *Eaton v. Delaware, L. & W. R. Co.* 57 N. Y. 889, 15 Am. Rep. 513; *Duff v. Allegheny Valley R. Co.* 91 Pa. 458, 36 Am. Rep. 675; *Woodruff v. Bowen* (Ind.) 22 L. R. A. 198; *Pennsylvania R. Co. v. Langdon*, 93 Pa. 21, 37 Am. Rep. 651; *Hickey v. Boston & L. R. Co.* 14 Allen, 429; *Gulf, C. & S. F. R. Co. v. Campbell*, 76 Tex. 174; *Farris v. Hoberg*, 134 Ind. —; *Fluker v. Georgia R. & Bkg. Co.* 81 Ga. 461, 3 L. R. A. 848; *Robertson v. New York & H. R. Co.* 22 Barb. 91; *Chicago, M. & St. P. R. Co. v. West*, 125 Ill. 820; *Cooper v. Lake Erie & W. R. Co.* (decided at the present term), (Ind.) 36 N. E. Rep. 272.

Under the issues, it was certainly a material fact, which the appellees had a right to show, whether or not this appellant had knowledge, a week before the injury, of the fact that

newsboys were not allowed in the elevator. It tended to negative any proof that he might have offered showing that he was rightfully attempting to ride at the time of the accident complained of, and also tended to show that as to any use of the elevator, he was a trespasser. The refusal of the court at the special term to admit this testimony deprived appellees of a valuable element of their defense,—that there was no invitation to appellant to ride, and that he was not permitted to do so. It was harmful error to sustain appellant's objection to the question, and exclude the evidence offered.

Subdivision Q of the first reason for a new trial challenges instruction No. 3, and, indeed, the whole series of instructions is criticised by the appellees; but this opinion has already been extended beyond the limits intended, and we will not consider the objection presented to the instructions.

We think the decision of the court in general term reversing the judgment of the special term correct, and *it is affirmed*.

MISSOURI SUPREME COURT (In Banc).

William SCHMITZ, by His Next Friend,
Anton Schmitz, *Resp't.*,
v.

ST. LOUIS, IRON MOUNTAIN &
SOUTHERN R. CO., *Appt.*

(.....Mo.....)

1. In an action by a child for injuries sustained at a railway crossing, in attempting to cross between cars standing on the crossing, evidence that plaintiff saw others cross before him, and that there was no flagman at the crossing, is admissible on the issue of defendant's negligence in starting the train without warning.
2. A deposition of a witness taken by plaintiff and filed in the suit is properly excluded on plaintiff's objection that the witness is present, upon defendant's offering it in evidence, under the implication contained in Rev. Stat. 1899, § 4461, which makes no provision for the reading of the deposition of a witness not a party to the suit who is present at the trial.
3. A railroad company which leaves a train standing for several minutes upon a much-used street crossing, with a slight space between the cars, as if to invite passage between them, is bound to use reasonable care in closing up the opening to avoid injury to one who is attempting to cross, although he has placed himself in such relation to the train that under other circumstances he would be regarded as a trespasser.
4. A child who, by reason of his want of knowledge, is not guilty of negligence in attempting to follow the example of adults in passing between cars standing upon a street

crossing, may recover damages if injured by the negligence of the company.

5. In an action for personal injuries sustained at a street crossing by the pushing of cars together while plaintiff was passing between them, the company's failure to ring the bell or sound the whistle before moving the cars, although not constituting a statutory cause of action, is properly considered in determining whether the company exercised due care in moving the cars.
6. A party cannot on appeal complain of an error in giving an instruction at his own instance and request.
7. The giving of an instruction assuming that it was a railway company's duty to keep a flagman at a street crossing, whereas the statute imposes no such duty, is not ground for reversal, where the company could not have been prejudiced thereby because the evidence clearly shows that it did have a flagman at such crossing.
8. Ignorance of danger by reason of his youth and inexperience may properly be considered on the question of the contributory negligence of a child in attempting to pass between cars standing on a street crossing.
9. Mental anguish of a boy nine years old, consisting of grief and sorrow over the loss of his limb and becoming a cripple for life, is a proper element of damages in an action by him for injuries sustained by the alleged negligence of a railway company at a highway crossing.
10. Prospective damages by the impairment of plaintiff's capacity for earning a livelihood after his majority is

NOTE.—Upon the general rule as to negligence in passing between or under cars, see note to *Central R. & Bkg. Co. v. Rylee* (Ga.) 13 L. R. A. 694. See also *Bumpel v. Oregon S. L. & U. N. R. Co.* (Idaho) 22 L. R. A. 725, in which an adult was held to be 23 L. R. A.

precluded by his negligence in attempting to crawl under a standing train from recovering for injuries caused by the starting of the train although no warning was given.

a proper element in an action for personal injuries by a minor nine years old, although his petition contains no specific allegation in regard thereto and there is no direct evidence on the subject.

11. In the absence of any objection in the lower court as to the amount of damages allowed by the jury such question cannot be raised for the first time on appeal.

(Sherwood, J., dissents.)

(December 4, 1893.)

APPEAL by defendant from a judgment of the Circuit Court for Warren County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. H. S. Priest and H. G. Herbel, for appellant:

The court erred in excluding the deposition of Frank Furlay offered by defendant, which had been taken by plaintiff and filed in this case.

Schmick v. Noel, 64 Tex. 406.

The court erred in overruling defendant's demurrers to the evidence interposed at the close of plaintiff's case and of the whole case.

Atchison, T. & S. F.R. Co. v. Plaskett, 47 Kan. 107; *Corcoran v. St. Louis, I. M. & S. R. Co.* 105 Mo. 899; *Rushenberger v. St. Louis, I. M. & S. R. Co.* 109 Mo. 112; *Hudson v. Wabash Western R. Co.* 101 Mo. 31; *Stillson v. Hannibal & St. J. R. Co.* 67 Mo. 671; *Dahletrom v. St. Louis, I. M. & S. R. Co.* 96 Mo. 102; *Andrews v. Central R. & Bkg. Co.* 10 L. R. A. 58, 86 Ga. 192, 46 Am. & Eng. R. R. Cas. 171; *Bird v. Flint & P. M. R. Co.* 86 Mich. 79; *Lewis v. Baltimore & O. R. Co.* 88 Md. 588, 17 Am. Rep. 521; *Lake Shore & M. S. R. Co. v. Pinchin*, 118 Ind. 692, 31 Am. & Eng. R. R. Cas. 428; *Sherman v. Hannibal & St. J. R. Co.* 72 Mo. 66, 37 Am. Rep. 423; *Rodgers v. Lees*, 12 L. R. A. 216, 140 Pa. 475; *Waldhier v. Hannibal & St. J. R. Co.* 71 Mo. 514; *Kelley v. Barber Asphalt Co.* 14 Ky. L. Rep. 256; *Diauhi v. St. Louis, I. M. & S. R. Co.* 105 Mo. 645.

The court erred in refusing the instructions asked by defendant.

Stewart v. Clinton, 79 Mo. 614; *Corcoran v. St. Louis, I. M. & S. R. Co.* 105 Mo. 405; *Rushenberger v. St. Louis, I. M. & S. R. Co. supra.*

The court erred in giving the instructions asked by plaintiff.

Stephens v. Hannibal & St. J. R. Co. 86 Mo. 227; *O'Brien v. Loomis*, 43 Mo. App. 29; *Mateer v. Missouri Pac. R. Co.* 105 Mo. 354; *Gurley v. Missouri Pac. R. Co.* 98 Mo. 450; *Zimmerman v. Hannibal & St. J. R. Co.* 71 Mo. 476; *Ohio & M. R. Co. v. Pearey*, 128 Ind. 197; *Mellor v. Missouri Pac. R. Co.* 10 L. R. A. 36, 105 Mo. 462; *Wilburn v. St. Louis, I. M. & S. R. Co.* 86 Mo. App. 215.

The court erred in overruling defendant's motion for a new trial because of the errors in instructions and the excessiveness of the verdict.

Sharp v. Kansas City Cable R. Co. 114 Mo. 94; *Gurley v. Missouri Pac. R. Co.* 104 Mo. 233; *Parsons & P. R. Co. v. Montgomery*, 46 Kan. 120.

23 L. R. A.

Mr. Seneca N. Taylor, for respondent:

It was not error for the court to admit the testimony of plaintiff, and other witnesses, of the fact that about one hundred persons had passed over, and between the disconnected draw-bars, in the situation they were in, when plaintiff attempted to cross over, and that, too, during the ten or fifteen minutes he stood waiting to pass over:

1. Because it was proper as showing the environment immediately before, and at the time plaintiff attempted to cross over the disconnected draw-bars, and also as showing the reasonableness for active diligence on the part of the defendant.

Fiedler v. St. Louis, I. M. & S. R. Co. 107 Mo. 645; *Barker v. Hannibal & St. J. R. Co.* 98 Mo. 50.

2. Because the action of others on the same occasion was a part of the *res gestæ* and tended to show what others deemed prudent in a like situation.

Twomley v. Central Park N. & E. R. Co. 69 N. Y. 158, 25 Am. Rep. 162; *Galena & C. U. R. Co. v. Fay*, 16 Ill. 568, 63 Am. Dec. 823; *Kleiber v. People's R. Co.* 14 L. R. A. 613, 107 Mo. 254.

The court did not err in refusing to allow defendant to read the deposition of Frank Furlay, because he was present in court at the time the same was offered, ready to be examined, having been duly subpoenaed in the case.

Rev. Stat. 4482; *Schmitz v. St. Louis, I. M. & S. R. Co.* 46 Mo. App. 392; *Priest v. Way*, 87 Mo. 28.

The court did not err in overruling defendant's demurrers to the evidence. On the case made by the evidence, according to the great weight of authority, it was properly submitted to the jury.

Schmitz v. St. Louis, I. M. & S. R. Co. supra; *Hiltz v. Missouri Pac. R. Co.* 101 Mo. 53; *Wilkins v. St. Louis, I. M. & S. R. Co.* Id. 93; *Gurley v. Missouri Pac. R. Co.* 104 Mo. 227; *Mateer v. Missouri Pac. R. Co.* 105 Mo. 320; *Fiedler v. St. Louis, I. M. & S. R. Co.* 107 Mo. 651; *Grant v. Baltimore & P. R. Co.* 2 McArthur. 277; *Rauch v. Lloyd*, 81 Pa. 358, 72 Am. Dec. 747; *Fitzpatrick v. Baltimore & O. R. Co.* 35 Md. 82; *McMahon v. Northern Cent. R. Co.* 39 Md. 433; *Shearm. & Redf. Neg.* 4th ed. §§ 92, 479; *Baum v. Fryrear*, 85 Mo. 151; *Karle v. Kansas City, St. J. & C. B. R. Co.* 55 Mo. 494; *Werner v. Citizens R. Co.* 81 Mo. 368; *Petty v. Hannibal & St. J. R. Co.* 88 Mo. 806; *Keim v. Union R. & Transit Co.* 90 Mo. 321; *Huckshold v. St. Louis, I. M. & S. R. Co.* 90 Mo. 555; *O'Connor v. Missouri Pac. R. Co.* 94 Mo. 150; *Dunkman v. Wabash, St. L. & P. R. Co.* 95 Mo. 241; *Kelly v. Union R. & Transit Co.* Id. 284; *Sullivan v. Missouri Pac. R. Co.* 97 Mo. 118; *Chicago, B. & Q. R. Co. v. Stumpa*, 69 Ill. 409; *Savannah & M. R. Co. v. Shearer*, 58 Ala. 672; *Robinson v. Western Pac. R. Co.* 48 Cal. 409; *Kellogg v. Chicago & N. W. R. Co.* 26 Wis. 223, 7 Am. Rep. 69; *Correll v. Burlington, C. R. & N. R. Co.* 38 Iowa, 120, 18 Am. Rep. 22; *Klanowski v. Grand Trunk R. Co. of Canada*, 57 Mich. 525; *Humphreys v. Armstrong County*, 56 Pa. 204; *Filer v. New York Cent. R. Co.* 49 N. Y. 47, 10 Am. Rep. 327; *Foley v. Railroad Co.* 18 C. B. N. S. 225; *Olayards v. Dethick*, 12 Q. B. 495.

2. Moreover, defendant, by offering evidence after its demurrer was overruled, thereby waived it, and cannot now insist that the court erred, even if in fact it did, which I deny.

Bowen v. Chicago, B. & K. C. R. Co. 95 Mo. 275; *Kelly v. Union R. & Transit Co.* Id. 279; *McPherson v. St. Louis, I. M. & S. R. Co.* 97 Mo. 253; *Hitz v. Missouri Pac. R. Co.* 101 Mo. 86.

3. Passing through the gap between the cars in a public street under the circumstances shown in this case, was not negligence *per se*.

Wilkins v. St. Louis, I. M. & S. R. Co., Grant v. Baltimore & P. R. Co., Rauch v. Lloyd, Fitzpatrick v. Baltimore & O. R. Co., and McMahon v. Northern Cent. R. Co. supra; Shearm. & Redf. Neg. 4th ed. §§ 92, 479; Schmitz v. St. Louis, I. M. & S. R. Co. supra.

Where a boy uses the care reasonably to be expected from one of his years and capacity, he is not guilty of contributory negligence, and whether or not he did use such care is a question for the jury.

Schmitz v. St. Louis, I. M. & S. R. Co. supra; Kempinger v. St. Louis & I. M. R. Co. 3 Mo. App. 581; *Boland v. Missouri R. Co.* 36 Mo. 484; *O'Flaherty v. Union R. Co.* 45 Mo. 71, 100 Am. Dec. 843; *Koons v. St. Louis & I. M. R. Co.* 65 Mo. 592; *Donoho v. Vulcan Iron Works*, 75 Mo. 401; *Saare v. Union R. Co.* 20 Mo. App. 211; *Hudson v. Wabash Western R. Co.* 101 Mo. 38; *Williams v. Kansas City, S. & M. R. Co.* 96 Mo. 275; *Dowling v. Allen*, 102 Mo. 218; *Washington & G. R. Co. v. Gladmon*, 82 U. S. 15 Wall. 401, 21 L. ed. 114; *Stout City & P. R. Co. v. Stout*, 84 U. S. 17 Wall. 657, 21 L. ed. 745; *Kansas Cent. R. Co. v. Fitzsimmons*, 22 Kan. 686, 31 Am. Rep. 203; *Hydraulic Works Co. v. Orr*, 88 Pa. 332.

Active diligence was due from defendant to use reasonable care and precaution not to injure children on the street, though climbing over its disconnected draw-bars. Defendant's instructions refused to state the reverse, and were properly refused.

Wilkins v. St. Louis, I. M. & S. R. Co. 101 Mo. 93; *Hitz v. Missouri Pac. R. Co.* 101 Mo. 58; *Frick v. St. Louis, K. C. & N. R. Co.* 75 Mo. 595, 5 Mo. App. 439; *Gurley v. Missouri Pac. R. Co.* 104 Mo. 227; *Harlan v. St. Louis, K. O. & N. R. Co.* 65 Mo. 24; *Dunkman v. Wabash, St. L. & P. R. Co.* 95 Mo. 232; *Scoville v. Hannibal & St. J. R. Co.* 81 Mo. 440; *Kelley v. Hannibal & St. J. R. Co.* 75 Mo. 140; *Welsh v. Jackson County Horse R. Co.* 81 Mo. 466; *Brown v. Hannibal & St. J. R. Co.* 50 Mo. 461, 11 Am. Rep. 420; *Boland v. Missouri R. Co.* 36 Mo. 490; *O'Flaherty v. Union R. Co.* 45 Mo. 71, 100 Am. Dec. 843; *Cadmus v. St. Louis Bridge & Tunnel Co.* 15 Mo. App. 95; *White v. Wabash Western R. Co.* 34 Mo. App. 74; *Mauerman v. St. Louis, I. M. & S. R. Co.* 41 Mo. App. 348; *Schmitz v. St. Louis, I. M. & S. R. Co.* 46 Mo. App. 380; *Fugler v. Bothe*, 43 Mo. App. 44; *Dougherty v. Missouri R. Co.* 97 Mo. 647; *M. Forster Vinegar Mfg. Co. v. Guggemos*, 98 Mo. 391; *Boller v. Cohen*, 42 Mo. App. 97; *Wetzell v. Wagoner*, 41 Mo. App. 509; *Missouri Pac. R. Co. v. Schoennen*, 37 Mo. App. 613.

The court did not give improper or illegal instructions at the instance of the plaintiff.

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The instructions given for plaintiff are in substance the same as those given in *Wilkins v. St. Louis, I. M. & S. R. Co.* 101 Mo. 101; and in *Schmitz v. St. Louis, I. M. & S. R. Co.* 46 Mo. App. 380.

Hicks v. Pacific R. Co. 64 Mo. 439; *Koons v. St. Louis & I. M. R. Co.* 65 Mo. 592.

Burgess, J., delivered the opinion of the court:

This is a suit by William Schmitz, a minor, nine years old, by his next friend, Anton Schmitz, to recover damages for personal injuries caused by the negligence of the defendant in operating its cars upon Leperance street crossing in the city of St. Louis. It was brought in the circuit court of the city of St. Louis, and thereafter taken by change of venue to Warren county circuit court. It was tried before a jury, and resulted in a verdict and judgment of \$5,708 for plaintiff. The petition, or that part of it which is before this court for consideration, is as follows: "Now comes the plaintiff, and avers that he is a minor, under the age of ten years, and that Anton Schmitz was duly appointed as his next friend to bring this suit, before said suit was brought. That defendant is, and at the time hereinafter mentioned was, a corporation duly organized under the laws of the state of Missouri, and engaged in the operation of a railroad, a part of which is in the city of St. Louis. Plaintiff further states that on the 24th day of August, 1890, and in the daytime, he was going east on a public street in said city known as 'Leperance Street,' where said street is crossed by defendant's railroad in said city. That at said time and place a train of flat cars was standing across said street, which impeded his progress on said street, which train stood there for several minutes, and not in motion. The plaintiff, seeing said train standing perfectly still for several minutes, and there being no sign or indication that it was going to move, and seeing many adults and others crossing over the same in said street—between the flat cars—without let or hindrance, or notice not to do so, undertook to cross over between two such flat cars, in said street, where the other persons upon said street had crossed immediately before him. That he stopped, listened, and looked before so crossing, and the bell of the locomotive was not rung, the whistle was not sounded, nor was any audible or visible signal given by defendant or its employes to notify plaintiff that said train was about to be thrust backwards, nor was any brakeman in sight of plaintiff, nor was any brakeman on the rear of said train, nor was there any gate or bar across said street where it was crossed by said railroad; and without any notice or warning whatever given on the part of the defendant, the said defendant violently, suddenly, carelessly, and negligently caused the engine, propelled by steam power, to jam the cars of said train together, thereby breaking and crushing the bones of plaintiff's foot and ankle between the bumpers of two of said cars while he was in the act of crossing as aforesaid, and in consequence he was injured, and maimed for life, and caused to

suffer great physical and mental pain and agony. Plaintiff further states that, considering his age and intelligence, he was at the time exercising that degree of care and diligence which could be expected of him, or that was due from one of his age, and that the immediate cause of said injury to him was the carelessness and negligence of the defendant in failing to do its duty in protecting persons, and especially children of immature judgment, in the lawful use of said public street from injury by its said cars; that the car so thrust backward which crushed plaintiff's foot was attached to several other cars and a locomotive, constituting a freight train, which at the time of said injuries was propelled backward suddenly and violently by steam power. Wherefore plaintiff avers that he has been injured and sustained damages in the sum of twenty thousand dollars (\$20,000), for which, with cost of suit, he prays judgment." The answer was a general denial and plea of contributory negligence on plaintiff's part in attempting to cross the track at the time, place, and manner he did. Plaintiff replied, denying the new matter in the answer.

The facts are that on August 24, 1890, William Schmitz, aged nine years and two months, with three other boys, went east on Lesperance street, a public street in the city of St. Louis, and, on arriving at the place where defendant's railroad tracks cross the street, they found their way impeded by two cars, the bumpers of which were disconnected, leaving an opening of about nine inches between them. They saw about fifty to seventy-five persons cross the track upon which said cars were standing, in a line near the center of the most traveled part of the street,—some of whom passed over and some under the disconnected bumpers, and some passed through the 9-inch space between them sideways; while some others climbed over the car, it being a flat car. After all of these had passed over, plaintiff and his then comrades still stood, looked, listened, and waited for the cars to separate further, thus widening the gap. After thus waiting for the cars to be moved from the street crossing five to fifteen minutes, during which time there was no flagman or other employé of defendant in sight and neither seeing nor hearing any indications that the cars would be moved, and being anxious to reach the other side of the railroad track, one of these boys crossed the track by passing through the disconnected bumpers, and then another climbed over said bumpers, and plaintiff endeavored to follow him, and in doing so put one foot on one of the bumpers and raised his body, and, as his other foot was swinging between the disconnected bumpers, the defendant's employés in charge of the engine caused it suddenly to jam the bumpers of the cars together, thereby catching plaintiff's foot and ankle between said disconnected bumpers, crushing the bones and muscles. The flagman was not in sight: The evidence shows that the plaintiff did not think that the cars would be moved without his being notified, and did not apprehend any danger in endeavoring to pass over the bumpers as he did on this occasion.

It also shows that he suffered intense physical pain for many months after his injury, and that he is crippled for life. The extent of his injuries was testified to by Dr. Faber; and his foot and ankle, as it appeared at the trial, was exhibited to the jury without objection.

During the course of the trial plaintiff was permitted, against defendant's objections, to prove that a large number of persons had crossed the train before he did, and that there was no watchman at the crossing to warn them of danger. The defendant saved his exceptions to these rulings of the court. The testimony adduced by the defendant tended to prove that a few minutes before the accident there was a train of cars standing north of the crossing; that defendant's watchman, John Misch, was standing on the west side of the track on which plaintiff was injured; that he saw several cars moving northward on the track towards the crossing at a slow rate of speed; that he crossed over this track to the east side, just a moment previous to the closing of the crossing; that he did not see plaintiff or his companions anywhere near the crossing at that time, nor did he see them there at all until after he heard the cry of pain caused by the crushing of plaintiff's foot; that the accident happened only a few moments after he had crossed over the track; that he was standing on the next track east of the one on which plaintiff was injured, and was within a few feet of him at the time; that there was a train backing northward towards the crossing a few moments before the accident; that the men in charge of this train were coupling up detached sections of cars for the purpose of making up a train; that the car which injured plaintiff formed a part of one of these detached sections, but the train backing north was not attached to this section, and never came in contact therewith, so far as the employés in charge of the train knew; that none of the hands in charge of this train witnessed or knew anything about the accident until after it had happened; that the watchman had been at the crossing all day, in the discharge of his duty, and was on the opposite side of the train on the track next to the one on which the boy was injured at the time thereof. The defendant offered in evidence the deposition of Frank Furley, which had been taken by plaintiff, and filed in this suit, to which evidence plaintiff objected, on the ground that the witness was in court, it appearing from the cross-examination of plaintiff's witnesses that deponent had been taken to the court by plaintiff. The court sustained the objection, and excluded the deposition, to which ruling and action of the court defendant at the time duly excepted. Defendant thereupon prayed the court to instruct the jury as follows:

"(a) The court instructs the jury that under the pleadings and the evidence the plaintiff cannot recover. First. The court instructs the jury that the following are the only grounds of negligence charged in plaintiff's petition which you can consider under the instructions hereafter given you: (1) That the bell of the locomotive was not rung, or the whistle sounded; (2) that plaintiff

was not notified of the intention of those in charge of the train to move it backward; (8) that no brakeman was on the rear car of said train; (4) that there was no gate or bar across the street; (5) that the servants of defendant, without any notice or warning, suddenly, carelessly, and negligently caused the engine to jam the cars of the train together, whereby plaintiff's foot was crushed and mashed. You are further instructed that it is admitted by the plaintiff's petition that the cars between which plaintiff was injured were coupled together and plaintiff was injured while attempting to climb between them." "Third. Concerning the charge in plaintiff's petition that the plaintiff was not notified of the intention of those in charge of the train to move it backwards, you are instructed that the defendant's servants had the right to assume that no person would attempt to climb between the cars of said train, and said servants were not bound to give notice to any one so climbing between said cars unless said servants knew that said person was in between said cars, so in the act of climbing over them; and unless you believe from the evidence that some servant engaged with said train actually knew that plaintiff was in the act of climbing between said cars at the time they were moved, then you must find that issue for the defendant. Fourth. Concerning the charge of the petition that defendant's servants, without any notice or warning, suddenly, carelessly, and negligently caused the engine to jam the cars together, you are instructed that the law does not require any such notice or warning of the defendant's servants, under the circumstances in this case, unless they actually knew that the plaintiff was between said cars, and was in danger of being hurt by such movement of the engine; and unless you find from the evidence that they did actually know that plaintiff was between said cars, and in danger of being hurt by such movement of them, then you must find for the defendant upon this, the last, ground charged in said petition." Which instructions the court refused to give to the jury, to which action and ruling of the court defendant at the time duly excepted.

The court then modified defendant's first, third, and sixth "refused" instructions, and of its own motion gave the same to the jury as modified, as follows: "The court instructs the jury that the following are the only grounds of negligence charged in plaintiff's petition which you can consider under the instructions hereafter given you: (1) That the bell of the locomotive was not rung, or the whistle sounded; (2) that the plaintiff was not notified of the intention of those in charge of the train to move it backward; (3) that no brakeman was on the rear car of said train; (4) that there was no gate or bar across the street; (5) that the servants of defendant, without any notice or warning, suddenly, carelessly, and negligently caused the engine to jam the cars of the train together, whereby plaintiff's foot was caught and mashed." "Third. Concerning the charge in plaintiff's petition that the plaintiff was not notified of the intention of those in charge of the train to move it backward, you are instructed

that the defendant's servants had the right to assume that no person would attempt to climb between the cars of said train, and said servants were not bound to give notice to any one so climbing between said cars, unless said servants knew, or by the exercise of ordinary care might have known, that said person was in between said cars, so in the act of climbing over them; and unless you believe from the evidence that some servant engaged with said train actually knew that plaintiff was in the act of climbing between said cars at the time they were moved, then you must find that issue for the defendant." "Sixth. Concerning the charge of the petition that defendant's servants, without any notice or warning, suddenly, carelessly, and negligently caused the engine to jam the cars together, you are instructed that the law does not require any such notice or warning of the defendant's servants under the circumstances of this case, unless they actually knew, or by exercise of ordinary care might have known, that the plaintiff was between said cars, and was in danger of being hurt by such movement of the engine; and unless you find from the evidence that they did actually know, or by the exercise of ordinary care might have known, that the plaintiff was between said cars, and in danger of being hurt by such movement of them, then you will find for the defendant upon this, the last, ground charged in said petition." To which action of the court in modifying said instructions and giving them to the jury as modified defendant at the time duly excepted.

The court, at the instance of the plaintiff, gave the jury the following instructions: "First. The court instructs the jury that it was the duty of the defendant's flagman, and its agents and servants in management of its locomotive and train under their charge, to exercise reasonable care and precaution to prevent any injury to persons upon the tracks of defendant, and any failure on their part to exercise care and precaution would be such negligence as to make the defendant liable for the injuries to plaintiff resulting from such negligence, unless the jury further believes from the evidence that plaintiff was not acting with reasonable care and diligence for one of his age in passing over the cars as he did on the occasion of his injuries; and in passing upon the question as to whether the flagman and agents and servants of the defendant were or were not negligent in conducting and managing the locomotive and train at said crossing you should take into consideration all the facts and circumstances as proved by the evidence to have existed at the time when and the place where the injuries occurred, and you should give to each fact and circumstance and to the testimony of each witness such weight only as you may deem such fact, circumstance, or testimony entitled to in connection with all the evidence in the case. Second. By the term 'negligence,' as used in these instructions, is meant the want of that degree of care that any ordinary prudent person would have exercised under the same or similar circumstances. Third. The court further instructs the jury that, though they may believe from the evidence that it would have

been negligence in an adult to have climbed over the drawbars of the cars, as the plaintiff did on the occasion of his injuries, still if the jury find that by reason of his youth and inexperience he was not aware of the danger to which he was exposed in doing so, then the jury will take this into consideration in passing upon the question of plaintiff's alleged contributory negligence. Fourth. The jury are instructed that if you find for the plaintiff you will, in assessing the damages, take into consideration the physical condition he was in before the injuries in question; the physical pain and mental anguish he has suffered, occasioned by said injuries; and the physical pain and mental anguish, if any, you believe from the evidence he is likely to suffer in the future because of said injuries; and in addition to this, you may also consider to what extent, if any, plaintiff's capacity for earning a livelihood, after his majority, will be impaired by said injuries, and you will return a verdict for him in such sum as you believe to be just and reasonable, not exceeding twenty thousand dollars." To which action of the court in giving said instructions to the jury, and each of them, the defendant at the time duly excepted.

The court, at the instance of the defendant, gave the jury the following instructions: "Second. Concerning the failure of the defendant to ring the bell or sound the whistle as charged in the petition, you are instructed that under the circumstances in this case the defendant's servants were not bound to do either, and your verdict must be for the defendant as to that ground of negligence." "Fourth. Concerning the charge in plaintiff's petition that there was no gate or bar across the street, you are instructed that there is no evidence to support that ground, and you must find for the defendant on that charge. Concerning the charge in the petition that no brakeman was stationed on the rear end of the train, you are instructed that, under the evidence in this case, the defendant was not required to have a brakeman so stationed, and you must find for the defendant upon this charge of the petition." "Seventh. The jury are instructed that it was an act of gross carelessness to have climbed between the cars as the plaintiff did, if he was of sufficient years and understanding to have appreciated the danger of so doing; and whether he did understand and appreciate the danger of so doing is a matter for you to determine; and in determining this you may take into consideration his admissions and statements while testifying in this case, and, if you find him of sufficient understanding to appreciate the danger he might encounter in passing between said cars, then you must, upon this finding alone, return a verdict for the defendant."

It is claimed by defendant that the court committed error in admitting the testimony of plaintiff and his witness Otten regarding the action of other persons in crossing the cars which caused the injury, at the time of or immediately preceding the accident, and of said witness Otten with reference to the absence of a flagman at the crossing at the time. It was held by this court in the case of *Burger* 28 L. R. A.

v. Missouri Pac. R. Co., 112 Mo. 288, which was an action by a child for injuries sustained at the crossing in attempting to cross through a train standing across the street, that evidence that plaintiff saw others cross before him was admissible on the issue of defendant's negligence in starting the train without warning. Evidence of a similar character was admitted without objection in the cases of *Fiedler v. St. Louis, I. M. & S. R. Co.* 107 Mo. 645; *Gurley v. Missouri Pac. R. Co.* 104 Mo. 215; *Brown v. Hannibal & St. J. R. Co.* 50 Mo. 461, 11 Am. Rep. 420; *Stillson v. Hannibal & St. J. R. Co.* 67 Mo. 672; *Philadelphia, W. & B. R. Co. v. Loyer*, 112 Pa. 414; and *Thurber v. Harlem Bridge, M. & N. R. Co.* 60 N. Y. 328.

Persons, and especially children, are naturally inclined to do whatever they may see others do. Nor was it error in permitting the witness Otten to testify that no flagman was present at the time of the accident, as this evidence was admissible as tending to show negligence on the part of the defendant, and the want of care and caution in order to prevent accidents at this crossing.

It was also contended by defendant that the court erred in excluding the deposition of Frank Furley, offered by defendant, which had been taken by the plaintiff, and filed in this case; and reliance is placed upon the case of *Schmick v. Noel*, 64 Tex. 406, as sustaining this position. An examination of that case will show that the deposition which was read was that of the plaintiff in the suit, and even in that case the court held that it was a matter of practice resting largely in the discretion of the trial court. The rule in this state, however, is that declarations of a party to a suit, contained in his deposition, taken by the other party, may be read in evidence against him in the same case, although he is present at the trial; *Bogie v. Nolan*, 96 Mo. 85. But section 4461, Rev. Stat. 1889, makes no provision for the reading of the deposition of a witness not a party to the suit, who is present at the time of the trial, and excludes, by implication at least, the right to do so. *Schmitz v. St. Louis, I. M. & S. R. Co.* 46 Mo. App. 891.

The next contention is that the demurrer to plaintiff's evidence should have been sustained, because, as soon as plaintiff touched or stepped upon defendant's train, he became a trespasser, and as such defendant owed him no duty, and he was entitled to no protection save against willful injury. The plaintiff had the same right that the defendant had to the use of the highway, and he might well assume that if any immediate movement of the cars was made at all some signal would be given before the movement was made, or that the cars would be pulled further apart, so as to relieve the street of the obstruction. While it is true that the duty of giving the statutory signals of ringing the bell and sounding the whistle has no application to one situated as plaintiff was in between two cars, but was intended to give warning to persons about to cross the track of the approach of a train, yet, as there was a space of at least nine inches open between the cars, through which a large number of persons had

been passing, and others were climbing over couplings between the cars. It was a question whether it was not the duty, under the circumstances, of those in charge of the train, to give some kind of warning of their intention to move, in order thereby to prevent injury to persons who might be passing between or over the cars. *Burger v. Missouri Pac. R. Co.* 112 Mo. 288; *Barkley v. Missouri Pac. R. Co.* 96 Mo. 878; *Philadelphia, W. & B. R. Co. v. Loyer*, 112 Pa. 414. That it was negligence in defendant to leave its cars standing across the street in a populous city, where many pedestrians were known to be in the habit of crossing, with a space at least nine inches between the drawheads of the cars, as if to invite persons who could do so to pass between them, there can be no question. And if, without any warning, it closed up the space between the cars, by reason of which plaintiff was injured without any fault or negligence on his part contributing directly thereto, the defendant should be held liable. It was the duty of the defendant's servants and employes to know the condition of the cars at the crossing, and to provide against any accident that might be occasioned by their movement. In the case of *Wilkins v. St. Louis, I. M. & S. R. Co.*, 101 Mo. 98, it appears that the plaintiff's husband was killed at the same crossing. The deceased undertook to pass between the cars standing about two feet apart, and by the sudden backward movement of the train, made without any warning, he was crushed between the cars and injured, from the effect of which injury he subsequently died. This court in that case said: "This movement is said to have been made with the object of pushing the loose train of several cars close together towards the north; but, as it was evident that an opening for the purpose of clearing the street was to have been made, a forward movement of the engine and train of eleven cars was much more likely to be anticipated by a looker-on than the movement that was actually made. There was evidence that no bell was rung or whistle sounded before the movement of the train in question. Deceased might rightly assume that some such signal would be given before the movement was made." So, in the case of *Gurley v. Missouri Pac. R. Co.*, 104 Mo. 211, in which it appears that the plaintiff was passing over a footway leading through the defendant's yards and over its tracks, and which was not a public street or highway, but the railroad company had permitted persons to use it in passing to and from the depot. Across this path there was a small space, about one foot in width, between two cars. The plaintiff, in attempting to pass through this opening, by a sudden movement of the cars was crushed between them and injured. This court held that no negligence could be attributed to the railroad company, because it was under no legal obligation to notify persons of the movements of its cars at that point. The decision was bottomed on the fact that the footpath was not a public highway, and that plaintiff's use of it was merely that of a licensee. The court said, *Gantt, J.*, delivering the opinion: "The relation of the plaintiff and defendant must

be kept in view. This was not a public crossing. If it had been so, defendant would have owed plaintiff a positive legal duty; but, being a mere private crossing, and plaintiff being a licensee only, defendant was bound not to recklessly injure plaintiff." While there was no statutory duty imposed on defendant to either ring the bell on the engine or sound the whistle before moving its train under the circumstances which existed in the case at bar at the time of the accident, it was, owing to the dangerous character of its machinery, the time and place where the injury occurred, the duty of its flagman and its agents and servants in the management of its cars under their charge to exercise at least reasonable and ordinary care and caution to prevent injury to persons crossing its tracks. If, then, the defendant was guilty of negligence which caused the injury, and plaintiff was at the time in the exercise of due care for one of his age and intelligence, and without fault contributing directly thereto, the defendant is liable. These questions were for the consideration of the jury under the instructions of the court as the evidence was ample upon which to predicate them. It necessarily follows that there was no error in refusing defendant's instructions in the nature of demurrers to the evidence.

At the instance of defendant the court instructed the jury that defendant's servants were not bound to ring the bell or sound the whistle; that there was no evidence that there was no gate or bar across the street; and that defendant was not required, under the evidence in this case, to have a brakeman on the rear end of the train at the time of the accident; and that for these reasons, also, the demurrers to the evidence should have been sustained, as there was then nothing left in the petition or evidence upon which the plaintiff could recover. As to whether the defendant's servants were guilty of negligence in the management of the train which caused the injuries, under the circumstances as disclosed by the evidence, aside from the failure to ring the bell or sound the whistle, in the absence of any evidence that there was no bar across the street, and no brakeman on the rear end of the cars, was also a question for the jury under the instructions of the court. Whatever conflict, if any, there was between plaintiff's first instruction and the one numbered 2 given at the request of the defendant, "that defendant was not bound to ring the bell or sound the whistle before moving its cars," was, under the circumstances in this case, an error committed by the court at the instance of defendant, and he will not now be heard to complain of an erroneous instruction given at his request. *Alexander v. Clark*, 88 Mo. 483; *Flowers v. Helm*, 29 Mo. 324. While the failure to do so could not be made a statutory cause of action, it was a matter for the jury to take into consideration in determining whether defendant's servants and employes were in the exercise of due care and caution in moving its cars. *Wilkins v. St. Louis, I. M. & S. R. Co.* 101 Mo. 98. It necessarily follows that there was no error committed by the court

in modifying defendant's refused instructions, and in giving them as modified, as the defendant asked and the court gave substantially the same instructions at the close of the evidence.

Another contention is that the instructions given for plaintiff were erroneous, and should have been refused. Plaintiff's first instruction seems to assume that it was the duty of defendant to keep a flagman at this crossing, and at first impression is objectionable for that reason, as the statute imposes no such duty; but, as the evidence clearly shows that defendant did have a flagman at the crossing to warn persons about to cross the track of impending danger, it is somewhat difficult to conceive how the defendant could have been prejudiced or the jury misled by reason thereof. Taken as a whole, it is, we think, not vulnerable to the objection urged against it. Nor is the instruction in fact in conflict with defendant's instructions, which eliminated from the consideration of the jury all the acts of specific negligence which were alleged in the petition as statutory causes of action, and left only the general allegation of negligence in the management of the train by defendant's servants and agents. Omitting and leaving out all the specific acts of negligence, the petition contains all the necessary allegations to constitute a cause of action at common law, and we think is good after verdict. No objection was taken to it either by motion to strike out any part of it, or by demurrer, or by motion to make it more definite and certain.

We see no objection to the third instruction given on behalf of the plaintiff. It simply tells the jury that if, by reason of the youth and inexperience of the plaintiff, he was not aware of the danger to which he was exposed in crossing between the cars, they will take this into consideration in passing upon the question as to whether or not he was guilty of contributory negligence. This we understand to be the law, as uniformly announced by this court.

Next, the instruction on the measure of damages is challenged as erroneous—First, in assuming that plaintiff suffered physical pain and mental anguish. Counsel for defendant concede that plaintiff suffered physical pain, but deny that one of his age could be capable of suffering mental anguish. That pain would necessarily ensue from any such injury as plaintiff sustained cannot be denied, and may well be assumed. Mental anguish may be properly said to be in this case grief and sorrow by plaintiff over the loss of the use of his limb and becoming a cripple for life. And that a boy nine years of age may ordinarily be capable of appreciating the consequences of such an injury we think too clear for argument. There was no prejudicial error, therefore, in assuming, as the instruction did, that the plaintiff suffered physical pain and mental anguish. The physician who attended him testified that he would be a cripple for life. "The general rule is that pain of mind," when connected with bodily injury, is the subject of damages: but it must be so connected in order to be included in the estimate, unless the injury is accompanied

by circumstances of malice, insult, or inhumanity. *Trigg v. St. Louis, K. C. & N. R. Co.*, 74 Mo. 147, 41 Am. Rep. 806, and authorities cited. Another objection urged against this instruction is because it tells the jury that in estimating the damages, if they find for plaintiff, in addition to physical pain and mental anguish they will consider to what extent, if any, plaintiff's capacity for earning a livelihood after his majority will be impaired. It will be observed that this is not a claim for damages for loss of services, but because of his inability to earn a livelihood after his majority by reason of injury. The petition contains no specific allegation with reference to plaintiff's inability to earn a livelihood, or to what extent it would likely be impaired after his arrival at the age of twenty-one years; nor was there any evidence with regard thereto further than that the evidence shows the injury to be permanent, and the plaintiff a cripple for life. In the case of *Rosenkrantz v. Lindell R. Co.*, 108 Mo. 9, Macfarlane, J., in speaking for the court, says: "It is well settled that prospective damage to adults on account of impairment of earning capacity in the future is a proper element of damages in the cases of personal injuries. *Whalen v. St. Louis, K. C. & N. R. Co.* 60 Mo. 323; *Pry v. Hannibal & St. J. R. Co.* 73 Mo. 124; 2 Sedgw. Damages, 8th ed. § 485.

"Ordinarily, damages will not be awarded to compensate for losses not yet experienced on mere conjectural possibility that such loss will occur. In the case of an adult, proof should be made of 'previous physical condition and ability to labor or follow his usual avocation, as well as his condition since the injury, to enable the jury to properly find the pecuniary damage.' 5 Am. & Eng. Encyclop. Law. 41, and authorities cited.

"What may or may not be done by any one in the future depends upon so many contingencies that prospective loss of earnings cannot be susceptible of direct and conclusive proof, even in case of adults. Nevertheless, as has been seen, such damages are uniformly allowed. The impairment of the earning capacity of one in his infancy is as great a damage to him as though he had not been injured until the day he had reached his majority. That he would have an equal right to compensation logically follows. This plaintiff had never earned anything, and what his ability to labor or his capacity for earning money in business pursuits will be in the future, no one can tell with any certainty. It is properly held in such case, in the absence of the existence of direct evidence, that much must be left to the judgment, common experience, and 'enlightened conscience of the jurors, guided by the facts and circumstances in the case.'" It follows as a necessary consequence. If such damage was not susceptible of proof, that it was not necessary that the petition should contain specific allegation in regard thereto. The jury saw the injured limb, heard the attending physician testify that the injury was permanent, and that the plaintiff would be a cripple for life; and they were as well prepared to judge from observation of the future

ability of plaintiff to earn a livelihood after he arrived at the age of maturity as any one else. The instruction which was condemned in the case of *Wilburn v. St. Louis, I. M. & S. R. Co.*, 36 Mo. App. 215, concluded as follows: "And for such other causes as would be just and proper." This instruction, as was said by the court, was palpably erroneous, and gave the jury no criterion whatever by which to estimate the damages, and is unlike the instruction given in the case at bar. And, finally, it is contended that this instruction is erroneous in not confining the jury to the evidence in assessing the damages. The instruction, after specifying what the jury might take into consideration in estimating the damages, concluded as follows: "And you will return a verdict for him in such sum as you believe to be just and reasonable, not exceeding twenty thousand dollars." This part of the instruction, taken

alone, would, of course, be objectionable, for the reason that it is too general and gives the jury no rule by which to estimate the damages; but when the instruction is read altogether, as it should be, no such objection could be urged against it. *Haniford v. Kansas City*, 108 Mo. 172. After telling the jury the facts that they must take into consideration in estimating the damages, it concludes as above indicated, and certainly confined the inquiry and damages to the facts mentioned. No objection was raised in the court below as to the amount of damages allowed by the jury, and that question cannot now be raised in this court for the first time.

As there does not appear to have been any error committed in the trial of the cause which would justify a reversal of it, *the judgment will be affirmed*, and it is so ordered.

All concur, except *Sherwood, J.*, who dissents, and *Barclay, J.*, absent.

KANSAS SUPREME COURT.

J. A. POLLEY, *Plff. in Err.*,
v.

Edward E. JOHNSON *et al.*

(.....Kan.....)

*1. Where land is conveyed by the owner to another in trust to reconvey

*Headnotes by ALLEN, J.

to the grantor's wife, or such person as the grantor may thereafter designate, and the grantee has no interest in the lands, but afterwards executes such trust by a conveyance to the grantor's wife, as between grantor and his creditors such lands will be treated as his property until reconveyed by the trustee; and the fact that such trust rests in parol, and is therefore not enforceable under the statute concerning trusts and powers, does not change the rule.

NOTE.—Crops as personal property for the purpose of levy and sale.

General doctrine.

For a classification of growing fruit as real or personal property, see note to *Sparrow v. Pond* (Minn.) 16 L. R. A. 103.

The question whether or not growing crops are the subject of execution as other personal property, would depend upon the question whether they are in their nature the natural or spontaneous growth of the land, as *fructus naturales*, or whether they are the production of labor and industry, *fructus industriales*. If they are the former they are considered as part of the land itself, if the latter, they are treated as other personal property. It has been generally held that only such crops as are sown and planted and reached perfection within the year are personal property and as such liable to be taken in execution. The test would, however, seem to be whether such crop was the production of the industry of man.

The manner, as well as the purpose of planting, is an essential element to be taken into consideration in determining whether such crops are real or personal estate and subject to execution. *Sparrow v. Pond*, 16 L. R. A. 103, 49 Minn. 412.

Growing crops of grain and other annual produce raised by industry, are personal property and chattels and may be levied on and sold under execution. *Kingsley v. Holbrook*, 45 N. H. 313, 86 Am. Dec. 173; *Howe v. Batchelder*, 49 N. H. 204.

To the same effect are the cases following: *Crine v. Tifts*, 65 Ga. 544; *Favorite v. Deardorff*, 84 Ind. 555; *Lindley v. Kelley*, 42 Ind. 294; *Coughlin v. Coughlin*, 26 Kan. 116; *Thompson v. Craigmyle*, 4 B. Mon. 591, 41 Am. Dec. 240; *Parham v. Thompson*, 2 J. J. Marsh. 159; *Oraddock v. Riddlebarger*, 2 Dana, 205; *Porche v. Bodin*, 25 La. Ann. 761; *Pickens v. Webster*, 31 La. 23 L. R. A.

Ann. 870; Penballow v. Dwight, 7 Mass. 34, 5 Am. Dec. 21; *Preston v. Ryan*, 45 Mich. 174; *Cayce v. Stovall*, 50 Miss. 396; *Westbrook v. Eager*, 16 N. J. L. 81; *Green v. Armstrong*, 1 Denio, 550; *Shepard v. Philbrick*, 2 Denio, 175; *Whipple v. Foot*, 2 Johns. 418, 3 Am. Dec. 442; *Harder v. Plass*, 67 Hun. 540; *Bank of Lansingburgh v. Crary*, 1 Barb. 542; *Harris v. Frink*, 49 N. Y. 24, 10 Am. Rep. 318; *Newcomb v. Raynor*, 15 Wend. 108, 34 Am. Dec. 219; *Mumford v. Whitney*, 15 Wend. 387, 30 Am. Dec. 60; *Austin v. Sawyer*, 9 Cow. 39; *Flynt v. Conrad*, 61 N. C. 190, 93 Am. Dec. 583; *Smith v. Tritt*, 18 N. C. 241, 23 Am. Dec. 585; *Brittain v. McKay*, 28 N. C. 235, 36 Am. Dec. 738; *Bond v. Coke*, 71 N. C. 100; *Stambaugh v. Yeates*, 2 Rawle, 161; *Pattison's App.*, 61 Pa. 294, 100 Am. Dec. 637; *Hershey v. Metzgar*, 90 Pa. 217; *Long v. Seavers*, 103 Pa. 519; *Devore v. Kemp*, 5 Hill, L. 259; *Cook v. Steel*, 43 Tex. 53; *Edwards v. Thompson*, 35 Tenn. 720; *Silberberg v. Trilling*, 82 Tex. 523; *Willis v. Moore*, 59 Tex. 623, 46 Am. Rep. 234; *Hamblet v. Bliss*, 55 Vt. 535.

The following English cases show that growing crops of grain and vegetables *fructus industriales*, being goods and chattels and not real estate, may be sold on execution as personal chattels. *Carrington v. Roots*, 2 Mees. & W. 243; *Sainsbury v. Matthews*, 4 Mees. & W. 343; *Jones v. Flint*, 10 Ad. & El. 753, 2 Perry & D. 594; *Warwick v. Bruce*, 2 Maule & S. 205; *Graves v. Weld*, 5 Barn. & Ad. 105, 2 Nev. & M. 725.

Even while annexed to the freehold. *McKenzie v. Lampley*, 31 Ala. 526.

A growing crop of fruit trees is part of the freehold and not goods and chattels, so as to be subject to execution under a *f. fa.* *Adams v. Smith*, 1 Ill. 221. *Bank of Lansingburgh v. Crary*, 1 Barb. 542.

Hops growing upon vines are personal estate, *ba-*

2. Annual crops which are the product of industry and care, sown by the owner of the soil, are, while growing and immature, personal property subject to attachment and sale for the debts of the owner.

(December 9, 1893.)

ERROR to the District Court for Lincoln County to review a judgment in favor of plaintiffs in an action brought to enjoin defendant from harvesting and carrying away wheat on a certain quarter-section of land. *Affirmed.*

The facts are stated in the opinion.

Mr. David Ritchie, for plaintiff in error:

From this testimony it clearly appears that the land in question was the homestead of H. H. Meer at the time of the conveyance and could not be sold or conveyed with intent to defraud creditors for the reason that it was in any event beyond the reach of creditors.

Mull v. Jones, 33 Kan. 112, and cases there cited; *Hizon v. George*, 18 Kan. 253; *Monroe v. May*, 9 Kan. 466; *Arthur v. Wallace*, 8 Kan. 267.

The legal effect of this transaction was that the attempted trust was void, but the deed in question was valid as against the Meers and all the world besides and conveyed not only the land but also the growing wheat then upon the land which had been sown by the owner of the soil, and was yet immature and unripe.

Gee v. Thrailkill, 45 Kan. 173; 2 Nash, Code Pl. 4th ed. p. 862; *Smith v. Hague*, 25 Kan. 246; *Garanflo v. Cooley*, 33 Kan. 187; *Chap-*

man v. Veach, 33 Kan. 167; *Babcock v. Dieter*, 30 Kan. 172; *Beckman v. Sikes*, 35 Kan. 120; *Smith v. Leighton*, 38 Kan. 544.

Annual crops which are produced by industry, when planted by the owner of the soil, remain a part of the real estate to which they are attached until such time as they are ready to be harvested and are not subject to execution until that time.

See Washb. Real Prop. 2d ed. §§ 5-8, p. 4; *Burleigh v. Piper*, 51 Iowa, 649; *Ellithorpe v. Reident*, 71 Iowa, 815.

Mr. C. B. Daughters, for defendant in error:

A conveyance to a third party for the sole purpose of having it transferred to first party's wife conveys nothing but the bare legal title to the third party.

Harrison v. Andrews, 18 Kan. 535.

In many of the states the levy upon growing crops is controlled by statute.

Our own statutes certainly authorize the levy and sale of growing crops in certain cases, and by implication in all cases.

See Justice Act, § 153; *Landley v. Kelley*, 42 Ind. 294; *Penhallow v. Dwight*, 7 Mass. 34, 5 Am. Dec. 21; *Davidson v. Waldron*, 31 Ill. 120, 83 Am. Dec. 206; *Pierce v. Roche*, 40 Ill. 292; *Preston v. Ryan*, 45 Mich. 174; *Johnson v. Walker*, 23 Neb. 736; *Ayers v. Hawk* (N. J. Eq.) Dec. 30, 1887.

Growing annual crops are always considered as personally.

Benjamin, Sales, p. 125; Washb. Real Prop. § 5, also § 4, p. 133; Hilliard, Real Prop. § 64, p. 16; Tiedeman, Real Prop. §§ 70, 71; *Cald-*

ing raised by means of manual cultivation. *Frank v. Harrington*, 36 Barb. 415; *Latham v. Atwood*, Cro. Car. 515.

Fruits growing upon cultivated trees are not the subject of levy as personal property. *Sparrow v. Pond*, 16 L. R. A. 103, 49 Minn. 412.

So peaches on trees cannot be taken in execution. *State v. Gemmill*, 1 Houst. (Del.) 9.

Altker when the fruit is gathered. *Ibid.*

Growing unpicked cotton upon the homestead is also exempt; *alkter* when picked. *Alexander v. Holte*, 60 Tex. 205; *Coates v. Caldwell*, 71 Tex. 20.

In *Sparrow v. Pond*, *supra*, it was held that blackberries growing on bushes could not be taken in execution as personal property.

The title to a growing crop sold under a *f. fa.* vests in the purchaser from the time of sale as against all others, and may be gathered when ripe. *Peacock v. Purvis*, 3 Brod. & B. 362, 5 Moore, 79; *Coombs v. Jordan*, 3 Bland, Ch. 512, 22 Am. Dec. 236.

The law affords the purchaser a remedy against all who unlawfully disturb him in the enjoyment thereof. *Brittain v. McKay*, 23 N. C. 265, 35 Am. Dec. 733.

Sufficiency of sheriff's possessions.

Such possession must be taken of personally under an attachment as the nature of the property admits of. *Throop v. Maiden* (Kan.) Nov. 11, 1893.

The officer must take and retain actual and exclusive control. *Ibid.*

Manual possession is not necessary, a declaration that it is levied upon under an execution is sufficient. *Whipple v. Foot*, 2 Johns. 418, 3 Am. Dec. 442.

Where corn levied upon by the sheriff was standing in the field ungathered at the time of execution levied, and the sheriff had previously notified the defendants of the purpose of his levy, and at the time of the levy that he was about to make it, go-
23 L. R. A.

ing into the field for that purpose, the court held his possession sufficient as against such parties, and that it was not necessary for him to place a watch and guard over the property. *Barr v. Cannon*, 60 Iowa, 20.

Where the officer notified the debtor of the levy but did not authorize him to hold possession for him nor place him in charge, and placed no notice of his claim upon the property, and exercised no control for a period of two months, during which time the property was used by the debtor, the court held that a subsequent mortgagee prevailed over such levy. *Throop v. Maiden*, *supra*.

Where a sheriff levied upon growing crops and before sale the same were seized by the collector of taxes and sold, the court held that such crops were already in the custody of the law and the collector sold without right, so that the purchaser from him had no right of action in trover against the purchaser from the sheriff. *Hartwell v. Bissell*, 17 Johns. 128.

The sheriff may suffer wheat to grow till harvest and then cut and sell it, or may perhaps sell it growing, and the purchaser would then be entitled to enter for the purpose of cutting and carrying it away. *Adams v. Tanner*, 5 Ala. 740.

In *McKenzie v. Lampley*, 31 Ala. 536, it was held that an execution was a lien upon a growing crop from the time of delivery to the sheriff.

Position of the purchaser.

The legal right to sell such a crop before it is gathered results from its personal character and the right to levy on it. *Farham v. Thompson*, 2 J. J. Marsh. 159.

And a creditor at such a sale who enters upon the land and purchases the crop is not a trespasser, the process and judgment being regular and the sale bona fide. *Ibid.*

well v. Custard, 7 Kan. 307, and cases therein cited.

Execution can levy on all that goes to the executor.

Benjamin, Sales, p. 123.

Distinction as to the mature or immature crops rejected.

Benjamin, Sales, p. 124.

Growing crops may be levied upon and sold as such.

2 Freeman, Executions, § 849b.

And a mere sale operates to sever it from the realty.

Johnson v. Walker, *supra*.

How growing crops are levied upon.

2 Freeman, Executions, § 268.

Growing crops may be reserved by parol.

Youmans v. Caldwell, 4 Ohio St. 71; *Baker v. Jordan*, 8 Ohio St. 498.

Growing crops are declared to be subject to execution from justice court.

Long v. Hines, 40 Kan. 216; *Pracht v. Pieter*, 30 Kan. 568.

Allen, J., delivered the opinion of the court:

Defendants in error, as plaintiffs below, brought their action against plaintiff in error

to enjoin him from harvesting and carrying away about 90 acres of wheat, grown on a quarter-section of land in Lincoln county. The wheat was sown in the fall of 1888 by H. H. Meer, who then owned and occupied the land as his homestead. On the 4th day of October he executed a deed for the land to Edward H. Thuse. His wife was in the insane asylum at the time, and he signed the deed also as her guardian. The copy of this deed contained in the record does not show any approval by the probate court, but no point on the want of approval is made by either party. On the 22d day of October an attachment issued in a suit against Meer by a justice of the peace, was levied on the crop of wheat, and on the 11th of December, 1888, the constable sold the same to the plaintiffs. These conveyed the land on January 5, 1889, to Emma Meer, wife of H. H. Meer. He testified on the trial that he paid nothing for the farm, and was to deed it back to Meer's wife, if she got well, or any other party he traded with or sold to. On January 31, 1889, Meer and wife conveyed the land to defendant Polley.

Two questions are raised by the plaintiff in error: (1) Was there anything that could

A purchaser under such an execution may enter and remove the corn purchased, provided it belonged to the defendant in the execution and the sale was valid. *Thompson v. Craigmyle*, 4 B. Mon. 391, 41 Am. Dec. 240.

A sale of a crop by a sheriff under an execution is valid and entitles the purchasers to ingress and egress to gather the same. *Stewart v. Doughty*, 9 Johns. 108.

Where growing crops were levied upon and sold by the sheriff under a *f. fa.* it was held that the purchaser acquired a superior title to that of the purchaser under a subsequent tax levy. *Hartwell v. Bissell*, 17 Johns. 128.

A purchaser under an execution sale is entitled to the crops upon the land at the time of sale, as against a purchaser under an execution by foreclosure on a mortgage subsequently made. *Shepard v. Philbrick*, 2 Denio, 175.

He has power of egress and regress for the purposes of cutting and carrying away such a crop. *Brittain v. McKay*, 23 N. C. 265, 35 Am. Dec. 738.

When the corn is not ripe at the time of sale under *f. fa.* the vendee has a reasonable time after it ripens to cut and carry it away, and while so remaining on the land it is not liable to distress for rent, being considered as *in custodia legis*. *Smith v. Tritt*, 18 N. C. 241, 28 Am. Dec. 565.

The vendee of the sheriff purchases the crops as personal chattels and not as parcel of the land, and acquires no particular right in the land itself, nor any particular possession or occupation of such land, but the law annexes to this transfer whatever is necessary for the taking and enjoying of the same for free entry, egress, and regress to cut and carry away the same. *Brittain v. McKay*, *supra*.

The Pennsylvania Act of March 21, 1772, made grain growing the subject of distress for rent, and gave the purchaser right of egress and ingress. *Bear v. Bitzer*, 16 Pa. 175, 55 Am. Dec. 490.

Crops held upon shares.

a. Tenants in common.

An interest in a crop worked on shares may be attached by the sheriff who retains possession of the whole crop, selling the undivided interest of the defendant, the purchaser being the co-tenant 23 L. R. A.

with the owner of the other portion of the crop. *Bernal v. Hovious*, 17 Cal. 541, 79 Am. Dec. 147.

In *Thompson v. Mawhinney*, 17 Ala. 382, 53 Am. Dec. 178, where authority was given by one joint tenant of a share of a crop to sell, it was held that such share was still liable under execution.

Where, in an execution against one co-tenant, the sheriff seizes and sells the whole property, an action of trespass will lie against him. *Moulton v. Robinson*, *Ladd v. Robinson*, 27 N. H. 550.

b. Husband and wife.

In *Davis v. Clark*, 26 Ind. 424, 89 Am. Dec. 471, it was held that land conveyed to husband and wife did not vest the husband with such an estate as was liable to sale on execution.

In *Patton v. Rankin*, 68 Ind. 845, 34 Am. Rep. 254, an action to enjoin the sale of corn levied upon by sheriff upon land belonging to the wife raised by the husband, the court followed *Davis v. Clark*, *supra*.

A crop raised on land held by husband and wife by entireties is subject to the same law as the land itself, and not liable to levy and sale on an execution against the husband. *Patton v. Rankin*, *supra*.

c. Cropper's share.

Execution does not lie against a cropper's share of a crop before division. *Gray v. Robinson* (Ariz.) Jan. 25, 1898.

A cropper's portion of the crop was held not to be subject to levy under a *f. fa.* until the advances made for the purpose of making the crop, were paid. *Hunter v. Edmundson*, Ga. Dec. pt. 1, p. 74.

In *Bratser v. Ansley*, 33 N. C. 12, 51 Am. Dec. 408, it was stated to be well settled in law in that state, that a cropper had no such interest in the crop as could be subjected to the payment of his debts while it remained *en masse* until a division, the whole being the property of the landlord.

d. Landlord and tenant.

A landlord's attachment for rent should direct the levy on the crops only, and should not authorize the officer executing it to levy on the estate generally. *Ellis v. Martin*, 60 Ala. 394; *Hawkins v. Gill*, 6 Ala. 680.

be taken under the order of attachment issued against Meer, by which the court could obtain jurisdiction? It is contended that the farm was the homestead of Meer, entirely exempt from the payment of his debts; that his creditors could not look, in any event, to this land for the satisfaction of their claims; that, as against them, the conveyance to Thuse passed a full title, notwithstanding the want of consideration, and the secret understanding that Thuse was to hold it for the plaintiff and subject to the control of Meer; that, as the trust under which Thuse held was created wholly by parol, it could not be enforced; that under the authority of *Gee v. Thraillkill*, 45 Kan. 173, Thuse acquired the absolute title to the land, which carried with it the crop of growing wheat; that, when the constable levied the attachment, Meer had no property either in the land or the growing wheat; and that he therefore at that time had no property in the wheat to be attached. Various cases are cited in support of the proposition that a conveyance of lands carries title to all growing crops thereon. There can be no question as to the correctness of this as a general proposition, but we think that this case clearly

shows that Thuse never had any real interest in the land. A deed to the homestead, executed under the circumstances and in the manner shown in this case, without the approval of the probate court, would not pass any title. But assuming that it did pass the legal title to Thuse, and, further, that the trust thereby created could not have been enforced in an action against him, yet as he has seen fit to recognize and execute the trust so created, and has in fact conveyed the land in accordance with the parol understanding between himself and Meer, we think the equitable title must be held to have never been transferred, and that the land and the wheat thereon was just as much the property of Meer after the execution of the conveyance to Thuse as before. *Harrison v. Andrews*, 18 Kan. 535. We think this case must be considered as though no change of title occurred until the execution of the deed by Meer and wife to Polley, which was after the sale of the growing wheat.

The second contention is that growing wheat sown by the owner of the soil is a part of the realty until ripe and ready to sever from the soil, and therefore is not subject to attachment as personality. In support of this

Process of attachment is the remedy for the enforcing of the lien if the crop is removed without consent, and if removed attachment may be levied on it in possession of the tenant or one holding it in his right, or in the possession of the purchaser with notice. *Lomax v. LeGrand*, 60 Ala. 537; *Rev. Code*, §§ 2961, 2963.

An attachment lien which ordinarily gives from the time of seizure or levy upon the property, does not so commence in the case of a crop lien the process of attachment only being used to enforce the latter. *Carter v. Wilson*, 61 Ala. 434.

In *Febell v. Simon*, 66 Cal. 264, it was held the purchaser at an execution sale of the interest of a landlord in a growing crop was tenant in common with the lessee where the land was rented upon shares.

In *Deaver v. Rice*, 20 N. C. 431, 34 Am. Dec. 338, it was held that the landlord's rent lien was not superior to that of the tenant's other creditors upon the crop.

In *Walton v. Bryan*, 64 N. C. 764, the lessor's interest in a crop reserved as rent was held not to be the subject of levy under execution prior to its separation.

A landlord's share in a crop is not severed by a sale under a *f. fa.* of the share, so as to affect the title of a subsequent purchaser at a sheriff's sale, who acquires his deed before the rent is due. *Long v. Seavers*, 103 Pa. 517.

Where the portion of a crop was reserved to the landlord in payment of rent, it was held he was not a tenant in common with the lessee and had no property in the crop until it was severed and delivered, which could be made the subject of a levy and sale. *Devore v. Kemp*, 3 Hill, L. 359.

Where land was leased upon shares, the produce to be controlled by the lessor until sale, the possession of the premises to be that of the lessor as against the lessee's creditors, it was held that the lessee had no title or interest in the crops attachable for his debts. *Madon v. Colburn*, 23 Vt. 631, 67 Am. Dec. 730.

State decisions.

Under the Alabama Act of 1821, § 1, a *f. fa.* or other execution could not be levied upon a planted crop until gathered, and it has been held that the statute 23 L. R. A.

prevents the lien attaching until that period, and the title of bona fide purchasers or creditors will not be affected thereby. *Adams v. Tanner*, 5 Ala. 740.

In *Evans v. Lamar*, 21 Ala. 333, it was stated that while it might be conceded that an ungathered crop was regarded as the chattel of the person who owned it, and by the common law was subject to be levied upon and sold under execution for the payment of his debts, yet the legislature of that state had by special enactment exempted such property from levy and sale under execution. *Clay's Dig.* 210, § 46.

The above act was repealed by section 10 of the Code, which enacted by section 2461, that a levy might be made on a growing crop, when there was no other property of the defendant known to the sheriff, but that no sale should be made until the crop was gathered, and this section was repealed by an Act of February 7, 1854.

In *McKenzie v. Lampley*, 31 Ala. 523, the delivery of the *fiat facias* to the sheriff was held to give the plaintiff a lien upon the growing crop, the common law rule not being affected by the statutory provisions which were in force at the time the writ was received by the sheriff.

Such crop is an independent whole not going as the land, but in a different direction, and "such a growing crop may under the common law be seized under a *fiat facias* issued against the owner of the inheritance as his goods and chattels, even while they are annexed to the freehold." *McKenzie v. Lampley*, 31 Ala. 523, 523.

A growing crop, however immature its state and whatever of labor may be required for its cultivation to maturity, and its severance from the soil, is a personal chattel, subject at common law to execution against a tenant, passing to his personal representatives not descending with the land to the heir, and it is a subject of sale or mortgage. *Booker v. Jones*, 65 Ala. 236.

In *Raventas v. Green*, 37 Cal. 254, an unripe growing crop of grain was held to be personal property subject to attachment, service of the writ and statutory notice being a sufficient attachment.

Where a lease provided that the entire crop should be the property of the landlord until the advances were paid, the crop raised was held not to be sub-

proposition, Washb. Real Prop. 2d ed. p. 4; *Burleigh v. Piper*, 51 Iowa, 649, and *Ellithorpe v. Reidesil*, 71 Iowa, 315, are cited. The last of these authorities, which is a case decided by the supreme court of Iowa, fully sustains this contention; and it is said in the opinion: "The whole proceeding was on the theory that the crops were personal property, and could be levied on and sold as such; but while they remained immature, and were being matured by the soil, they were attached to and constituted part of the realty; they could no more be levied upon and sold on execution as personally than could the trees growing upon the premises. This doctrine is elementary, and it has frequently been declared by this court. *Downard v. Groff*, 40 Iowa, 597; *Burleigh v. Piper*, 51 Iowa, 650; *Hecht v. Dettman*, 56 Iowa, 679, 41 Am. Rep. 131; *Martin v. Knapp*, 57 Iowa, 386." It must be conceded that there is much force in the reasoning to sustain this position. It is a well-established rule that a conveyance of land, either by voluntary deed or judicial sale without reservation, carries all growing crops with the title to the land. *Garansflo v. Cooley*, 83 Kan. 187; *Smith v. Hague*, 25 Kan. 246; *Chapman v. Veach*, 32 Kan. 167. The value of the growing crop depends upon the soil for its support and nourishment, and if disconnected at once, in a case like this, would be nothing. A levy and sale usually

affords but little return to the creditor, while it is a serious loss oftentimes to the debtor; but, whatever may be our individual views as to the policy of the law, we must be governed by it as we find it. In the case of *Beckman v. Sikes*, 85 Kan. 120, it was held that a sale under a mortgage foreclosure carried to the purchaser growing crops planted after the decree of foreclosure was entered as against a purchaser, who bought from the mortgagor the growing crop one day before the sale by the sheriff. In the opinion the court says: "The lien of the mortgage and the judgment, however, attached to the growing crops until they were severed, as well as to the land. The mortgagor planted the crop, knowing that it was subject to the mortgage, and liable to be divested by the foreclosure and sale of the premises. Any one who purchased said crops from him took them subject to the same contingency, as the recorded mortgage and the decree of foreclosure were notice to him of the existence of the lien. If the land is not sold until the crops ripen and are severed, the vendee of the mortgagor would ordinarily get a good title; but if the land was sold and conveyed while the crop was still growing, and there was no reservation, or waiver of the right to the crop, at such sale the title to the same would pass with the land." *Goodwin v. Smith*, 49 Kan. 351, 17 L. R. A. 284, holds: "The pur-

ject to attachment by creditors until after the repayment of such advances. *Howell v. Foster*, 65 Cal. 100.

Where a mortgage *à fa.* was levied upon stock "and all the crops on" a certain place, it was held the levy was sufficiently specific. *Crine v. Tifts*, 65 Ga. 644.

Where a large crop of growing corn was purchased, it was held not to be liable to execution for the vendor's debts while being cribbed on the premises where grown, it appearing that the vendor clearly intended the sale to be complete at the time the contract was entered into. *Vaughn v. Owens*, 21 Ill. App. 249.

Where mortgaged lands in possession of the mortgagor, were levied upon by an execution creditor who sold a crop of wheat growing thereon and levied upon a crop of corn, but before sale thereof a receiver was appointed in foreclosure proceedings, the court held that as against such execution or that the receiver had no rights to the crops. *Favorite v. Deardorff*, 84 Ind. 555.

The homestead was exempt from such a forced sale except where a lien is given by the joint consent of husband and wife, under article 15, § 9, of the Kansas Constitution. *Coughlin v. Coughlin*, 26 Kan. 116.

Growing crops raised annually by labor are the subject of sale as personal property before maturity, and their sale does not necessarily involve an interest in realty requiring a written agreement. *Northern v. State*, 1 Ind. 113, where the action was brought against a constable for failure to return an execution and to collect the money thereon.

By article 466 of the Revised Code of Louisiana, standing crops are considered as immovables and as part of the land to which they are attached, and by article 466 the fruits of an immovable, gathered or produced while it is under seizure, are considered as making part thereof and inure to the benefit of the person making the seizure.

In *Porche v. Bodin*, 23 La. Ann. 761, it was held that the evident meaning of these articles was, where the crop belongs to the owner of the planta-

tion, it forms part of the immovable, and where it is seized, the fruits gathered or produced inure to the benefit of the seizing creditor.

Where the plantation was seized under a judgment and was not sold until some four years after, and after the lien had expired, it was held that the mere seizure of the mortgaged property did not divest the plaintiff of his title to the crop which he was raising, and that the seizure in no manner disturbed him in its cultivation. *Sandel v. Douglass*, 27 La. Ann. 623.

Where a sheriff entered and seized growing corn, cut down the same and sold it as personal estate, the court held his action justifiable. *Penhallow v. Dwight*, 7 Mass. 84, 5 Am. Dec. 31.

The equity prevailing in favor of a mortgagee of after-acquired property will not prevail against a levy made before it had become no more than a general equity. *People v. Bristol*, 35 Mich. 28.

A levy will prevail over subsequent transactions, but it cannot invalidate prior dispositions in favor of honest creditors and in violation of no statute or legal rule. *Ibid.*

Compiled Laws of Michigan, § 4667, 6100, in forbidding the sale of the equity of redemption in mortgaged lands did not in terms prohibit the sale of anything personal in its nature. *Preston v. Ryan*, 45 Mich. 174.

In *Gillitt v. Truax*, 27 Minn. 523, it was held that growing crops might be levied upon at any period of their growth, without regard to whether they were above or below the surface, but no sale could be made until the same were ripe or fit for harvesting, and such sale must be completed within thirty days thereafter. Gen. Stat. 1873, chap. 66, § 815.

In *Norris v. Watson*, 23 N. H. 364, 55 Am. Dec. 161, it was held that the provisions of the Revised Statutes, section 15, chapter 184, authorizing the mortgage of growing crops as personal property, and the attachment of personal property subject to mortgage, were not intended to change the law relating to the attachment of growing crops which were not therefore attachable.

chaser at a judicial sale of mortgaged premises is entitled to the growing crop of wheat on the land against the tenant of the mortgagor, who took a lease of the land after a suit for foreclosure had been commenced, and planted the wheat after judgment had been rendered in the foreclosure action; the purchaser having acquired a sheriff's deed on the 2d day of February, and the wheat not ripening and being ready for harvesting until the 20th day of June." See also *Missouri Valley Land Co. v. Barwick*, 50 Kan. 57. In *Caldwell v. Aisop*, 48 Kan. 571, 17 L. R. A. 782, "an owner of mortgaged land leased the same to another, and reserved as rent a share of the crop. He was in default in the payment of the mortgage, and insolvent. After default was made, and after the leasing of the premises, but before the rent was due, he sold his share of the crop rent to one who had notice of the mortgage and of the default. After the crop had fully matured, but while it was standing upon the land, foreclosure proceedings were begun, and a receiver of the land appointed, but the court refused to authorize the receiver to take possession of the crop. Held, that the order of refusal was not error."

It will be observed that the decisions in all these cases relate to the rights of mortgagors, mortgagees, and parties claiming under them. In this case we have a different

question to consider. There is no question here as to the effect of a voluntary incumbrance on the land, nor of a decree of foreclosure and sale thereunder. We have here the bare question as to whether immature growing crops are a part of the realty, as between debtor and creditor, or are personal property, subject to attachment and sale for debt. In *Caldwell v. Custard*, 7 Kan. 303, it was said "that growing crops are personal estate." In 1 Freeman on Executions, § 118, it is said: "Crops, whether growing, or standing in the field ready to be harvested, are, when produced by annual cultivation, no part of the realty. They are therefore liable to voluntary transfer as chattels. It is equally well settled that they may be assigned and sold under execution. At common law, *fructus industriales*, as growing corn or other annual products, which would go to the executors upon death, may be taken upon execution." The author cites a long list of authorities in support of his position. In 8 Washburn on Real Property, p. 367, the author says: "But although a sale of growing crops of annual culture not yet mature would seem to carry with it an interest in land, since a crop must stand upon and draw nutriment from the soil until it shall have grown and matured for the harvest, the cases appear to be quite uniform in holding that the property in the crop would pass, with a

The statute in question is limited in its operation to "property not exempt from the attachment" and names "grain unthrashed, hay, or potatoes," but makes no mention of growing crops. *Norris v. Watson*, *supra*.

In *Shannon v. Jones*, 34 N. C. 206, it was held that an execution might be levied upon a matured standing crop, chapter 35 of the Act of 1844 only applying to growing crops not matured.

Where such a growing crop was sold by the sheriff, the purchaser subsequently gathering the same, it was held that the officer was liable for trover in the same manner as a purchaser. *Shannon v. Jones*, *supra*.

Where a sheriff sold growing corn under an execution, two miles from the place where the crop stood, the court held the sale invalid and the purchaser acquired no title. *Smith v. Tritt*, 18 N. C. 241, 38 Am. Dec. 535; *Ainsworth v. Greelee*, 7 N. C. 470, 38 Am. Dec. 615; *Blount v. Mitchell*, 8 N. C. 65.

The Revised Code, chapter 45, section 11, excepts growing crops from levy under execution, until matured. *Wooten v. Hill*, 98 N. C. 52.

In *Collins v. Myers*, 16 Ohio, 547, it was held that a mortgage upon personal property which remained in the possession of the mortgagor, was void as against creditors and subsequent purchasers.

Growing crops are not the subject of sale under a *levari facias*. *Myers v. White*, 1 Rawle, 353.

An action *quare clausum fregit* will lie for the levy of such an execution. *Ibid*.

In *Myers v. White*, *supra*, it was held that the sheriff could not sell grain in the ground by virtue of a *levari facias* on a mortgage.

In *Stambaugh v. Yeates*, 2 Rawle, 161, it was held that although grain in the ground might be sold as personal property on an execution on a *f. fa.*, yet it did not pass by a levy and sale of the land on a *venditioni exponas*.

Where land was sold by the sheriff, where the grain was the property of the judgment debtor, it was held that a subsequent purchaser under a later

sheriff sale of the grain had no title as against the first purchaser. *Bear v. Bitzer*, 16 Pa. 175, 55 Am. Dec. 490.

A sale under a *f. fa.* of the landlord's share, does not create a severance so as to pass his title as against a purchaser of the lands at a subsequent sheriff sale, taking his deed before the rent is due. *Long v. Seavers*, 103 Pa. 519.

All rent in grain or money falling due after a private sale of the land, or after a judicial sale with the deed acknowledged, and all grain of the vendor or debtor then growing, pass to the vendee of the sheriff as against every other assignment. *Bittinger v. Baker*, 29 Pa. 66, 70 Am. Dec. 154.

Where, by an agreement between a father and his son, the son was to reimburse himself for supplies furnished for the purpose of raising a crop, which was to be raised for the purpose of supporting the family, the father being unable to do so and in debt, it was held not a fraud upon creditors, and that the crop could not be made the subject of execution by the father's creditors. *Leslie v. Joyner*, 2 Head, 514.

In Tennessee under section 3749 of the Code (Milliken & Vertrees), the right of a creditor to levy upon the growing crop of his debtor is recognized, but cannot be executed until the 15th of November after such crop is matured, unless the owner absconds, conceals himself, or leaves the country. *Edwards v. Thompson*, 85 Tenn. 720.

When grown upon the homestead, however, it is not the subject of seizure and sale until after it is gathered. *Coates v. Caldwell*, 71 Tex. 20; *Silberberg v. Trilling*, 53 Tex. 523.

Where a mortgagee purchases at a foreclosure sale, the crops will pass as against an execution creditor of the mortgagor, who would be entitled to an injunction for the protection of his interests. *Crews v. Pendleton*, 1 Leigh, 297, 19 Am. Dec. 750.

In *Caldwell v. Fifield*, 24 N. J. L. 161, it was held that subsequently acquired property was not bound by the levy of a sheriff under an execution.

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license to enter and sever the same; and some of the English cases put it upon the same ground as that by which one may hold emblements growing upon the soil of another. An attempt to sum up the results of the decisions, although they are not wholly harmonious, may be made as follows: *Fructus industriales*, as has been previously said, are, at common law, chattels, and are governed by the seventeenth section of the statute of frauds. This seems to be agreed by all the cases, though it is often difficult to decide what are *fructus industriales*." In Benjamin on Sales, p. 126, it is said: "As to artificial or annual crops, *fructus industriales*, the law is quite clear that a sale thereof, in whatever state of maturity, and however long they are to remain in the soil in order to complete their growth, is a sale of personal property, and not of an interest in land." In *Ayers v. Hawk* (N. J. Eq.), 11 Atl. Rep. 744, two judgment creditors levied on what they both claimed to be a growing crop of corn, one making his levy after the corn was put in the ground, but before it had made its appearance above the surface. The other levied after such appearance. Held, that the first was a valid levy, and entitled to priority. We think the authorities greatly preponderate in support of the proposition that annual crops, fruits of the labor of the tiller of the soil, are personal property, subject to levy and sale as chattels for the debts of the owner. *Lindley v. Kelley*, 42 Ind. 294; *Pierce v. Roche*, 40 Ill. 292; *Johnson v. Walker*, 28 Neb. 786. For further citations bearing on this question, see, particularly, Freeman on Executions, above cited. The statutes of this state also seem to recognize this rule. The sixth subdivision of paragraph 2998 of the General Statutes of 1889, concerning exemptions, exempts "the necessary food for the support of the stock mentioned in this section for one year, either provided or growing, or both, as the debtor may choose." Paragraph 2824: "The emblements or annual crops raised by labor, and whether severed or not from the land of

the deceased at the time of his death, shall be assets in the hands of the executor or administrator, and shall be included in the inventory." Paragraph 2825: "The executor or administrator, or the person to whom he may sell such emblements may, at all reasonable times, enter upon the lands to cultivate, sever and gather the same." Paragraph 5008 (being part of the procedure before justices of the peace): "In all cases where any lands may have been let, reserving rent in kind, and when the crops or emblements growing or grown thereon shall be levied on or attached by virtue of any execution, attachment or other process against the landlord or tenant, the interest of such landlord or tenant against whom such process was not issued, shall not be affected thereby; but the same may be sold, subject to the claim or interest of the landlord or tenant against whom such process did not issue." While these sections do not reach the case we have under consideration, we think they show a recognition of what we regard as the settled doctrine of the common law,—that such growing crops are personal property, subject to sale on execution for the debts of the owner; and, were we to hold a different rule to apply in this case, the only class of debtors benefited thereby would be those owning both the soil and the crop, for the section of the justice's act just quoted renders the shares of landlord and tenant, where that relation exists, both subject to levy and sale. It cannot be presumed that the legislature would intentionally exempt crops raised by the labor of the owner of the land, and at the same time subject to execution those raised by a tenant entitled to a share, only, for his labors.

However much we may disapprove of the policy of the law, we are constrained to hold that the growing wheat attached in this case was subject to levy, and to affirm the judgment.

All the Justices concur.

Rehearing denied.

ARKANSAS SUPREME COURT

S. P. LEEP, *Appt.*,
v.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN R. CO.

(.....Ark.....)

1. The legislature cannot interfere with the right of parties to contract on a subject which is purely and exclusively private, unaffected by any public interest, or duty to person, to society, or government, where the parties are capable of contracting.
2. The right of an individual to contract to labor with a period of credit

for payment of his wages is included in the constitutional right to acquire and possess property.

3. Statutes regulating contracts between corporations and their employes may be enacted under the reserved power to amend corporate charters.
4. Corporations may, by statute, be compelled on the discharge of an employe to pay the wages then earned, and without discount for prepayment, although by the terms of his contract the wages would not have been yet payable, if power to amend their charters has been reserved.
5. A statute attempting to make a corporation, on the discharge of an em-

NOTE.—For an exhaustive discussion of the constitutionality of statutes restricting contracts, see notes to *State v. Loomis* (Mo.) 21 L. R. A. 789, and *Com. v. Perry* (Mass.) 14 L. R. A. 825. 23 L. R. A.

As to constitutional equality of privileges, immunities, and protection, see note to *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* (Ky.) 14 L. R. A. 679.

ploye, pay the whole amount of his stipulated wages up to that date, although by his failure to perform his contract he has damaged the corporation, is unconstitutional, as taking property from the corporation without due process of law.

6. In a statute as to contracts with employes, unconstitutional provisions as to natural persons may be eliminated, where the remainder of the statute relates to corporations, and is valid.

7. The restriction by statute of contracts between corporations and employes is not unconstitutional because interfering with the right of the employes to contract.

8. A statute as to contracts with employes is general and uniform, where it applies to all corporations engaged in the business of operating or constructing railroads, or railroad bridges.

9. Actions for penalties which are excluded from the jurisdiction of a justice of the peace do not include an action by a discharged employe for wages, in which he is entitled to recover, under the statute, for wages after his discharge up to the day of payment, as the additional amount is in the nature of exemplary damages rather than a statutory penalty.

(Bunn, Ch. J., dissents.)

(February 3, 1894.)

APPEAL by plaintiff from a judgment of the Circuit Court for Pulaski County disallowing a portion of his claim in an action brought to recover wages and a penalty for failure to pay them when demanded. *Reversed.*

The facts are stated in the opinion.

Messrs. Marshall & Coffman, for appellant:

If this act is a legitimate exercise of the police power, there is nothing in the Constitution of the United States or any of its amendments to interfere.

Mugler v. Kansas, 128 U. S. 623, 31 L. ed. 206; *Wilkinson v. Rahrer*, 140 U. S. 545, 35 L. ed. 572.

Nor is there in the state constitution, for no state or people can part with this power by contract or otherwise.

18 Am. & Eng. Encyclop. Law, 745, 746; *Stons v. Mississippi*, 101 U. S. 814, 35 L. ed. 1079.

This power cannot be defined specifically, but it extends to the prohibition of all things hurtful to society. It is simply the legislative department acting without limit, save the authority of the courts to define in each case what is the proper subject-matter and such a reasonable exercise of this power as will not invade constitutional rights.

State v. Schlemmer, 10 L. R. A. 185, and note, 43 La. Ann. 1166; 18 Am. & Eng. Encyclop. Law, 740; 8 Am. & Eng. Encyclop. Law, 688; *Toledo, W. & W. R. Co. v. Jacksonville*, 87 Ill. 57, 16 Am. Rep. 611; *Lakeview v. Rose Hill Cemetery Co.* 70 Ill. 192, 23 Am. Rep. 71; *Tiedeman*, Pol. Powers, §§ 1-3.

Railroad and other corporations and individuals engaged in a business "affected with a

public interest" are subject to police regulations as to charges and many other things. "The test of their constitutionality is in every case whether they are designed and do tend to protect some public or private right from the injurious act of the railroad company, and the most complete regulation of this kind is that by railroad commissioners."

Tiedeman, Pol. Powers, 561, 590, 594-599; *Railroad Comrs. v. Portland & O. Cent. R. Co.* 63 Me. 269, 18 Am. Rep. 208; *Thorpe v. Rutland & B. R. Co.* 37 Vt. 140, 62 Am. Dec. 625; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155, 24 L. ed. 94; *Budd v. New York*, 148 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45.

That the relations of employer and employe, when connected with a public interest and when the public safety and welfare require it, may be the subject-matter of police regulation, cannot be doubted.

Tiedeman, Pol. Powers, § 179.

The legislative opinion that police regulation in this regard is necessary is final, and the courts can only say whether the act "bears a real or substantial relation" to the object sought; with its wisdom, policy or necessity they have nothing to do.

Mugler v. Kansas, *supra*; *Powell v. Pennsylvania*, 127 U. S. 878, 32 L. ed. 258, 18 Am. & Eng. Encyclop. Law, 746, 747.

If it be contended that the business of constructing railroads or railroad bridges is not affected with a public interest, that part of the act may be stricken out and the rest allowed to stand.

Marsh v. State, 37 Ark. 356.

For a similar reason it might be held good only as to corporations engaged in either business named or only as to corporations operating railroads or railroad bridges. The constitutional provisions as to amendments are read into every charter, and give the power of recalling every right, privilege, or immunity derived directly from the state.

Union Pac. R. Co. v. United States Sinking Fund Cases, 99 U. S. 700, 25 L. ed. 496; *Shields v. Ohio*, 95 U. S. 819, 24 L. ed. 857; 8 Am. & Eng. Encyclop. Law, 628.

In fact the only limit to the exercise of this reserved power is that property or rights which have become vested under a legitimate exercise of the powers granted, cannot be taken away.

8 Am. & Eng. Encyclop. Law, 629-638; *People v. O'Brien*, 2 L. R. A. 255, 111 N. Y. 46.

The reservation affects the entire relation between the state and the corporation and places under legislative control all rights, privileges, and immunities derived by its charter directly from the state.

Tomlinson v. Jessup, 82 U. S. 15 Wall. 459, 21 L. ed. 206.

The statute cannot impair the obligation of any contract made after its passage.

Lehigh Water Co. v. Easton, 121 U. S. 888, 30 L. ed. 1059.

Hancock v. Yaden, 6 L. R. A. 576, 121 Ind. 366, holds that the laborer himself may be prohibited by statute from contracting for anything but money for his wages.

Shaffer v. Union Min. Co. of Allegany County, 55 Md. 79, is a case exactly in point, under a statute which, like our own, restricted the

corporation but not the laborer in his right of contract. It was urged that the statute repealed by implication another statute which gave him the right to assign his wages for supplies, but the court held otherwise.

See also *McManaman v. Hanover Coal Co.* 6 Kulp, 181; *Lamb v. Northern R. Co.* [1891] 2 Q. B. 281; *State v. Loomis*, 21 L. R. A. 789, 115 Mo. 307; *Peel Splint Coal Co. v. State*, 17 L. R. A. 385, 86 W. Va. 802; *Ramsey v. People*, 17 L. R. A. 858, 143 Ill. 890; *State v. Brown & S. Mfg. Co.* 17 L. R. A. 856, 18 R. I. —; *Frorer v. People*, 16 L. R. A. 492, 141 Ill. 171; *People v. Phyls*, 19 L. R. A. 141, 136 N. Y. 554; *San Antonio & A. Pass. R. Co. v. Wilson* (Tex.) 35 Cent. L. J. 242.

The act in question does not deny defendant its equal rights in the courts or take its property without due process of law.

Missouri Pac. R. Co. v. Humes, 115 U. S. 512, 29 L. ed. 463; *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26, 32 L. ed. 585; Cooley, Const. Lim. 353-358; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616.

The act is not special, unequal, or class legislation within the 14th Amendment to the Constitution of the United States or any provision of the state constitution, for it treats all alike under similar circumstances and conditions.

Boyd v. Bryant, 85 Ark. 69, 37 Am. Rep. 6; *Bannon v. State*, 49 Ark. 167; *Little Rock & Ft. S. R. Co. v. Hanniford*, Id. 291; *Dow v. Beidelman*, Id. 455; *Davis v. Gaines*, 48 Ark. 370; *St. Louis, I. M. & S. R. Co. v. Worthen* 7 L. R. A. 374, 52 Ark. 529; *Little Rock & Ft. S. R. Co. v. Payne*, 88 Ark. 816, 84 Am. Rep. 55; *Danley v. State Bank*, 15 Ark. 16; Cooley, Const. Lim. 390-398; 3 Am. & Eng. Encyclop. Law, 595-598; 8 Am. & Eng. Encyclop. Law, 623, note 1; *Bowman v. Lewis*, 101 U. S. 22, 25 L. ed. 989; *Barbier v. Connolly*, 118 U. S. 27, 28 L. ed. 923; *Soon Hing v. Crowley*, 118 U. S. 703, 28 L. ed. 1145; *Cincinnati, N. O. & T. P. R. Co. v. Kentucky*, 115 U. S. 321, 29 L. ed. 414; *Missouri Pac. R. Co. v. Humes*, *supra*, *Missouri Pac. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107; *Wurts v. Hoagland*, 114 U. S. 606, 29 L. ed. 229; *Allen v. Pioneer-Press Co.* 8 L. R. A. 582, 40 Minn. 117.

Messrs. Dodge & Johnson, for appellee: The Act of March 25, 1889, entitled "An Act to Provide for the Protection of Servants and Employés of Railroads," is unconstitutional and therefore void.

Three classes of persons were singled out, and told that the organic law of the state did not apply to them in several particulars.

Will the courts permit such an invasion of the inherent rights of those parties? Such legislation was discountenanced and condemned by this court in the case of *St. Louis, I. M. & S. R. Co. v. Williams*, 49 Ark. 493. See also *South & North Ala. R. Co. v. Morris*, 65 Ala. 199.

Arkansas Const. art. 2, § 7, provides that "the right of trial by jury shall remain inviolate."

Section 18 provides, "that every person is entitled to a certain remedy in the law for all injuries or wrongs he may receive in his person, property, or character."

To require the employé to resort to the 23 L. R. A.

courts to settle and recover the amount due him, must be done under a penalty amounting to practically an absolute denial of the right granted by the sections of the constitution above noted. This law takes away and destroys the right to a trial by jury by imposing a penalty for insisting upon that right under the constitution.

Whitehead v. Arkansas Cent. R. Co. 28 Ark. 461; *Cairo & F. R. Co. v. Trout*, 32 Ark. 24; *State v. Cor*, 8 Ark. 446; *State v. Morrill*, 16 Ark. 384.

This act is class legislation of the boldest and baldest character.

Atchison & N. R. Co. v. Baty, 6 Neb. 87, 29 Am. Rep. 856; *Wally v. Kennedy*, 2 Yerg. 554, 24 Am. Dec. 511; *Erwine's App.* 16 Pa. 266, 55 Am. Dec. 499; *Chicago, St. L. & N. O. R. Co. v. Moss*, 60 Miss. 641, 20 Am. & Eng. R. R. Cas. 555.

The act is special legislation, and violative of Ark. Const. art. 5, p. 14, §§ 25, 26.

State v. Miller, 100 Mo. 439; *Lafferty v. Chicago & W. M. R. Co.* 71 Mich. 851; *Schut v. Chicago & W. M. R. Co.* 70 Mich. 433; *Ayar's App.* 2 L. R. A. 577, 122 Pa. 266; Cooley, Const. Lim. *391, 392; *Strauder v. West Virginia*, 100 U. S. 303, 25 L. ed. 664; *Bernier v. Russell*, 89 Ill. 60; *Lewis v. Webb*, 3 Me. 326; *Durham v. Lewiston*, 4 Me. 140; *Holden v. James*, 11 Mass. 396, 6 Am. Dec. 174; *Picquet, Appellant*, 5 Pick. 65; *Budd v. State*, 8 Humph. 4-8, 39 Am. Dec. 189; *Vanzant v. Waddell*, 2 Yerg. 260; *People v. Friebie*, 36 Cal. 135; *Davis v. Menasha*, 21 Wis. 492; *Lancaster v. Barr*, 25 Wis. 560; *Brown v. Haywood*, 4 Helsk. 357; *Wally v. Kennedy*, 2 Yerg. 554, 24 Am. Dec. 511.

The act is also violative of that clause in section 1 of the 14th Amendment to the Constitution of the United States, which declares that no state shall "deny to any person within its jurisdiction the equal protection of its laws."

Bowman v. Lewis, 101 U. S. 30, 25 L. ed. 992; *Bank of United States v. Deveaux*, 9 U. S. 6 Cranch, 61, 3 L. ed. 88.

Corporations are protected by the prohibitions as well as natural persons.

Home Ins. Co. v. Morse, 87 U. S. 20 Wall. 455, 22 L. ed. 369; *Northwestern Fertilizing Co. v. Hyde Park*, 3 Biss. 481; *Society for Propagation of Gospel v. Wheeler*, 2 Gall. 135; *Society for Propagation of Gospel v. New Haven*, 21 U. S. 8 Wheat. 488, 490, 5 L. ed. 688; *People v. Hays*, 37 Barb. 455; *Chater v. San Francisco Sugar Ref. Co.* 19 Cal. 246; *People v. Baillam*, 57 Cal. 594; *Doyle v. Continental Ins. Co.* 94 U. S. 544, 24 L. ed. 153; *Ho Ah Kow v. Numan*, 5 Sawy. 553; *Re Ah Fong*, 3 Sawy. 157.

The prohibitions of the amendment extend to all action of the state denying equal protection of the laws, whether it be action by one of these agencies or by another.

Virginia v. Rives, 100 U. S. 818, 25 L. ed. 669; *Ex parte Virginia*, 100 U. S. 839, 846, 25 L. ed. 678, 679; *Ward v. Flood*, 48 Cal. 50, 17 Am. Rep. 405; *Guy v. Hermance*, 5 Cal. 74, 63 Am. Dec. 85.

If discrimination in fixing the qualification of jurors violates the provisions of the 14th Amendment, as denying the equal protection

of the law, it is not easy to perceive why discriminations in the assessment and collection of damages for failing to pay its debts by railroad companies expressly made are not equally ⁴⁰.

Ex parte Kearny, 55 Cal. 212; *Jackson v. People*, 9 Mich. 111, 77 Am. Dec. 491; *Stuart v. Palmer*, 74 N. Y. 191, 80 Am. Rep. 289; *Davidson v. New Orleans Admrs.* 96 U. S. 97, 24 L. ed. 616, 7 Alb. L. J. 225.

Due process of law requires an orderly proceeding adapted to the nature of the case in which the citizen has an opportunity to be heard, and to defend, enforce, and protect his rights.

Dartmouth College Case, 17 U. S. 4 Wheat. 519, 4 L. ed. 629; *Westervelt v. Gregg*, 12 N. Y. 209, 62 Am. Dec. 160; *Goshen v. Stonington*, 4 Conn. 209, 10 Am. Dec. 121.

The act is a special and not a general act, and for that reason is in violation of federal and state constitutional prohibitions.

Godcharles v. Wigman, 118 Pa. 481; *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 869; *Topeka v. Gillett*, 82 Kan. 481; *Ex parte Westerfeld*, 55 Cal. 550, 11 Rep. 10; *Acheson & N. R. Co. v. Baty*, 6 Neb. 37, 29 Am. Rep. 856.

Special legislation which imposes degrading and cruel punishments upon a class of persons entitled to the equal protection of the law is unconstitutional and void.

Ho Ah Kow v. Nunan, 5 Sawy. 553, 8 Rep. 195.

An act which confers upon the court the right to remit interest is void, and the converse of this principle is equally true, that an act which confers upon the court the right to allow as damages upon a debt more than the constitutional rate of interest, is also void.

Kent v. Kent, 29 Gratt. 840.

An ordinance forbidding females to wait upon persons in a bar-room is unconstitutional, not applying to both sexes.

Ex parte McGuire, 57 Cal. 604.

The legislature cannot authorize summary confiscation of property as the punishment for a mere trespass.

Rockwell v. Nearing, 85 N. Y. 802, 6 Am. L. Reg. N. S. 378; *State v. Fire Creek Coal & Coke Co.* 6 L. R. A. 359, 38 W. Va. 188; *Godcharles v. Wigman*, *supra*; *State v. Goodwill*, 6 L. R. A. 621, 38 W. Va. 179.

In *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 869, it was held that an act was unconstitutional when it attempted to single out owners and operators of coal mines, and provide that they shall bear burdens not imposed upon other owners of property or employers of labor, and prohibit them from making contracts which it is competent for other owners of property or laborers to make; and that such legislation was not an exercise of the police power.

The act under discussion is an act of paternalism, contrary to our form of government, and violative of the spirit and intention of the organic law of the land, both federal and state.

San Antonio & A. Pass. R. Co. v. Wilson (Tex.) 85 Cent. L. J. 242; dissenting opinion in *Budd v. New York*, 143 U. S. 551, 36 L. ed. 253, 4 Inters. Com. Rep. 45; *Fitzgerald v. Missouri Pac. R. Co.* 45 Fed. Rep. 812, 83 Cent. L. J. 287; *Re House Bill No. 10*, 15 Colo. 600; 38 L. R. A.

People v. Otis, 90 N. Y. 52; *Com. v. Perry*, 14 L. R. A. 325, 155 Mass. 117, 84 Cent. L. J. 78.

Battle, J., delivered the opinion of the court:

The St. Louis, Iron Mountain & Southern Railway Company is a corporation duly organized according to the laws of Arkansas, and is engaged in operating a railroad in this state. S. P. Leep was employed to work for it at the rate of \$35 per month of thirty days, and labored under his contract until the 9th of September, 1890, when he was discharged. On the same day he demanded of the company his unpaid wages that were then due, amounting, at the contract rate, to the sum of \$27.90. The company failed to pay then, but promised that it would on the 18th of September, 1890. Leep refused to wait until the day of the promised payment, and brought suit before a justice of the peace for the amount due to him, the \$27.90, and also for a penalty for the nonpayment of the same on the day he was discharged, at the contract rate from the time of such discharge to the day of bringing the suit. He recovered a judgment for \$36.61 and costs. The defendant then appealed to the Pulaski circuit court. He recovered judgment in that court against the defendant for \$27.90 and costs, but no penalty or damages, and, failing to recover the penalty, he appealed to this court.

He bases his claim to a penalty or damages upon the act of the general assembly, which is in the following words:

"Section 1. Whenever any railroad company or any company, corporation, or person engaged in the business of operating or constructing any railroad or railroad bridge, or any contractor or sub-contractor engaged in the construction of any such road or bridge, shall discharge, with or without cause, or refuse to further employ any servant or employé thereof, the unpaid wages of any such servant or employé, then earned at the contract rate, without abatement or deduction, shall be and become due and payable on the day of such discharge, or refusal to longer employ; and if the same be not paid on such day, then, as a penalty for such nonpayment, the wages of such servant or employé shall continue at the same rate until paid; provided, such wages shall not continue more than sixty days, unless an action therefor shall be commenced within that time.

"Sec. 2. That no such servant or employé who secretes or absents himself to avoid payment to him or refuses to receive the same when fully tendered, shall be entitled to any benefit under this act for such time as he so avoids payment.

"Sec. 3. That any such servant or employé whose employment is for a definite period of time, and who is discharged without cause before the expiration of such time, may, in addition to the penalties prescribed by this act, have an action against any such employer for any damages he may have sustained by reason of such wrongful discharge, and such action may be joined with an action for unpaid wages and penalty."

This act applies to corporations, com-

panies, and persons engaged in the business of operating or constructing railroads or railroad bridges, and to contractors and subcontractors engaged in the construction of any such road or bridge, and requires them to pay their employes, on the day of discharge, or of the refusal to further employ them, the unpaid wages then earned by them at the contract rate, without abatement or deduction. The object of the act is to make it unlawful for such companies, corporations, persons, contractors, or subcontractors to contract to pay the wages of those employed by them in the operating of railroads or in the construction of such roads or bridges at any time subsequent to the day on which the employes may be discharged, or on which such employer may refuse to longer employ them. In other words, it declares the wages shall be paid on such day, notwithstanding they may not be due according to the contract until a day subsequent. In this respect the act attempts to limit the right to contract. Is it constitutional?

The constitutionality of a legislative act is to be determined solely by reference to those limitations which the constitution imposes. No court ought to "declare a statute unconstitutional and void," says Judge Cooley, "solely on the ground of unjust and oppressive provisions, or because it is supposed to violate the natural, social, or political rights of the citizen, unless it can be shown such injustice is prohibited, or such rights are guaranteed or protected by the constitution." The judiciary and the legislative are co-ordinate departments of the government; neither of which has a right to invade the province of the other. In determining the validity of a statute the sole question for the courts to decide is one of power, not of expediency, justice, or wisdom. In deciding such questions they should, in the spirit of the comity and good will that should prevail between the different departments of the government, resolve all doubt in favor of the constitutionality of the acts of the legislature; and, if any act be reasonably susceptible of two constructions, one of which would render it unconstitutional and the other valid, should give to it the latter, on the presumption that the legislature did not intend to exceed its power. Cooley, Const. Lim. 6th ed. pp. 157, 200, 203, 208; *Sinking Fund Cases*, 99 U. S. 700, 718, 25 L. ed. 496, 501; *Munn v. Illinois*, 94 U. S. 118, 24 L. ed. 77; *Powell v. Com.* 114 Pa. 292; *Missouri Pac. R. Co. v. Humes*, 115 U. S. 520, 29 L. ed. 465.

According to the foregoing test, is the act under consideration constitutional? Section 8 of article 2 of the Constitution of this state declares: "All men are created equally free and independent, and have certain inherent and inalienable rights; amongst which are those of enjoying and defending life and liberty; of acquiring, possessing and protecting property and reputation; and of pursuing their own happiness. To secure these rights governments are instituted among men, deriving their just powers from the consent of the governed." Section 8 of the same article ordains that no person shall "be deprived of life, liberty, or property without due process

of law." Section 1 of the 14th Amendment to the Constitution of the United States provides: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The rights to acquire and possess property necessarily include the right to contract, for it is the principal mode of acquisition, and is the only way by which a person can rightly acquire it by his own exertion. Of all the "rights of persons" it is the most essential to human happiness.

But the right to contract is not unlimited. The conflicting interests of individuals make this impossible. Rights in conflict with each other cannot be unlimited. Duties to persons, to society, the public, and the government are imposed on every individual. Every man, when he enters into society, undertakes to perform these duties; and necessarily surrenders some rights or privileges on account of his relation to others. His right to contract becomes subject to these duties, among which is the duty to so conduct himself and use his own property as to not unnecessarily injure another. He submits himself to such restraints and burdens as may conduce to the general comfort, health, and prosperity of the state. To conserve and enforce these rights and duties the government can impose such restrictions upon his actions as may be appropriate for that purpose. "This power inheres in every sovereignty, and is essential to the maintenance of public order, and the preservation of mutual rights from the disturbing conflicts which would arise in the absence of any controlling, regulating authority."

The legislature can control, to some extent, the right to contract in reference to property "clothed with a public interest, when used in a manner to make it of public consequence, and affect the community at large." By devoting his property to a use in which the public has an interest, the owner, in effect, grants to the public an interest in that use, and subjects himself to the control of the legislature for the common good, to the extent of the interest he has thus created. Upon this principle the legislature can fix the maximum of charges for the storage of grain in public warehouses, and for carriage of freight and passengers by common carriers. From the same source comes the power to regulate millers, bakers, hackmen, ferries, wharfingers, innkeepers, and the like, "and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold." *Munn v. Illinois*, 94 U. S. 118, 24 L. ed. 77; *Budd v. New York*, 148 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45; *Dow v. Beidelman*, 125 U. S. 680, 31 L. ed. 841, 3 Inters. Com. Rep. 56, 49 Ark. 325; *Mobile v. Yuille*, 3 Ala. 140, 36 Am. Dec. 441. Upon the same principle it was held in *Spring Valley Water Works v. Schottler*, 110 U. S. 347, 28 L. ed. 178, "that it is within the power of the government to regulate the price at which water shall be sold

by one who enjoys a virtual monopoly of the sale."

It has been held by the courts that the legislature can regulate or prohibit the sale or manufacture of oleomargarine for the purpose of protecting the public against fraud. *Powell v. Com.* 114 Pa. 265, 60 Am. Rep. 350, 137 U. S. 678, 32 L. ed. 258; *State v. Addington*, 12 Mo. App. 214, 77 Mo. 110.

Common carriers and telegraph companies cannot lawfully stipulate for exemption from responsibility for the negligence of themselves or their servants. *St. Louis, I. M. & S. R. Co. v. Lesser*, 46 Ark. 236; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* 129 U. S. 397, 32 L. ed. 788; *Western U. Teleg. Co. v. Short*, 53 Ark. 434, 9 L. R. A. 744.

No one can bind himself by an agreement not to engage in any particular business at any time or place. *Taylor v. Saurman*, 110 Pa. 3.

Such contracts are void, because they are injurious to the public, contrary to public policy.

An act which made it unlawful for any person to transport or move, after sunset and before sunrise of the succeeding day, within certain counties, any cotton in the seed, but permitted the owner or producer to remove it from the field to his gin house, or other place of storage, was held by the supreme court of Alabama to be constitutional. The court holds that "its object was to regulate traffic in the staple agricultural product of the state, so as to prevent a prevalent evil, which, in the opinion of the lawmaking power, may have done much to demoralize agricultural labor and destroy the legitimate profits of agricultural pursuits, to the public detriment, at least within the specified territory." *Davis v. State*, 68 Ala. 58, 44 Am. Rep. 128; *Mangan v. State*, 76 Ala. 60. Similar statutes have been held to be constitutional by other courts. *State v. Moore*, 104 N. C. 714; *Butcher's Union, S. H. & L. S. L. Co. v. Crescent City, L. S. L. & S. H. Co.* 111 U. S. 746, 28 L. ed. 585; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989; *Herdie v. Roessler*, 109 N. Y. 127; *Brechtbill v. Randall*, 102 Ind. 528, 52 Am. Rep. 695. There can be no violation of the constitution in the denial of the right to contract to those who are incapable of binding themselves thereby. The term "contract" implies "the existence of a physical and moral power of assenting, as well as a deliberate and free exercise of such power. The absence of any of these capacities in either of the parties to a contract renders the person laboring under it incapable of binding himself thereby." Hence restrictions were thrown around the exercise of this right by seamen. They sustained to the master of a ship a servile relation. At common law they owed to him obedience and respect; and in case of disobedience or disorderly conduct the master could punish them, because discipline is necessary, and "without it the ship would always be in great peril, and no voyage could be successfully conducted." The authority of the master over them was like unto that of a parent over his child, or of a master over his apprentice. This employment, and the

usages and customs regulating it, constituted them a servile class, as helpless and dependent in many respects as that of infants, and demanded the protection accorded to them.

The legislature has the power to prohibit the making of contracts, when it becomes necessary to protect the rights of others. As for example, it can provide by statute, as it did in Pennsylvania, that when the debtor, and a person or corporation owing money to the debtor, are residents of the state, it shall be unlawful for any citizen to send out of the state, by assignment or otherwise, for or without value, any claim against such debtor, with the intent to deprive him of his exemptions from execution by having collections out of such money made in the courts of another state; and that the assignor in such a case shall be liable in an action of debt to the person from whom any such claim shall have been collected by attachment or otherwise, outside of the courts of the state of his residence for the full amount collected. *Sweeney v. Hunter*, 145 Pa. 368.

Another illustration of the power of the legislature to restrict the right to contract when it becomes necessary to protect others is furnished by the statutes of this state. It is the duty of every husband to take care of, support, and protect his wife and children, and provide them with a home. To aid him in the discharge of this duty, the constitution of this state declares "that the homestead of any resident of this state, who is married or the head of a family, shall not," except in certain specified cases, "be subject to the lien of any judgment or decree of any court, or to sale under execution or other process thereon." The obvious intent of this provision was to secure to every resident, who is married or the head of a family, a home, which he may improve and make comfortable, where his wife and children "may be sheltered and live beyond the reach of misfortunes which even the most prudent and sagacious cannot always avoid." For the purpose of protecting the wife in the enjoyment of this right, the statutes of this state provide "that no conveyance, mortgage, or other instrument affecting the homestead of any married man, shall be of any validity, . . . unless his wife joins in the execution of such instrument and acknowledges the same."

Other instances of statutory regulations of the right to contract may be found in the statutes of many states prohibiting the taking of usury. They rest upon a traditional policy antedating constitutions. They "proceed," says Mr. Justice Schofield, in *Proser v. People*, 141 Ill. 171, 16 L. R. A. 492, "upon the theory that the lender and borrower of money do not occupy towards each other the same relations of equality that parties do in contracting with each other in regard to the loan or sale of other kinds of property, and that the borrower's necessities deprive him of freedom in contracting, and place him at the mercy of the lender." Lord Chief Justice Best, in 1825, in delivering the unanimous opinion of the twelve judges in the house of lords upon a question submitted to them under the English usury laws, said: "The supposed

policy of the usury laws in modern times is to protect necessity against avarice, to fix such a rate of interest as will enable industry to employ with advantage borrowed capital, and thereby to promote labor and increase national wealth, and to enable the state to borrow on better terms than could be made if speculators could meet the ministers in the money market on equal terms." *House of Lords*, 8 Bing. 193. So at least they can be based on the right of the legislature to protect the public welfare.

The statutes of fraud are sometimes referred to for the purpose of showing the power of the legislature to control the right to contract. The object of these statutes was to prevent fraud and perjuries. For this purpose some of them provide that certain contracts shall be in writing, in order to prevent controversies, litigation, and false swearing as to the terms of the contract. Others declare that certain deeds, conveyances, and transactions shall be void, because they defraud or tend to defraud innocent persons. They are based on the maxim, "*sic utere tuo ut alienum non laedas*." None of them limit the right to contract, but regulate the exercise of it. *Manuf. Dig.* §§ 8371-3384. They clearly come within the power of the legislature to protect the rights of persons, prevent wrongs, and enforce honesty and fair dealing in the transactions of individuals.

We have thus far spoken of the limitations that can be imposed on the right to contract. We have seen that the power of the legislature to do so is based in every case on some condition, and not on the absolute right to control. We think it is obvious that the right to contract cannot be limited by arbitrary legislation which rests on no reason upon which it can be defended; for, if it could, the right would cease to exist, and become a license revocable at the will of the legislature, and the government would become a despotism in theory, if not in fact. Such a power cannot exist, for, if it could, it would be subversive of the right to enjoy and defend liberty, to acquire and possess property, and to pursue happiness, declared to be inalienable by the constitution of this state.

When the subject of contract is purely and exclusively private, unaffected by any public interest or duty to person, to society, or government, and the parties are capable of contracting, there is no condition existing upon which the legislature can interfere for the purpose of prohibiting the contract or controlling the terms thereof. In *State v. Goodwill*, 38 W. Va. 179, 6 L. R. A. 621, the supreme court considered the constitutionality of a statute of West Virginia, which declared "that it shall not be lawful for any person, firm, company, corporation, or association engaged in mining coal, ore, or other minerals, or mining and manufacturing them or either of them, or manufacturing iron or steel, or both, or any other kind of manufacturing, . . . to issue for the payment of labor any order or other paper notes whatsoever unless the same purports to be redeemable for its face value in lawful money of the United States, bearing interest at a legal rate, made payable to employé or bearer, and

redeemable within a period of thirty days by the person, firm, company, corporation or association giving, making or issuing the same." The court held that the statute was unconstitutional and void, and said: "The property which every man has in his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of the poor man lies in the strength and dexterity of his own hand; and to hinder him from employing these in what manner he may think proper, without injury to his neighbor, is a plain violation of this most sacred property. It is equally an encroachment both upon the just liberty and rights of the workman and his employer, or those who might be disposed to employ him, for the legislature to interfere with the freedom of contract between them, as such interference hinders the one from working at what he thinks proper, and at the same time prevents the other from employing whom he chooses. A person living under the protection of this government has the right to adopt and follow any lawful industrial pursuit, not injurious to the community, which he may see fit; and as incident to this is the right to labor or employ labor, make contracts in respect thereto upon such terms as may be agreed upon by the parties, to enforce all lawful contracts, to sue and give evidence, and to inherit, purchase, lease, sell, or convey property of any kind. The enjoyment or deprivation of these rights and privileges constitutes the essential distinction between freedom and slavery, between liberty and oppression."

A Missouri statute made it unlawful (Rev. Stat. § 7058) "for any corporation, person, or firm engaged in manufacturing or mining to issue for the payment of wages, any order, check, or other token of indebtedness, payable otherwise than in lawful money, unless the same is negotiable and redeemable at its face value, in cash, or in goods, at the option of the holder, at the store or other place of business of the corporation, person or firm;" and provided that the order, check, memorandum, or other evidence of indebtedness so issued should, upon presentation and demand within thirty days from date or delivery thereof, be redeemed by the person or corporation issuing the same, in goods, at the current cash market price for like goods, or lawful money as may be demanded by the holder. In *State v. Loomis*, 115 Mo. 307, 21 L. R. A. 789, the supreme court of Missouri held this statute unconstitutional. Similar statutes were held unconstitutional in *Godcharles v. Wigeman*, 113 Pa. 431; *State v. Fire Creek Coal & Coke Co.* 38 W. Va. 188, 6 L. R. A. 859; *Ramsey v. People*, 142 Ill. 380, 17 L. R. A. 858; and *Braceville Coal Co. v. People*, 147 Ill. 66, 23 L. R. A. 340.

In *Com. v. Perry*, 155 Mass. 117, 14 L. R. A. 326, the statute under consideration provided that "no employer shall impose a fine upon, or withhold the wages or any part of the wages of, an employé engaged at weaving, for imperfections that many arise during the process of weaving." The court held that the statute was unconstitutional, and in doing so said: "Article 1 of the Dec-

laration of Rights of the Constitution of Massachusetts enumerates among the natural inalienable rights of men the right of acquiring, possessing, and protecting property.

. . . The right to acquire, possess and protect property includes the right to make reasonable contracts, which shall be under the protection of the law. The manufacture of cloth is an important industry, essential to the welfare of the community. There is no reason why men should not be permitted to engage in it. Indeed, the statute before us recognizes it as a legitimate business into which anybody may freely enter. The right to employ weavers, and to make proper contracts with them, is, therefore, protected by our constitution; and a statute which forbids the making of such contracts, or attempts to nullify them or impair the obligation, violates fundamental principles of right which are expressly recognized in our constitution. If the statute is held to permit a manufacturer to hire weavers and agree to pay them a certain price per yard for weaving cloth with proper skill and care, it renders the contract of no effect when it requires him, under a penalty, to pay the contract price if the employé does his work negligently, and fails to perform his contract; for it is an essential element of such a contract that full payment is to be made only when the contract is performed. If it be held to forbid the making of such contracts, and to permit the hiring of weavers only upon terms that prompt payment shall be made of the price for good work, however badly their work may be done, and that the remedy of the employer for their dereliction shall be only by suits against them for damages, it is an interference with the right to make reasonable and proper contracts in conducting a legitimate business, which the constitution guarantees to every one when it declares that he has a natural inalienable right of acquiring, possessing, and protecting property. Which-ever interpretation be given to this part of the act, we are of opinion that it is unconstitutional."

In *San Antonio & A. Pass. R. Co. v. Wilson* (Tex.) 19 S. W. Rep. 910, it appears that the legislature of Texas passed an act providing that, in the event a railroad company shall refuse to pay, under certain circumstances, its indebtedness to an employé, within fifteen days after demand thereof, it shall be liable to pay such employé 20 per cent on the amount due him for damages, in addition to the amount due, and that such damages shall not be less than \$5 nor more than \$100. The supreme court of Texas held the act unconstitutional, and, among other things, said: "Article 10, § 2, of the State Constitution declares that all railroads are public highways, and railroad companies common carriers; that the legislature shall pass laws to regulate freight and passenger tariffs, to correct abuses, and prevent discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this state, and enforce the same by adequate penalties; and, to the further accomplishment of these objects and purposes, may provide and establish all requisite

means and agencies invested with such powers as may be deemed adequate and advisable. . . . There is no question as to the scope of this section of our constitution. Its provisions necessarily refer to and contemplate all injuries to the public arising out of a violation of duties due by the railway company to the public as a common carrier. Within this broad field it rests with the legislature to determine what are those duties to the public, and what constitute abuses and injuries, and also what remedies are necessary to prevent them; and to decide whether the abuses shall be corrected through statutes which declare the act or acts to be a crime punishable as such, or whether the act or acts shall be corrected through a civil action, with punitive damages. . . . But when we consider the relation of railway companies to their own servants, both as to acts of employment and payment, we find a field in which special legislation has no right ordinarily to enter, and in which railways stand on the same footing with all other corporations or persons, and which cannot be contemplated or included within the scope of section 2, article 10. . . . We think the position taken by appellant is correct, and section 2, article 10, contemplates only the public duties of railways, and excludes all right of interference with the employment or payment of their servants."

The Texas act, as it appears from the quotation we have made, was held to be unconstitutional because the constitution of Texas confined legislation in respect to railroads to the duties they owe to the public as common carriers, and excludes all right of interference by the legislature with the employment or payment of their servants. Article 10, § 2, of the Texas Constitution, so far as it is set out in the last case referred to, is substantially incorporated into our constitution, except there is no provision in ours expressly authorizing the establishment of means and agencies with power to enforce it as to railroads; and it does not appear in the opinion in that case that there is any power reserved in Texas to the legislature to amend or repeal charters.

An Indiana statute "forbade the execution of contracts waiving the payment of wages in money." This statute was held to be constitutional in *Hancock v. Yaden*, 121 Ind. 866, 6 L. R. A. 576, on the ground that it "protected and maintained the medium of payment established by the sovereign power of the nation."

A statute of West Virginia prohibited the payment of employés in paper redeemable otherwise than in lawful money; and another provided that coal should be weighed and measured, before it is screened, in a certain way, and that all coal paid for by weight shall be paid for according to such weight at the price agreed on, and that all coal paid for by measure shall be paid for according to such measure at the contract rate. The court, in *Peel Splint Coal Co. v. State*, 86 W. Va. 802, 17 L. R. A. 885, held that these statutes were constitutional, two judges dissenting. The court said: "We base this decision in this case—First, upon the ground that the de-

fendant is a corporation in the enjoyment of unusual and extraordinary privileges, which enables it and similar associations to surround themselves with a vast retinue of laborers, who need to be protected against all fraudulent or suspicious devices in the weighing of coal or in the payment of labor; secondly, the defendant is a licensee, pursuing an avocation which the state has taken under its general supervision for the purpose of securing the safety of employes by ventilation, inspection, and governmental report, and the defendant, therefore, must submit to such regulations as the sovereign thinks conducive to public health, public morals, or public security."

Hancock v. Yaden, and Peel Splint Coal Co. v. State, supra, are against the weight of authority, but they do not hold that the legislature has the absolute power to limit the right to contract.

The legislature cannot regulate or restrain the right of individuals to contract by making it unlawful for them to agree with each other that wages shall be paid at any specified time subsequent to the day on which the labor by which they are earned shall be completed, or that the price of property sold shall be paid on a day subsequent to the sale. Such a contract as to the time of performance is necessarily harmless, of purely and exclusively private concern, and cannot affect any one except the parties. It is an important means used in the acquisition of property, which sells for more on time than for cash. Labor commands higher wages when they are payable in the future than it does when they are paid at the time of performance. A large proportion of the business of the world is transacted on a credit. Nations, states, counties, towns, and persons contract debts payable in the future. Property is sold on time under executions, judgments, and decrees of courts. The right of persons to sell or labor on a credit is everywhere and by all recognized as legitimate, and is protected by the constitution in the declaration that the right to acquire and possess property is inalienable.

But what is true of persons is not always true of corporations. Natural persons do not derive the right to contract from the legislature. Corporations do. They possess only those powers or properties which the charters of their creation confer upon them, either expressly or as incidental to their existence; and these may be modified or diminished by amendment or extinguished by the repeal of the charters.

The Constitution of 1874 (art. 12, § 6), ordains: "Corporations may be formed under general laws; which laws may, from time to time, be altered or repealed. The general assembly shall have the power to alter, revoke or annul any charter of incorporation now existing and revocable at the adoption of this constitution, or any that may hereafter be created, whenever, in their opinion, it may be injurious to the citizens of this state: in such manner, however, that no injustice shall be done to the corporators." The Constitution of 1868 declared: "The general assembly shall pass no special act conferring corporate

powers. Corporations may be formed under general laws; but all such laws may, from time to time, be altered or repealed." Under these constitutions the general assembly has enacted statutes providing for the organization of corporations, and from them the corporations of this state derive their powers, subject to the power of the legislature to change them by amending the laws under which they were organized.

As said by Mr. Justice Miller in *Greenwood v. Union Freight R. Co.*, 105 U. S. 13, 19, 26 L. ed. 961, 964: "A short reference to the origin of this reservation of the right to repeal charters of corporations may be of service in enabling us to decide upon its office and effect when called into operation by the legislative exercise of the power."

Continuing, he said, in the same case: "As early as 1806, in the case of *Wales v. Stetson*, 2 Mass. 143, 3 Am. Dec. 39, the supreme court of that state made the declaration 'that the rights legally vested in all corporations cannot be controlled or destroyed by any subsequent statute, unless a power for that purpose be reserved to the legislature in the act of incorporation.' In *Dartmouth College Trustees v. Woodward*, 17 U. S. 4 Wheat. 518, 4 L. ed. 629, decided in 1819, this court announced principles on the subject of the protection that the charter of private corporations were entitled to claim under the clause of the Federal Constitution against impairing the obligation of contracts, which, though received at the time with dissatisfaction, have never been overruled by this court. The opinion in that case carried the protection of the constitutional provision somewhat in advance of what had been decided in *Fletcher v. Peck*, 10 U. S. 6 Cranch, 87, 3 L. ed. 162, and the preceding cases, and held that it applied not only to contracts between individuals, and to grants of property made by the state to individuals or to corporations, but that the rights and franchises conferred upon private, as distinguished from public, corporations by the legislative acts under which their existence was authorized, and a right to exercise the functions conferred upon them by the statute were, when accepted by the corporators, contracts which the state could not impair. It became obvious at once that many acts of incorporation which had been passed as laws of a public character, partaking in no general sense of a bargain between the states and the corporations which they created, but which yet conferred private rights, were no longer subject to amendment, alteration, or repeal, except by the consent of the corporate body, and that the general control which the legislatures creating such bodies had previously supposed they had the right to exercise no longer existed. It was, no doubt, with a view to suggest a method by which the state legislatures could retain in a large measure this important power, without violating the provision of the Federal Constitution, that Mr. Justice Story, in his concurring opinion in the *Dartmouth College Case*, suggested that, when the legislature was enacting a charter for a corporation, a provision in the statute reserving to the legislature the right to amend or repeal it must be held to be a part of the

contract itself, and the subsequent exercise of the right would be in accordance with the contract, and could not, therefore, impair its obligation."

In order to avoid the consequences of the rule laid down in the *Dartmouth College Case*, many states have availed themselves of *Judge Story's* suggestion. In chartering the Union Mining Company the legislature of Maryland reserved the right to amend or repeal its charter at pleasure. Afterwards it passed an act (Laws 1880, chap. 278) providing "that every corporation engaged in mining or manufacturing, or operating a railroad in Allegany county, and employing ten or more hands, shall pay its employes the full amount of their wages in legal tender money of the United States," and "that every such employe shall be entitled to receive from any such corporation employing him the whole or so much of the wages earned by him as shall not have been actually paid to him in legal tender money of the United States, without set-off or deduction of his demand for or in respect of any account or claim whatever." The Union Mining Company was sued after the enactment of this act by Shaffer and Munn for wages due to its employes. *Mr. Justice Irving*, in commenting on this act, in that case, said: "It being conceded that the legislature, when it incorporated the Union Mining Company, reserved the right to alter or amend its charter at pleasure, there can be no doubt that the legislature could enact a law prohibiting the corporation from paying its employes otherwise than in money, and that it could forbid the corporation from making contracts with them for payment in anything but money."

The acceptance by the corporation of a charter with the reservation of the right to alter and amend, made that provision a part of the contract, which, as between the legislature and it, as a private corporation, it must be understood to be. A corporation has no inherent or natural right like a citizen. It has no rights but those which are expressly conferred upon it, or are necessarily inferable from the powers actually granted, or such as may be indispensable to the exercise of such as are granted. A private corporation is only a quasi individual, the pure creation of the legislative will, with just such powers as are conferred expressly or by necessary implication, and none others. Whatever, therefore, may have been the mischief intended to be reached and prevented by this law by restrictions imposed on the corporation, it was competent for the legislature by this law, which operates as an amendment of its charter, to accomplish." *Shaffer v. Union Min. Co. of Allegany County*, 55 Md. 74.

A statute of Rhode Island (Rev. Stat. chap. 125, § 14) provides: "All acts of incorporation hereafter granted may be amended or repealed at the will of the general assembly, unless express provisions be made therein to the contrary." The Brown & Sharpe Manufacturing Company was incorporated by the general assembly of Rhode Island for the purpose of manufacturing machinery, subject to a chapter of which this statute was a

part. After the incorporation of it, the legislature passed an act requiring corporations to pay weekly the employes engaged in its business the wages earned by them to within nine days of the date of such payment, unless prevented by inevitable casualty. In *State v. Brown & S. Mfg. Co.*, 18 R. I. —, 17 L. R. A. 856, which was an action for the violation of this act, the supreme court of Rhode Island held that the act was constitutional, and that it operated as an amendment to the charter of the corporation sued, as it was a reasonable exercise of the power to amend.

In the *Sinking Fund Cases*, 90 U. S. 700, 25 L. ed. 496, "the question was whether congress had the constitutional power to enact a law compelling the Union Pacific and Central Pacific Railroad Companies to set aside a portion of their current earnings as a sinking fund for the purpose of meeting a very large indebtedness secured by mortgage upon the roads, and payable at a future day. The majority of the court held that the legislation was valid as an exercise of the general legislative powers of the government, and also because the right to alter or amend the charters of the companies had been expressly reserved to congress."

In commenting on the reserved power to amend or repeal the charters of corporations, in that case, *Chief Justice Waite*, in delivering the opinion of the court, said: "All agree that it cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made; but, as was said by this court, through *Mr. Justice Clifford*, in *Miller v. New York*, 82 U. S. 15 Wall. 498, 21 L. ed. 104, it may safely be affirmed that the reserved power may be exercised, and to almost any extent, to carry into effect the original purposes of the grant, or to secure the due administration of its affairs, so as to protect the rights of stockholders and creditors, and for the proper disposition of its assets; and again, in *Holyoke Water Power Co. v. Lyman*, 82 U. S. 15 Wall. 519, 21 L. ed. 189, 'to protect the rights of the public and of the corporators, or to promote the due administration of the affairs of the corporation.' *Mr. Justice Field*, also speaking for the court, was even more explicit when, in *Tomlinson v. Jessup*, 82 U. S. 15 Wall. 459, 21 L. ed. 206, he said the reservation affects the entire relation between the state and the corporation, and places under legislative control all rights, privileges, and immunities derived by its charter directly from the state; and again, as late as *Maine Cent. R. Co. v. Maine*, 96 U. S. 510, 24 L. ed. 840, by the reservation

the state retained the power to alter it [charter] in all particulars constituting the grant to the new company formed under it, of corporate rights, privileges, and immunities. *Mr. Justice Swayne*, in *Shields v. Ohio*, 95 U. S. 824, 24 L. ed. 859, says, by way of limitation, the alterations must be reasonable. They must be made in good faith, and be consistent with the object and scope of the act of incorporation. Sheer op-

pression and wrong cannot be inflicted under the guise of an amendment or alteration." The rules as here laid down are fully sustained by authority.

In speaking of the reserved power to amend or repeal the charters of corporations, *Mr. Justice Gray*, in delivering the opinion of the court in *Inland Fisheries Comrs. v. Holyoke Water Power Co.*, 104 Mass. 451, said: "It is sufficient now to say that it is established by adjudications which we cannot disregard, and the principles of which we fully approve, that it at least reserves to the legislature the authority to make any alteration or amendment in a charter granted subject to it that will not defeat or substantially impair the object of the grant, or any rights which have vested under it, and that the legislature may deem necessary to secure either that object or other public or private rights. Under such a clause, for instance, the legislature may make the stockholders of an incorporated bank liable for the future debts of the corporation. *Sherman v. Smith*, 86 U. S. 1 Black, 587, 17 L. ed. 168; *Re Gibson*, 21 N. Y. 9. It may vary the measure, and thus enlarge the proportion, of the profits which a mutual life insurance company is required by the terms of its charter to pay to a charitable institution. *Massachusetts General Hospital v. State Mut. L. Assur. Co.* 4 Gray, 227. Railroad corporations may be compelled, by general or special laws, to make changes in the levee, grade, and surface of the roadbed, new structures at crossings of other railroads or of highways, or station houses at particular places, in a manner, and to be enforced by forms of process, different from those provided for or contemplated by the original charter or the general law in force when that charter was granted. *Borbury v. Boston & P. R. Corp.* 6 Cush. 424; *Fitchburg R. Co. v. Grand Junction R. & Depot Co.* 4 Allen, 198; *Com. v. Eastern R. Co.* 103 Mass. 254, 4 Am. Rep. 555; *Albany Northern R. Co. v. Brownell*, 24 N. Y. 845, overruling *Miller v. New York & E. R. Co.* 21 Barb. 518."

In *Spring Valley Water Works v. Schottiler*, 110 U. S. 847, 28 L. ed. 173, it appears that the constitution of the state of California "provided that corporations might be formed under general laws, and should not be created by special act, except for municipal purposes; and that all laws, general and special, passed pursuant to that provision, might be, from time to time, altered and repealed. A general law was enacted by the legislature for the formation of corporations for supplying cities, counties, and towns with water, which provided that the rates to be charged for water should be fixed by a board of commissioners, to be appointed in part by the corporation and in part by the municipal authorities. The constitution and laws of the state were subsequently changed so as to take away from corporations which had been organized and put into operation under the old constitution and laws the power to name members of the boards of commissioners, and so as to place in the municipal authorities the sole power of fixing rates for water." The court held that "these changes violated no

provisions of the Constitution of the United States."

Chief Justice Waite, speaking for the court, said: "The Spring Valley Company is an artificial being, created by or under the authority of the legislature of California. The people of the state, when they first established their government, provided in express terms that corporations, other than for municipal purposes, should not be formed except under general laws, subject at all times to alteration or repeal. . . . In California the constitution put this reservation in every charter, and consequently this company was from the moment of its creation subject to the legislative power of alteration, and, if deemed expedient, of absolute extinguishment as a corporate body." See *State v. Brown & S. Mfg. Co.* 18 R. I. —, 17 L. R. A. 858.

It is obvious that the legislature cannot, under the power to amend, take from corporations the right to contract; for it is essential to their existence. It can regulate it when the interests of the public demand it, but not to such an extent as to render it ineffectual, or substantially impair the object of incorporation. The constitution of this state, in reserving the power to amend or repeal, expressly provides that it may be exercised whenever, in the opinion of the legislature, the charter "may be injurious to the citizens of this state; in such manner, however, that no injustice shall be done to the corporators." Article 12, § 6.

Whenever the charters of railroad companies become obstacles in the way of the legislature so regulating their roads as to make them subserve the public interest to the fullest extent practicable, their charters are, in that respect, injurious to the citizens of the state, and can be amended as to defects in such manner as will be just to the corporators; for they are organized for a public purpose, and their roads are declared by the constitution to be public highways, and they are made common carriers. They are clothed with a public trust, and in many respects are expressly subjected by the constitution to the control of the legislature. There is no enterprise in which the public is so largely interested as it is in the successful and efficient operation of railroads. With the trust with which they are clothed is imposed the duty to serve the public as common carriers in the most efficient manner practicable. For this reason the legislature may impose on them such duties as may be reasonably calculated to secure such results. Being created by statute, the legislature may so change them by amendment as to make them subserve the purposes for which they were created. If the legislature, in its wisdom, seeing that their employes are and will be persons dependent on their labor for a livelihood, and unable to work on a credit, should find that better servants and service could be secured by the prompt payment of their wages on the termination of their employment, and that the purpose of their creation would thereby be more nearly accomplished, it might require them to pay for the labor of their employes when the same is fully performed, at

the end of their employment. If it be true that in doing so it would interfere with contracts which are purely and exclusively private, and thereby limit their right to contract with individuals, it would nevertheless, under such circumstances, have the right to do so under the reserved power to amend.

But we do not mean, by holding as we do, to intimate that the legislature can, by way of amendment, fix or limit the compensation of the employes of railroad companies. That might seriously affect one of the principal charter rights of the companies, and thereby substantially impair the object of their incorporation. Such a power would be subversive of the right, and, when exercised to its fullest extent, would leave to the corporation the privilege of selecting its employes without the right of contracting with them. An amendment to that extent would be manifestly unjust to the companies, and violative of the constitution, which, while it grants the right to amend when, in the opinion of the legislature, the charter is injurious to the citizens, it limits the right to do so to amendments that are just to the corporations. The act in question is not subject to that imputation. It is prospective in its operation, and leaves to the corporations the right of making contracts with their employes on advantageous terms.

Is the act before us a proper amendment? It provides, among other things, that whenever any corporation "engaged in the business of operating or constructing any railroad or railroad bridge" shall discharge with cause any servant or employé thereof, "the unpaid wages of any such servant or employé, then earned at the contract rate, without abatement or deduction, shall be and become due and payable on the day of such discharge;" "and if the same be not paid on such day then, as a penalty for such nonpayment, the wages of such servant or employé shall continue at the same rate until paid." This provision is susceptible of two constructions, one of which makes the act require the corporation to pay the employé all the wages to which he would have been entitled had he fully performed his contract up to the time of his discharge, notwithstanding he had failed to do so and had damaged the corporation thereby. If this be its intention, it is unconstitutional, because its enforcement might take property from the corporation without due process of law, for the employé is not entitled to the stipulated wages until he has performed the contract. He may have damaged his employer by the failure to do so in a sum larger than the wages he would have been entitled to receive in the event he had complied with his agreement. To compel the corporation, in such a case, to pay any sum whatever, would be a deprivation of property without due process of law. The same would be equally true if the corporation should be compelled to pay full wages when the damage caused by the non-performance of the contract does not exceed them. *Com. v. Perry*, 155 Mass. 117, 14 L. R. A. 825. Such an amendment of the charters of corporations is clearly unjust to the corporations.

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The other construction is more reasonable. It makes the words "without abatement or deduction" mean "without discount." The legislature evidently thought that the employé might receive money or property in the course of his employment in part payment for his labor, and evidently intended that the wages thus paid should not be repaid. A strict construction of the words "without abatement or deduction" would deprive the corporation of a credit for the money or property in a settlement with its employé for his services. Then, again, the act requires the corporation to pay only the unpaid wages earned, at the contract rate, at the time of his discharge. Stipulated wages cannot be earned except by the performance of the contract by which the employer agrees to pay them. Obviously, then, the act means by the words "without abatement or deduction" that the unpaid wages earned at the contract rate at the time of the discharge shall be paid without discount on account of the payment thereof before the time they were payable according to the terms of the contract of employment. When construed in this manner, this provision of the act is constitutional, and it is our duty to so construe it.

Tested by the principles of law we have indicated, the Act under consideration is unconstitutional so far as it affects natural persons. As to corporations it is a valid statute. It does not seriously impair their right to contract, but leaves them to contract with their employes on profitable terms.

So much of the act as is unconstitutional can be eliminated, and the remainder stand. *State v. Marsh*, 87 Ark. 856; *Little Rock & Ft. S. R. Co. v. Worthen*, 46 Ark. 812; *State v. Deschamp*, 53 Ark. 490; *Davis v. Gaines*, 48 Ark. 370, 383.

After this elimination, so much of the first section of the act as remains in force reads as follows (Act March 25, 1889): "Section 1. Whenever any corporation, engaged in the business of operating or constructing any railroad or railroad bridge, shall discharge with or without cause, or refuse to further employ, any servant or employé thereof, the unpaid wages of such servant or employé then earned at the contract rate, without abatement or deduction, shall be and become due and payable, on the day of such discharge or refusal to longer employ; and if the same be not paid on such day then, as a penalty for such nonpayment, the wages of such servant or employé shall continue at the same rate until paid. Provided, such wages shall not continue more than sixty days, unless an action therefor shall be commenced within that time."

It cannot be truthfully said that so much of the act as we find to be in force is unconstitutional because it interferes with the rights of employes to make such contracts with corporations as they see fit. As said in *State v. Brown & S. Mfg. Co.*, 18 R. I. —, 17 L. R. A. 856: "No inhibition is placed upon employes to make such contracts as they choose, with any person or body, natural or artificial, that is authorized to contract with them. But corporations are artificial bodies,

and possess only such powers as are granted to them, and natural persons dealing with them have no right to demand that greater power should be granted to corporations in order that they may make other contracts with such corporations than the corporations are authorized to enter into."

The "act being general and uniform in its operation upon all persons coming within the class to which it applies, it does not (if amendments to charters can) come within that special legislation prohibited by the constitution; for it applies to and embraces all persons 'who are or may come into certain situations and circumstances,' and is general and uniform; not because it operates upon every person in the state, for it does not, but because every person who is brought within the relations and circumstances provided for, is affected by the law." *Little Rock & Ft. S. R. Co. v. Hanniford*, 49 Ark. 291; *McAulich v. Mississippi & M. R. Co.* 20 Iowa, 342; *Missouri Pac. R. Co. v. Mackey*, 127 U. S. 205, 33 L. ed. 107; *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 27, 32 L. ed. 535; *Re Oberg*, 21 Or. 406, 14 L. R. A. 577; *Hawthorn v. People*, 109 Ill. 311; *Youngblood v. Birmingham Trust & Sav. Co.* 95 Ala. 521, 20 L. R. A. 58; *Cooley*, Const. Lim. 6th ed. 480, 481.

This action was brought before a justice of the peace for the recovery of wages earned, and the penalty or damages allowed by the act on account of the nonpayment thereof from the time the wages were due to the day of bringing the suit. The question arises, Did the justice of the peace have jurisdiction? We have held that a justice of the peace did not have jurisdiction in an action for the recovery of a statutory penalty. *Baltimore & O. Teleg. Co. v. Looney*, 48 Ark. 301. On the other hand, the jurisdiction of justices of the peace in actions for the recovery of punitive or exemplary damages has been sustained. The question, then, is, Is the amount allowed to the employé, in addition to the wages earned, a penalty or exemplary damages? The answer depends on the interpretation of so much of the act as is in the following words: "And if the same [wages] be not paid on such day then, as a penalty for such nonpayment, the wages of such servant or employé shall continue at the same rate until paid." According to the act, the wages earned become due when the employé is discharged or the employer refuses to longer employ him. The additional amount is allowed on account of the failure to pay the wages when due, and is regulated according to the length of the delay of payment. It is allowed for a double purpose,—as a compensation for the delay, and as a punishment for the failure to pay. It is composed of all the elements and serves all the purposes of exemplary damages. *Day v. Woodworth*, 54 U. S. 18 How. 363, 14 L. ed. 181; *Missouri Pac. R. Co. v. Humes*, 115 U. S. 513, 29 L. ed. 463; *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 84–86, 32 L. ed. 538; *Sedgw. Damages*, 6th ed. p. 35. The name given to it by the act cannot change it.

Our conclusion is, the additional amount 23 L. R. A.

is allowed as exemplary damages, and that the justice of the peace had jurisdiction in this action.

The judgment of the Circuit Court is therefore reversed, and judgment will be rendered by this court in favor of appellant against appellee for \$27.90, and \$8.50 as exemplary damages, the amount sued for, and all his costs.

Bunn, Ch. J., dissenting:

The constitutionality of the Act entitled "An Act to Provide for the Protection of Servants and Employés of Railroads," approved March 25, 1889, is called in question by the plea of the appellee company, which was sustained in the court below, and the appellant appeals to this court. The majority of the court holds that the act in question, in so far as it affects private individuals, is unconstitutional, but that, in so far as it affects corporations, it is constitutional; and, furthermore, that it is divisible, so that the unconstitutional part may be eliminated and the valid part may stand. The court also holds that the act in fact does not interfere with the right to contract, but only affects some of its incidents, if I fully comprehend its meaning. From the decision of the majority of the judges I feel constrained to dissent, for reasons that follow.

Since the court, in its well-considered opinion, holds that the act in question, according to the weight of authority, cannot stand upon the ground that it is a legitimate expression of the police or of any of the other great powers said to be inherent in government, I am relieved of the necessity of discussing the question involved from that standpoint, and therefore address myself directly to the consideration of the constitutional provision subjecting incorporation statutes to the legislative power of alteration and repeal on the one hand, and of alteration, revocation, and amendment of charters on the other, to be found in section 6, art. 12, of the Constitution, from which, and from which alone, the court derives the authority to enact the act in question and similar acts. The act is as follows: "Section 1. Whenever any railroad company or any company, corporation, or person engaged in the business of operating or constructing any railroad or railroad bridge, or any contractor or subcontractor engaged in the construction of any such road or bridge, shall discharge, with or without cause, or refuse to further employ any servant or employé thereof, the unpaid wages of any such servant or employé, then earned at the contract rate, without abatement or deduction, shall be, and become due and payable on the day of such discharge, or refusal to longer employ; and if the same be not paid on such day then, as a penalty for such nonpayment, the wages of such servant or employé shall continue at the same rate until paid. Provided, such wages shall not continue more than sixty days, unless an action therefor shall be commenced within that time. Sec. 2. That no such servant or employé who secretes or absents himself to avoid payment to him or refuses to receive the same when fully tendered, shall be en-

titled to any benefit under this act for such time as he so avoids payment. Sec. 3. That any such servant or employé whose employment is for a definite period of time, and who is discharged without cause before the expiration of such time may, in addition to the penalties prescribed by this act, have an action against any such employer for any damages he may have sustained by reason of such wrongful discharge, and such action may be joined with an action for unpaid wages and penalty. Sec. 4. That this act shall take effect and be in force from and after its passage." The constitutional provision referred to is in these words, viz.: "Art. 12, § 6. Corporations may be formed under general laws; which laws may, from time to time, be altered or repealed. The general assembly shall have the power to alter, revoke, or annul any charter of incorporation now existing and revocable at the adoption of this constitution, or any that may hereafter be created whenever, in their opinion, it may be injurious to the citizens of this state; in such manner, however, that no injustice shall be done to the incorporators." It is stated in the opinion of the court that the act would be treated as amendatory of our incorporation laws, and thus it was thought to give it the effect of accomplishing what is thought to be provided for in the section of the constitution quoted above. At the threshold of the discussion, therefore, we are confronted with a question of the most serious character. It is this: Can this court arbitrarily treat one statute as amendatory of another? That is to say, is it not a legal proposition of itself whether any statute is amendatory of another, aside from the idea of both dealing with the same or kindred subjects? It will be observed that the act in question does not in terms refer to any other statute, and, this being so, can any other statute be said to be amended by it? Section 23, art. 5, of the Constitution is in these words, viz.: "No law shall be revived, amended, or the provisions thereof extended or conferred, by reference to its title only, but so much thereof as is revived, amended, extended, or conferred shall be re-instated and published at length." Now, if a law referring to a previous law by title only is not to be considered as amendatory of it, how much more true is it that a subsequent law, which does not refer even to the title of a former law, is not amendatory of the existing or former law. The prohibition contained in this section of the constitution was not meant as an idle saying, a mere flourish of high-sounding words, but was intended to subserve a great purpose,—the protection of the citizen against surreptitious legislation. Nor has this court, or the courts of other states, treated this and similar provisions as light and meaningless things. *Beard v. Wilson*, 53 Ark. 290; *Havis v. Jefferson* (Ark.) 14 S. W. Rep. 1101; *Watkins v. Burke Springs*, 49 Ark. 181; *Judson v. Bessemer*, 87 Ala. 240, 4 L. R. A. 742; *State v. Trenton*, 53 N. J. L. 566; *Pitkin County Comrs. v. Aspen Min. & Smelting Co.* 8 Colo. App. 223.

From the decisions on the subject we gather 23 L. R. A.

this principle: that an act, as an independent law, may not be objectionable on constitutional grounds, and yet, as an amendment of some existing law, it may be invalid. The rule is a reasonable one, because no law should be altered or amended without something appears in the amendatory act to give notice to the public of a change in the original law, while, if the new act is intended as an independent act, the original act is not affected, and there is nothing to take notice of. This, perhaps, is enough to say on this part of the subject.

The majority of the court, treating the act in question as an independent act, would hold it unconstitutional for reasons assigned in the opinion, which reasons we think sound and incontrovertible. But the majority of the court, treating the act in question as amendatory of our general incorporation laws (the court does not say which one, for there are two or more), holds it to be constitutional under the power reserved to the legislature in the last sentence (sec. 6, art. 12, of the Constitution), and I have endeavored to show that the act can have no place as an amendment, because it does not show a compliance with the constitution in the manner of its enactment as such amendment. The last sentence of the sixth section of article 12 of the Constitution manifestly refers to corporations created and to be created by special acts of the legislature, judging from the words employed and the context. Each charter is then made the subject of legislative alteration, revocation, and amendment, in case it becomes injurious to the citizens of the state, and provided it was revocable at the adoption of the constitution, if already in existence. The charters "hereafter to exist" were doubtless those special charters conferred by legislation to be expressed in special acts. Now, it does not appear in this case what kind of a corporation the appellee company is, whether it was created under our general incorporation laws or by special act of the legislature. As a matter of common knowledge it may be assumed, however, that it was created by special act, since it is now forty or more years since it became a matter of public concern, and since it had its origin at a time when there was no general incorporation law in this state. There could, then, be no grant of corporate powers for strictly private purposes. All such were considered in conflict with the constitutional prohibition of monopolies. Strictly public, or municipal, and quasi public, such as railroad corporations, were all that were allowable. The former were strictly at the will and pleasure of the legislature; the latter were the result of contract between the state and corporators, and by their contracts were both state and corporations to be governed. *State v. Curran*, 12 Ark. 821. Of this latter class, presumably, was the appellee company; and to show that its charter is the subject of legislative revocation or amendment we must look to the language of the contract,—the charter,—which does not appear in evidence in this cause.

Motion to modify judgment overruled May 26, 1894.

INDIANA SUPREME COURT.

Thomas A. FLORES, County Treasurer,
et al., Appls.,
v.

Elizabeth R. SHERIDAN, Admx., etc., of
Alexander L. Sheridan, Deceased.

(.....Ind.....)

1. A taxpayer's neglect for a series of years to place upon his personalty list credits from which he is entitled to deduct debts will not prevent him from claiming the deduction when notified to show cause why he should not be compelled to pay taxes upon the credits for those years as delinquent property.
2. Deducting debts from the gross amount of credits on which a person is required to pay taxes does not violate a constitutional provision "for a uniform and equal rate of assessment for taxation," and authorizing the legislature to "prescribe such reg-

ulations as shall secure a just valuation for taxation of all property both real and personal, excepting such only . . . as may be specially exempted by law," since the just value of credits is to be ascertained by subtracting from their gross amount the bona fide indebtedness of the taxpayer.

3. The deduction of debts from credits to be taxed is not an exemption within the meaning of constitutional and statutory provisions as to exemptions from taxation.

(February 13, 1894.)

A PPEAL by defendants from a judgment of the Superior Court for Tippecanoe County in favor of plaintiff in an action brought to enjoin the collection of certain taxes. *Affirmed.* Mr. Sheridan in his lifetime sold some real estate and gave ten years time at interest for the payments. Soon afterward he invested in

NOTE.—Constitutionality of provision for deduction of debts from credits or other property.

The decision in the above case, that the deduction of debts from credits to be taxed is not an exemption within the meaning of the constitutional provisions relating to exemption from taxation, is not strictly one of first impression, but the prior cases on the subject are very few and not harmonious.

In *Fayette County v. People's & D. Bank* (Ohio) 10 L. R. A. 198, a distinction is made between a deduction of indebtedness from taxable credits and a deduction from tangible property in possession, such as money on deposit in a bank; and the court, while holding that a deduction of the average amount of deposits and accounts payable, exclusive of current deposit accounts, from the average amount of notes and bills receivable, discounted, or purchased in the course of business by a banker, would not be in conflict with the constitutional provision for uniformity of taxation, or a requirement for the taxation of property of banks of every description, without deduction, held that the same deduction from the average amount of cash and cash items in possession would be a violation of the constitutional rule of uniformity.

This decision reviews, and in a certain sense supplements, the prior decision in the case of *Exchange Bank of Columbus v. Hines*, 3 Ohio St. 1, in which a statute allowing the deduction of liabilities from the amount of "moneys and credits" was held unconstitutional.

But in conflict with the case of *FLORES v. SHERIDAN*, and the Ohio case of *Fayette County v. People's & D. Bank*, *supra*, the supreme court of South Dakota, in an advisory opinion given to the governor, declares that a statute allowing a deduction of an indebtedness from credits is in violation of a constitutional prohibition against exemptions from taxation. The court expressly holds that such a deduction of debts from credits is an exemption contrary to the express decision in *FLORES v. SHERIDAN*. *Re Assessment & Collection of Taxes* (S. Dak.) April 10, 1893.

The court further held in the South Dakota case that allowing a deduction of indebtedness from taxable personal property, without allowing the same deduction from taxable real property, was a violation of the constitutional rule of uniformity; and that the same was true of a provision allowing the deduction of indebtedness owned or held with-

in the state, but denying the deduction of indebtedness held or owned outside the state.

But this opinion of the court in South Dakota is based largely on the Ohio case of *Exchange Bank of Columbus v. Hines*, *supra*, which has been explained and limited by the later case of *Fayette County v. People's & D. Bank*, with which the South Dakota case is in conflict as well as with the case of *FLORES v. SHERIDAN*.

The Oregon decision in *Wetmore v. Multnomah County*, 6 Or. 463, upheld a statute permitting the deduction of indebtedness, holding it not to be unconstitutional as unequal or ununiform, but here the deduction was allowed from the value of all taxable property real as well as personal.

The growing interest in methods of taxation, and the increasing importance of establishing just principles on the subject, make it certain that the question here presented will receive much greater attention hereafter than it has yet received, although statutes allowing the deduction of indebtedness have long been in force in some states, without any question of their validity, or at least without any contest thereof in the courts. Such is the case for instance in New York state in which a statute from an early period has allowed a deduction of debts from the value of all taxable personal property, 1 Rev. Stat. 321, § 9. But while this statute has been before the courts as in *People v. Ryan*, 88 N. Y. 142, 42 Am. Rep. 238, affirming a decision of the general term of the supreme court which in turn affirmed that of the special term reported in 10 Abb. N. C. 37, no question of its constitutionality was raised. The same is true of the case of *People v. Lookport Board of Education*, 46 Barb. 588, which held the statute inapplicable to moneyed corporations. But it should be said there is not in New York as in some other states any constitutional provision requiring uniformity of taxation or requiring all property to be taxed.

The Indiana case of *FLORES v. SHERIDAN* throws the weight of authority in favor of the constitutionality of such deduction of debts from credits, if, indeed, the weight of authority was not already on that side; but the decisions are so few, and the courts so much at variance, that the question cannot be regarded as entirely settled.

In several cases the deduction of debts has been considered with respect to the creation of a discrimination against national banks; but these cases have no particular bearing on the question here presented.

R. A. E.

other real estate on time, arranging the payments to correspond with those due him, the amount of the purchase price being in excess of that which had been paid for his property. Since his debts exceeded his credits, he assumed that he was not liable to a personal tax and omitted to mention either debts or credits on his lists for several years. This omission was subsequently discovered, and Mr. Sheridan's administratrix was notified to show cause why the omitted credits should not be taxed as delinquents during the years in which they were omitted from the tax list.

Further facts appear in the opinion.

Messrs. Charles E. Lake, George P. Haywood, and R. P. Davidson for appellants.

Messrs. John M. La Rue and John D. Gougar, for appellee:

There was no sufficient description of the property alleged to have been omitted either in the paper given to the auditor informing him of the matter, in his notices, or in any of his proceedings.

Florer v. Sherwood, 128 Ind. 495.

The deductions were proper.

Wason v. First Nat. Bank of Indianapolis, 107 Ind. 206.

The taxpayer may recover taxes after payment if the assessor refuses to allow his credits. *Indianapolis v. Vajen*, 111 Ind. 240; Rev. Stat. 1881, §§ 6332, 6334; *Matter v. Campbell*, 71 Ind. 512.

The method of deducting debts from credits was proper.

Woll v. Thomas, 1 Ind. App. 232.

Dailey, J., delivered the opinion of the court:

The appellee, as plaintiff in the court below brought her action against the appellants and Melville W. Miller and George P. Haywood to prevent the collection of certain taxes by appellant Florer, treasurer of Tippecanoe county. The original complaint was lost, and another substituted. A demurrer was filed to the substituted complaint by each defendant for want of sufficient facts to constitute a cause of action, which was sustained as to defendants Miller and Haywood, and, plaintiff refusing to amend the complaint, judgment was rendered in their favor. The demurrers of appellants, Florer and Barnes, were overruled, to which ruling they excepted, and, declining to answer further, the court rendered judgment for the plaintiff on the demurrers of Florer and Barnes to the complaint, perpetually enjoining the collection of the whole, or any part, of said taxes, and ordering the assessment mentioned in the complaint stricken from the tax duplicate. The defendants Florer and Barnes prayed an appeal.

The errors complained of arise upon the ruling of the court on the separate demurrers of each defendant. The assignment of errors contains two specifications: First, the court erred in overruling the separate demurrer of Thomas A. Florer, treasurer of Tippecanoe county, Ind., to the substituted complaint; second, the court erred in overruling the separate demurrer of Thomas J. Barnes, auditor of Tippecanoe county, Ind., to the substituted

complaint. The complaint, in substance, alleges that on the 8th day of February, 1890, the defendants Melville W. Miller and George P. Haywood filed in the office of said Barnes, auditor of Tippecanoe county, Ind., a paper giving to said auditor the information that Alexander L. Sheridan, then deceased, was, during the years 1884 to 1889, inclusive, a citizen of the city of La Fayette and Tippecanoe county, and was the owner of certain property, subject to taxation for said years, which had not been listed for taxation, and by reason of which the property had been omitted, and no taxes paid thereon; that said auditor, acting upon such information, gave notice to the appellee, who was, at the time of filing the information, the administratrix of decedent's estate, that he intended to place said property on the tax duplicate, and required her to appear on the 22d day of March, 1890, and show cause, if she could, why such assessment should not be made; that, pursuant to said notice, appellee called upon said auditor at his office, and informed him that decedent, in his lifetime, had no money loaned, but that for and during the years mentioned he did own \$8,800 of credits, but that the same had not been listed by the decedent for taxation because during said time he was in debt to others in excess of the credits owned by him; that said auditor, refusing to investigate further as to the truth of the statements made by said administratrix, but being advised as to the law by said Miller and Haywood, claimed that, as the credits and debts were not placed on the schedule at the time of the assessment of the decedent, the deduction could not then be made, and the property should be placed on the tax duplicate, and taxed as other property, and he thereupon assessed said credits, and placed the amounts and value on the tax duplicates; that afterwards, said duplicates being in the hands of said Florer as treasurer of said county, he was about to proceed to the collection of said taxes out of the property of the decedent, — and prays that he be enjoined from so doing. The complaint further avers that said decedent was the owner of certain real estate in said county, and, inasmuch as said taxes had been wrongfully assessed and placed on said tax duplicate, they were an apparent lien on said land, and a claim against said estate, and asks that they be stricken from said docket. There is also an allegation of a want of description of the omitted property.

It will be observed that this action arose by reason of the appellant Barnes, as auditor of Tippecanoe county, by virtue of the authority given him as such auditor by section 1, p. 341, Acts 1889, having assessed and placed on the tax duplicate of said county for taxes for the years 1884 to 1889, inclusive, certain credits described in the complaint, in the hands of the appellee, administratrix, as omitted property, the same having been left out by the decedent of the appellee for said years, and by reason of the treasurer of said county being about to enforce the collection of said taxes. The Act of March 9, 1889, *supra*, amending section 6416, Rev. Stat. 1881, reads: "Whenever any county auditor

shall discover or receive credible information, or if he shall have reason to believe, that any real or personal property has been omitted in whole or in part, in the assessment of any year or number of years, from the assessment book or from the tax duplicate, he shall proceed to correct the tax duplicate and add such property thereto, with the proper valuation, and charge such property and the owner thereof, with the proper amount of taxes thereon, to enable him to do which he is invested with all the powers of assessors under this act, but before making such correction or addition, if the persons claiming to own such property, or occupying, or in possession thereof reside in the county and be not present, he shall give such person notice in writing of his intention to add such property to the tax duplicate, describing it in general terms, and requiring such person to appear before him, at his office, at a specified time within five days after giving such notice, to show cause, if any, why such property should not be added to the tax duplicate, and if the party so notified do not appear, or if he appear and fail to show any good and sufficient cause why such assessment should not be made, the same shall be made," etc. There is no doubt that under the provisions of this section the appellee had a right to show cause, if any existed, why such credit should not be annexed to the tax duplicate to increase the liability of the estate, unless the clause in section 6832, Rev. Stat. 1881, is unconstitutional, which stipulates that, "in making up the amount of credits which any person is required to list, for himself or for any other person, company, or corporation, he shall be entitled to deduct from the gross amount of credits the amount of all bona fide debts owing by such person, company, or corporation to any other person, company, or corporation for a consideration received." In *Indianapolis v. Vajen*, 111 Ind. 243, this court says: "There is no controversy but that, under the ruling in *Wasson v. First Nat. Bank of Indianapolis*, 107 Ind. 206, the plaintiff was entitled to deduct his bona fide indebtedness from the value of his bank stock, if proper steps to that end had been taken before the payment of the tax." From the facts averred in the complaint, it is evident that whatever appellee might have done by way of making statements before the auditor when she appeared before him in response to notice to show cause, etc., or in whatever form she might have presented her claim for deductions, it would, in any event, have been unavailing, although she was notified to appear for that purpose, because it is alleged that he refused to allow deductions. The complaint shows that Miller and Haywood gave information to the auditor in a paper, partly written and partly printed, that the decedent in his lifetime had omitted to list "moneys loaned" and "credits" for the time stated, but described no item of omitted property otherwise than as moneys loaned or credits, and that, upon this information being filed, the auditor issued a notice to the appellee in which no property was described as omitted from taxation, except the amounts of "moneys loaned" and "credits" were giv-

en; but to whom the moneys had been loaned or what the credits were is not stated in the notice or elsewhere. It has been decided by this court in *Florer v. Sherwood*, 128 Ind. 495, that this description is not sufficient, and we still adhere to that opinion. The court says: "But money loaned and credits may, or may not, be of their face value, depending on many contingencies; and to justify an assessment by the auditor of property of that character he must know of specific loans and specific credits which have been omitted, and upon which valuation may be placed." Especially is this principle found to be correct when we remember that all taxation in this state is upon values, and none upon amounts. In *Woll v. Thomas*, 1 Ind. App. 282, the court says: "Our conclusion is that the auditor had no right, under the law in force at that time [from 1883 to 1888], to assess any property as omitted except distinct, definite, and recognizable articles which had not been listed and properly appraised by the assessor." In construing section 6832, *supra*, concerning the rights of taxpayers, this court, in *Matter v. Campbell*, 71 Ind. 512, at page 517 said: "We are clearly of the opinion that, under the assessment laws of this state, the resident taxpayer has the right, in listing his personal property for taxation, to deduct from his money at interest, either within or without the state, and 'all other demands,' together constituting the total amount of all credits owned and held by him, his bona fide indebtedness, and to list or give in the surplus or remainder only for the purpose of taxation." If the assessor refuse to allow his credits, the taxpayer may recover back the taxes. *Indianapolis v. Vajen*, *supra*. There is an allegation in the complaint that there was no concealment from the assessor, and the presumption is that he did his duty. In what we say we do not want to be understood as approving the "loose-jointed and slipshod" method of listing property adopted by the decedent, and feel that the statute should be strictly complied with; yet, when all the sections of the tax law are construed together, we are convinced that the right to correct the list existed when the appellee appeared before the auditor, in obedience to the notice he gave her to show cause why the addition should not be made.

But a more potent question presents itself for our consideration. The constitutionality of the clause in section 6832, *supra*, deducting debts, is assailed by the learned and ingenious counsel for the appellants with much vigor, although a provision of this kind has existed in our tax laws for many years. We have looked diligently, but in vain, for a single case in which its validity has ever been questioned in this court. The attack is upon two grounds: First, because such provision as to deductions violates the principles of fundamental law "for a uniform and equal rate of assessment for taxation;" second, because the exemptions which the general assembly is authorized to make do not include the class of property called "credits." Section 1, article 10, of the Constitution of Indiana, being section 193, Rev. Stat. 1881, au-

thorizes the lawmaking power to "provide by law for a uniform and equal rate of assessment and taxation," and that it "shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting such only, for municipal, educational, literary, scientific, religious or charitable purposes, as may be specially exempted by law." In support of counsel's contention they urge that, when the legislature enacts a law for the assessment and taxation of property, it must not only have an equal rate of assessment for all property for the same particular purpose, but there must also be uniformity as to the matter or species of property taxed; that all property must be affected alike, unless it comes under the exceptions in the latter clause of the section, and there must be no inconsistency; that, if there is an exception of any property from taxation, this uniformity does not exist, unless the law thus exempting the property extends to and includes all of that kind or species of property, and that "money at interest" is construed to mean property (*Wasson v. First Nat. Bank of Indianapolis, supra*); that, as moneyed capital, credits are of the most valuable of property, and therefore any law providing for an exemption of such property makes provision for exempting from taxation of not only a species of property the most valuable, but also of so large an amount that the courts can judicially know that the quantity is sufficient to form a large and material part of the moneyed capital of the state; that deductions are exemptions, and credits are property, and, as they are not taxed, therefore credits are exemptions; that the taxing power is inherent in every sovereignty, and there can be no presumption in favor of its relinquishment, surrender, or abandonment; that the whole community is interested in retaining the power of taxation undiminished, and for this reason the laws are strictly construed against exemptions; that if it could be conceded that deductions of debts from credits were not strictly exemptions, but only an equalizing of values, the same result is reached as though the property were excluded; that the law of deduction from any standpoint is unfair, unequal, unjust, oppressive, and pernicious, because it increases the tax of the poor man who is in debt for his real or personal estate, and not able to own credits, and that it is the property, in whatever form it may exist, that the government reaches out for, to make it contribute for its support, and not the individual who owns it,—in other words, counsel assume that it is the real worth of the property in existence, and not the net or real worth of the individual, that is made the basis of valuation under the fundamental law of this state. There is no more difficult problem than that of levying direct taxes so as to make them just and equitable in every respect. If unequal and unjust, the burden is readily noticed; and one chief reason assigned by those who favor resorting to indirect taxes is that this method enables the government, in the language of Furgot, "to pluck the goose without making it cry out," since those who pay do not perceive,

23 L. R. A.

or at least do not reflect, that a part of what they pay as a price is really paid as a tax. Our mode of raising revenue has been to levy annual taxes on the value of the real and personal property, with limited exceptions. This plan seems, at first blush, to be just, and in that belief it has been steadily adhered to, notwithstanding the many and serious difficulties and objections attending the taxation of personal property. For instance, personalty cannot be assessed without inquisitorial process of some kind, instituted for the purpose of ascertaining that which is not open to public inspection, and which many individuals, through their avarice, except under the compulsion of such process, would not consent to disclose. Statutes have recognized the difficulty, and provided a list to be presented by the taxpayer under oath, leaving the person taxed to reduce the amount by his own oath if he shall see fit and be able to do so. It has been said that this is objectionable, as holding out a temptation to false swearing in matters where a false oath would be difficult, if not impossible, of detection, and that the assessment of personalty creates constant incentives to defraud the state by concealing the knowledge of every kind which the taxpayer believes cannot be discovered. It is also claimed by many that the taxation of personal property is unjust, in that it discriminates against residents and in favor of non-residents, and is an inducement to citizens to establish residences abroad. It also leads to duplicate taxation in various ways. Cooley on Taxation, on page 29, says: "To make it just, it is generally thought necessary that the taxpayers' debts should be deducted; and this complicates the difficulty of ascertaining what his estate is, and leaves every man, in effect, to make his own assessment, or subjects him to the arbitrary and capricious acts of the assessors." It has always been that, when the law seeks to tax lands and personalty with equality, the land pays the greater proportion of the tax, because this can all be reached and all taxed. Real estate is open to constant public observation and inspection, and no frauds or evasions can conceal it from view. Taxes are defined to be "the enforced proportional contributions of persons and property levied by the authority of the state for the support of the government and for all public needs. The citizen and the property owner owes to the government the duty to pay taxes, and he is supposed to be compensated in the protection it affords to his life, liberty, and property." Cooley, Taxn. pp. 1, 2. The same author says: "What is aimed at is not taxes strictly just, but such taxes as will best subserve the welfare of the political society. The power of taxation is not judicial. The legislature must determine all questions of state necessity, discretion, or policy involved in ordering and apportioning a tax. The judicial tribunals have no concern with the prudence or wisdom of legislation not inconsistent with organic law. Theoretically, tax laws should be framed with a view to apportioning the burdens of government so that each person enjoying its protection shall be re-

quired to contribute as much as his reasonable proportion, and no more. The tax that comes nearest to accomplishing this is, in theory, most nearly perfect." Cooley, Taxn. 124. "Perfect equality in the assessment of taxes is unattainable. Approximation to it is all that can be had. Under any system of government, however wisely and carefully framed, a disproportionate share of the public burdens will be thrown on certain kinds of property, because they are visible and tangible, while others are of a nature to elude vigilance. It is only where statutes are passed which impose taxes on false and unjust principles, or produce gross inequality, so that they cannot be deemed in any sense proportional in their effect on those who are to bear the public charges, that courts can interpose, and arrest the course of legislation by declaring such enactments void." Cooley, Taxn. 127. Perfect, equal taxation will remain an unattainable good as long as laws and government and man are imperfect. There are instances in this state where duplicate taxes are imposed, or rather double taxation of the same property to two individuals; as, where the purchaser of property on credit is taxed on its full value, while the seller is taxed to the same amount on the debt. In such case the decisions are uniform in holding that taxation is not invalid because of any such unequal consequences. This results from the reasoning stated, that any possible system of taxation must inevitably produce unequal and unjust effects in individual instances, and, if inequality in result must defeat the general law, then taxation becomes impossible. Such laws must be practical, and they only forbid that one party shall pay a double tax on the same property. We are aided but little by the decisions of other courts in the consideration of the question presented by appellants, for the reason that the fundamental law on which the opinions are based is quite dissimilar. The constitution of the state of Ohio provides that "laws shall be passed taxing by a uniform rule all moneys, credits, investments in bonds, stock, joint-stock companies or otherwise, and also all real and personal property according to its true value in money; but burying grounds, etc., may be exempt by law from taxation." This provision renders it imperative that all the property of which exemption is not permitted by it shall be taxed, and precludes any other exemptions than those indicated. In *Exchange Bank of Columbus v. Hines*, 8 Ohio St. 1, the court says: "Obligations for the payment of money are taxed by value, and, if of no value, are not taxable." The constitution of Illinois differs from our own in that it provides that the "general assembly shall provide for levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to his or her property," and that "the corporate authorities, etc., may be vested with power to assess and collect taxes for corporate purposes, such taxes to be uniform with respect to persons and property within the jurisdiction of the body imposing the same." "These provisions preclude discrimination in favor of or

against any classes of property or persons whatsoever; they require the taxation of loans or any other credits, these being property as much as lands or chattels in possession." *Jacksonville v. McConnell*, 12 Ill. 188; *People v. Worthington*, 21 Ill. 171. In California, as the constitution requires "all property" to be "taxed in proportion to its value," it is held not competent to exempt solvent debts from taxation. *People v. McCreery*, 34 Cal. 432; *People v. Gerke*, 35 Cal. 677; *People v. Black Diamond Coal Min. Co.* 37 Cal. 54; *People v. Whartenby*, 38 Cal. 461.

It was evidently the object of the convention, in the adoption of section 1, article 10, *supra*, and other provisions of the Constitution of this state, to devise a system for the assessment and levy of taxes that would distribute these burdens among those liable to them upon principles of uniformity, equality, and justice; and to secure this object the general assembly is required to "prescribe such rules and regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting," etc. The legislature had a right, under its provisions, to equalize these burdens by a regulation which would tend to secure a just valuation. The plan adopted was to ascertain the just value of the credits after deducting the indebtedness. Credits are, by the constitution, property, and as such are to be taxed. Their just value is to be ascertained by subtracting the bona fide indebtedness from the gross amount of the notes, accounts, and other choses in action, and the balance is to be returned as belonging to the individual. Surely, the difference thus found is the precise amount and just value of the credits of the party in the legal and proper sense of the term. Section 1, article 10, *supra*, does not say the gross amount of all notes, accounts, and other choses in action shall be taxed, and we cannot so construe it without perverting its language and obvious meaning. Consider for a moment its practical operation under such a construction. A. has an account against B. for \$1,000, or a debt against him for a like amount, evidenced by a promissory note. B. holds an account or promissory note evidencing a bona fide indebtedness against A. for the same amount of money. Equity, except where one of the parties is insolvent, treats these claims as compensating each other. Neither owes nor could recover in an action against the other; and yet, if appellants' theory is right, \$2,000 must be placed upon the tax duplicate because the holders never met and settled or surrendered their claims. In such case, each is a chose in action held by the party to whom it belongs, and must, under the contention of counsel, be returned to the assessor; and yet it is obvious that neither, as against the other, has a penny of credit, either in money or just value. If the owner is taxed upon such credit, it is upon fiction. The tax duplicate in this way would be increased, but not from property of value in the state. We think the constitution requires that property, wealth, substantial values, shall be taxed, but not imaginary values. As against an insolvent maker, the

true value in money of the credit can only be taxed, and so it is where a man has both credits and debts, if there is no balance, there is no sum of money due, however large the items of account upon each side may be. The items of credit upon the one side are of no value as far as they are balanced by the debts upon the other side. If the balance is in favor of one creditor, this is the exact sum of money due him as against all others, and it is the true value of his credits. Deductions and exemptions are two separate and distinct things, having no connection. A deduction is the taking of the subtrahend from the minuend; it is a subtraction. Exemption is an immunity or privilege; it is freedom from a charge or burden to which others are subject. We think the court did

not err in overruling the demurrers of the defendants Florer and Barnes to the complaint.

The judgment of the court below is affirmed.

Howard, Ch. J., dissenting:

I am constrained to withhold my concurrence in so much of the foregoing opinion as holds that the constitution permits the enactment of a law which authorizes the deduction of debts from credits in the giving in of choses in action for taxation. I am of opinion that all the property of the state, including all credits, and save only such property as is expressly exempted by the constitution, should be subject to equal and uniform taxation.

NEW JERSEY COURT OF ERRORS AND APPEALS.

George W. BITTLE, *Plff. in Err.*,

CAMDEN & ATLANTIC R. CO.

(.....N. J.....)

*1. A railroad company is bound to use ordinary care and prudence in giving statutory signals of the approach of its trains towards a station and crossing, and in passing them, or wherever, at any given point, such signals are allowed or required to be given; and negligence in the exercise of its right and duty in this respect is actionable negligence.

2. The court will take judicial cognizance that the blowing of a whistle is one of the signals used in operating and running a railway train, and that it is authorized and required in approaching stations and crossings, and in passing them; yet, if it be done negligently, wantonly, or maliciously, such negligence, wantonness, or maliciousness is actionable if injury results therefrom.

(*Magie and Van Syckel, JJ., dissent.*)

(January 18, 1894.)

ERROR to the Supreme Court to review a judgment in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Mr. John W. Wescott for plaintiff in error.

Mr. Samuel H. Grey for defendant in error.

*Headnotes by LIPPINCOTT, J.

NOTE.—The principle on which a person may be held liable for injuries to another caused by the performance of an act which is in itself lawful is here emphasized by holding that such liability may arise from the performance of an act which the law compelled the party to perform. The decision is not a novel one but we believe it presents the matter more clearly and strongly than any other case has done, and the correctness of the principle 23 L. R. A.

Lippincott, J., delivered the opinion of the court:

The plaintiff below, who is also the plaintiff in error, sued the Camden & Atlantic Railroad Company to recover damages for personal injuries. The evidence on the part of the plaintiff shows that the accident out of which the injuries to the plaintiff arose occurred at Berlin, in the county of Camden, on March 28, 1891, about 5 o'clock in the afternoon. The plaintiff was, with a horse and wagon, engaged near the station at Berlin in unloading manure from a freight car of the defendants on a side track, and carting the same to a field not far away. On one of these trips he had loaded the wagon with manure, and had gotten off the car to drive away with his load to the field, when his attention was called to the fact of an approaching train on its way from Philadelphia to Atlantic City. The load on the wagon was nearly a ton in weight, and his horse was a young and spirited animal, but one which, to a considerable extent, by the evidence, had been accustomed to cars, and not ordinarily scared by them. He was, with his horse and wagon, about seventy-five yards away from the main tracks, near a siding upon which the freight cars holding the manure were standing, which siding ran nearly parallel with the main track on which the passenger train was approaching, and the roadway or other way upon which he was to drive with his load ran about parallel with these tracks, and in the same direction in which the train was going. The evidence shows that from this point he could not be seen by the engineer of an approaching train until the train came nearly or about opposite

declared can hardly be questioned although there must remain in most cases a difficult question of fact as to the existence of negligence in the giving of such a signal.

For the giving of statutory signals as the measure of trainmen's duty at a railroad crossing, see *note* to New York, L. E. & W. R. Co. v. Leamon (N. J.) 15 L. R. A. 426.

to the point where he was engaged. When the plaintiff's attention was called to an approaching train he took hold of the head of his horse, and was in the act of leading him along this roadway in which he was to go on his way to the field, and, while doing this, the train, which was somewhat behind time, came along and passed the station at a high rate of speed. The evidence on the part of the plaintiff does not show that the whistle blew, or the bell rang, before this point was reached. The evidence on the part of plaintiff, in substance, shows that as the train came to this point the engineer leaned out of the cab window, looked at the plaintiff holding his horse by the head, and then suddenly reached up and opened the valve, and blew a loud, shrill whistle, which so frightened the horse that it became entirely unmanageable, and the plaintiff, in his efforts to control it and prevent it from running away, was very seriously injured. The situation, by the evidence, appeared to be that there is an east-bound and a west-bound main track passing this station. The station faces the north, and the main tracks are in front of the station. Some short distance west of the station, Taunton avenue, a public highway, crosses the tracks at right angles. Immediately at the station, Jackson street, a public highway, crosses the tracks at right angles. About one hundred yards east of the station there is also another crossing, called "Bishop's Crossing," also a highway; and still further east, nearly a half mile away, there is another crossing, called "Bishop's Road." Back of the station, on the south side, nearly seventy-five yards away, was the side track on which the carload of manure was standing, from which the defendant was loading his wagon. The side track was nearly parallel with the main track, deflecting a little to the south.

Upon the manner in which the whistle was blown, the plaintiff testifies that, when his wagon was loaded, he got off the car on the ground, and took the horse by the head, and started out away from the car to go to the field with his load, when his attention was called to the approaching train; that the Jackson street crossing is at the end of the station. This was the point opposite which the plaintiff was holding his horse; and he says: "I didn't think of them blowing the whistle there, because he was just beyond the crossing when he blowed the whistle, and he was looking with his head out of the cab window, and saw me, and he was smiling; and he just reached up and pulled his whistle, as I call it, 'wide open,' and the instant he done that she jumped." In another place in his evidence he says: "As soon as he saw me he reached right up and pulled the whistle," and that he never heard a shriller whistle in his life; that it was "a great deal louder than the usual whistle, and that it was so blown for two hundred yards;" and he further says, so far as his hearing was concerned, the whistle did not blow until the train was just beyond the crossing at Jackson street, opposite the point where the plaintiff was with his horse and wagon, and that the whistle has never since been blown at this

point; and that, at the time it was blown in this manner, there was nothing on the track ahead to provoke such a whistle. It may be well said that there exists, if this evidence be true, a question whether there was not only negligence, but wantonness, on the part of the engineer in blowing this whistle as he did. Mr. Minnard, a witness, who lives opposite, and about seventy feet from, the station a little beyond the easterly end, testifies that he was back of his house when he first heard the locomotive whistle and that it sounded like a cattle call, and he supposed it was such, and started around the end of his house, when his wife met him, and told him that a horse was running away; that there was no way of measuring the sound of the whistle, but that it was a cattle call,—a loud shrill whistle; that it was a great many times louder than the ordinary blow on approaching a station, or what they used to blow on approaching. He thought somebody was on the track, and he started, supposing some one was on the track. The train was running at such rate of speed that, before he got around his house, it was a mile and a half away. He then describes the efforts of the plaintiff to control the horse, and that he would not have attempted its control for all the horses in the county. Harry Beckly, another witness, whose attention was called to the matter when the horse started, and while he had no occasion before that time to note the particulars, testifies that he saw a man have his head out of the cab window, and that he blew the whistle. He described it as being louder than usual, but otherwise took no note of it except that the whistle did not blow till the engine was opposite the house of Mr. Minnard. Arthur W. Robinson, a witness, was unloading a freight car next to the car from which the plaintiff was unloading; described the whistle as "a long, loud blow;" that "it was an uncommonly loud blow,—loud and long;" and that he never heard a train blow in that place before. This witness states that he heard no whistle blow upon the approach of this train towards the station and crossings there. William Boardly, a witness, described the whistle as a "real loud blow;" that it was a quick, loud blow,—louder than he had heard before; that when the whistle "burst out," as he describes it, he looked up, and saw a man hold of the whistle, with his head out of the cab window; that he was looking towards the plaintiff, and that he looked as if he was laughing. Harry Bittle swears that the whistle has not blown at this place since.

There is much other evidence on the part of the plaintiff as to the situation of the crossings,—the number of them, and the distance apart,—the location of the main tracks, and the side track upon which the freight car stood. There is some evidence to show that the engineer, on approaching this station, could not see the plaintiff in the position in which he was with his horse and wagon, but at the point where the witnesses identify this unusual blowing of the whistle there appears to have been no difficulty in this respect. The plaintiff, with his horse and wagon, was in plain view of the engineer,

or other person in the cab, looking from the cab window. At the close of the evidence the defendant moved a nonsuit, which was granted on three grounds: First, that the blowing of this whistle at this place where it was blown was not an unlawful act of the defendant, in view of statutory authority in this respect, and that the company was authorized to blow the whistle in this place; and, secondly, that there was nothing peculiar about the blowing of the whistle which made it unlawful, or constituted the manner of its blowing actionable negligence; that the only question raised upon this point was whether the whistle blown was the one ordinarily to be blown at this crossing or place, or whether it had an audibility which to one witness created the idea that there was something on the track ahead of the train, and whether the distinction between those two degrees of whistling constituted actionable negligence. The trial court held that these were questions of law, and to be determined by the court, and they were determined in favor of the defendant. Besides these two points, the further finding of the court was that, even if the engineer was negligent, still there existed contributory negligence on the part of the plaintiff; that, if there was negligence on the part of the engineer, still that negligence was shared by the plaintiff, in that the engineer saw all that could be seen, and saw nothing more than the plaintiff knew himself; or, in other words, he saw a man who thought he had his horse under management, leading the horse in a manner which ordinarily does give a man such control. So that if there was a mistake in judgment—if there was negligence in the judgment—on the part of the engineer, it was negligence which was fully shared by the plaintiff. If, therefore, there was negligence, the negligence of the engineer and the plaintiff was identical. Both thought, and had a right to think, the same thing, except that the plaintiff knew what he was thinking about, and the engineer could not know what the plaintiff thought; and that it was a case in which, whatever the negligence of the engineer, he borrowed it from the plaintiff, and he was no more nor less negligent than the plaintiff, and their negligence resulted from precisely the same failure to foresee exactly what the horse would do under such blowing as the whistle might give at that place, and under the circumstances. Upon these grounds the trial justice at the circuit nonsuited the plaintiff.

Upon a review of this case, the conclusion is that, under the statute authorizing the points and distances at and for which either a whistle shall be blown or a bell rung, the defendant had the right to blow this whistle at this point. The statutory signal was required here, and by force of the statute, considering the proximity of these crossings to each other, it became the duty of the defendant to ring the bell or blow the whistle, and continue to do so until the engine had crossed the first three streets or highways named, and their duty was performed when either the whistle was so blown or the bell so rung; and such duty, if properly performed, could

not be made the source of complaint, whatever might be the results; but to fully comply with such statutory duty, and free itself from fault, the defendant was compelled to commence the blowing of such whistle at the point provided by the statute, and continue it over the space provided. Now, there is evidence here on the part of the plaintiff—and considerable of it, too—that neither the bell was heard to ring, nor the whistle to blow, until the point of accident was reached. If this be true, the defendant did not comply with the statutory requirements as to warning signals in approaching these crossings, and it is difficult to perceive why this element of negligence in this case should not have been submitted to the jury. *Revision*, p. 910, § 6. The plaintiff in this case, under the circumstances in which he was placed, might perhaps be well entitled to this warning. *New York, L. E. & W. R. Co. v. Leaman*, 54 N. J. L. 202, 15 L. R. A. 426. Then, again, if no whistle was blown until Jackson street crossing was reached, as appears by some of the evidence, and then there was a sudden call, no previous warning being given, the question arises whether also this fact, so far as it affects the plaintiff, should not have been submitted to the jury, upon the inquiry as to the existence of negligence of the defendant in the performance of its duty to the plaintiff. But these considerations do not appear to have entered into the holding of the trial justice upon the motion to nonsuit, and are not deemed necessary to be discussed in this review.

Thus, while the legal right to blow the whistle at this point may be conceded, yet it does not by any means follow that this right could be exercised in a negligent, heedless, or wanton manner by the servants of the defendant, resulting in an injury to the plaintiff; and this, as the case is presented, appears to be the difficulty. The question here is whether this whistle was so negligently, needlessly, or wantonly blown as to have caused this injury to the plaintiff. Abstractly, this question, in any given case where an inference of this character may be reasonably drawn from the evidence, should be committed to the jury for its decision, and not assumed by the court. It is not necessary to repeat the circumstances of the accident. One fact upon the evidence seems to be clear, whether the whistle was blown or not, or continuously or not, before the point of accident was reached, and that is that the engineer, while apparently looking at the plaintiff, who, with his horse and wagon, was in full view, holding his horse, or leading him in the usual manner along the way provided, reached up and gave to his whistle an extra force of sound, shrill and loud,—louder and shriller than ever was heard before. It is described as a cattle call by one witness,—a call which is usually made when cattle are upon the track ahead of the train, or a call by reason of some sudden danger. This accident was apparently the result of this manner of sounding this whistle. There is no evidence in the case at this point that such a sounding of the whistle was called for by any danger to the train

whatever, from obstructions ahead of it on or near the track. The plaintiff with his horse was in no situation of danger, and it must be said with some degree of emphasis that, upon the evidence as it stood at the close of the plaintiff's case, there was every appearance of negligence and heedlessness, if not wantonness, in the act of blowing this whistle in the manner in which it was blown. It must be that the defendant is bound to use reasonable care and prudence in giving statutory signals of the approach of a train, or its existence, at any given point where such signal may be allowed or required. Negligence in the exercise of a lawful right is actionable if it causes injury. It is no excuse or justification that an act occasioning injury was itself lawful, or that it was done in the exercise of a lawful right, if the injury arose from the negligent manner in which it was done. *Pennsylvania R. Co. v. Barnett*, 59 Pa. 259, 93 Am. Dec. 346. This is quite aside from the question whether blowing at this point could do any good or not. It was their legislative duty to blow the whistle, and it cannot be said that legal injury can arise from the proper performance of this duty; but the pregnant question always is whether, under all the circumstances of the case, reasonable care has been used in the exercise of legislative right and the performance of the legislative duty. A negligent exercise of the right, or the negligent performance of the duty, can in no event be excused. *Bradley v. Boston & M. Railroad*, 2 Cush. 589; *Linsfield v. Old Colony R. Corp.* 10 Cush. 562, 57 Am. Dec. 154; *Wakefield v. Connecticut & P. Rivers R. Co.* 87 Vt. 880. In *Philadelphia, W. & B. R. Co. v. Stinger*, 78 Pa. 219, the case was that the plaintiff was driving his horse parallel with defendant's tracks, and the horse was frightened by the whistle. The court reversing said: "If the court below had left it to the jury to find negligence from the use of the whistle the second time, if they believed it to be so used, provided the engineer saw, or with proper care might have seen, the plaintiff's wagon, and that his horse was becoming unmanageable, there would have been no error." There were two blasts of the whistle in this case cited, and the court allowed the jury to say whether the first blast was negligent. In this case there was no question of the right to use the whistle at the point at which it was used. The question was whether it was used in a negligent manner. *Hill v. Portland, etc., R. R. Co.*, 55 Me. 488, 92 Am. Dec. 601, is a case nearly in point with the case in hand. There a horse was standing at the depot, the train started, and the engine driver blew a sharp, loud blast, which frightened the horse. The defendant had legislative authority to blow the whistle there, but the question of whether there was negligence in the manner of blowing the whistle was left to the jury. In *Culp v. Atchison & N. R. Co.*, 17 Kan. 475, the declaration charged that a negligent blowing of the whistle was the cause of the injury. On demurrer it was held actionable. To the same effect may be cited the case of *Chicago, B. & Q. R. Co. v. Dunn*, 62 Ill. 451. While a railway com-

pany is entitled by law to run its train along a street it is not liable for damages caused by the horses of a traveler taking fright at the necessary blowing off of steam from one of its locomotives; but, if the steam was blown off negligently, it would be liable. *Hahn v. Southern Pac. R. Co.* 51 Cal. 605. Under our statute in this state, the court will judicially know that the blowing of a whistle is one of the signals used in running a railway train, and that it is authorized and required; yet, if it be done negligently or wantonly, such negligence or wantonness is actionable. 1 Thomp. Neg. 851, and cases cited; *Toledo, W. & W. R. Co. v. Harmon*, 47 Ill. 298; *Nashville & C. R. Co. v. Starnes*, 9 Heisk. 52, 24 Am. Rep. 296. So, in case of the sounding of a steam whistle with a loud noise when it was unnecessary (*Ibid.*) where it was a negligent act (*Chicago, B. & Q. R. Co. v. Dunn*, *supra*), and where it was done in a spirit of wanton playfulness (*Nashville & C. R. Co. v. Starnes*, *supra*); and, so far as the adjudicated cases go, the question whether the act was one of negligence or of wantonness or malice is of little import, save as to the measure of damage.

Reference has been made to these few cases on the subject of the care to be exercised in giving even the statutory signals, to show that this specific character of negligence has been a subject of adjudications. It, of course, cannot be at all denied that there may be such negligence, heedlessness, or wantonness in the sounding of railway whistles, even at the places where it is authorized and required to sound them, as to be entirely actionable. While no liability attaches for damages for these acts so long as they are exercised in accordance with statutory authority with ordinary care, yet liability ensues when they are done negligently or wantonly. The rule obtains generally that a master is not answerable in damages for the wanton and malicious acts of his servant; yet this immunity is not generally extended to railroad corporations, whose servants are intrusted with such extensive means of doing mischief. Accordingly, it has been established that if such servants, while in charge of the company's engines and machinery, and engaged about its business, negligently, wantonly, or willfully pervert such agencies, the company must respond in damages; and this is the principle deducible from the authorities upon this subject. Applying these principles to the facts and circumstances of this case, it leads to the conclusion that the jury should have been permitted to pass judgment upon the question whether this whistle was blown in such a negligent, willful, or wanton manner as to be actionable.

Turning to the question of whether the plaintiff was guilty of contributory negligence in this case, it seems very difficult to determine upon what ground such contributory negligence can be imputed to him. Neither by his own act, nor any act of his uniting with the act of the engineer in blowing this whistle, can want of care be attributable to him. It would appear that he was then, so far as his own case goes, exercising every care which a prudent man could exercise.

He was in a place, and on a way, where he had the legal right to be,—in fact, at a place provided by the defendant for him to be in the business of unloading freight from its own cars; and he was on the very grounds prepared by the company for this use, and engaged in an occupation perfectly legal and proper, and one which was of advantage to the defendant. On learning of the approach of the train, although without hearing any statutory signal, he exercised care in placing himself in a position in which he would be most conveniently able to control his horse in case the exercise of such control was needed, and he used every endeavor possible to so control it and avoid injury; and in the discussion of this question it is assumed that he was guilty of no act of negligence in endeavoring to control and save from injury the horse which he had in charge. And, while no opinion can perhaps be passed here as to the conclusion or inference to be drawn from these facts, yet for the purposes of this case it would appear as if the inference of ordinary care and caution to avoid injury is the most reasonable one, and, at all events, not so clearly otherwise as to deprive the jury of the right to pass on it. Upon this question of whether a nonsuit, upon either of these grounds here discussed, should have been granted, the rule of law to apply has often been enunciated in this court, and there is but little need of referring to more than one or two cases. It is by applying these general rules to each particular case that a safe conclusion can be reached. The chief justice, in *Pennsylvania R. Co. v. Matthews*, 36 N. J. L. 581 (in this court), speaking to the question whether the plaintiff, by his want of ordinary caution, produced the damage, says: "It is sufficient for all useful purposes to say that the evidence on this subject is open to fair debate, and leaves the mind in a state of some doubt on this question whether the driver of the horses which were destroyed exercised, or not, that degree of care which his legal duty exacted. This being the case, the judge would not have been justified in taking this question from the jury. Such a course is proper only when the absence of caution is apparent, and is in reason indisputable." This general doctrine has been universally adopted; and in *Bahr v. Lombard*, 53 N. J. L. 283, *Mr. Justice Garrison* (in this court), as alike applicable to the defendant upon alleged proof of negligence, and to the plaintiff upon alleged proof of contributory negligence, declares

that "when, in an action for negligence, the standard of duty can be predicated as matter of law, the only question for the jury is whether the conduct of the defendant fell short of that standard. If, from the facts in evidence, two inferences as to the defendant's conduct may legitimately be drawn, one favorable, and the other unfavorable, to its negligence, a question is presented which calls for opinion of the jury." Passing over the many decided cases adhering to this doctrine, the latest expression on this subject is by *Mr. Justice Magie* (in this court), in *Newark Pass. R. Co. v. Block* (N. J. Err. & App.) 27 Atl. Rep. 1067, where, in speaking of the power to direct a nonsuit or verdict, he says: "The power to direct a verdict is identical with, and rests upon the same foundation as, the power to nonsuit." When in such cases the trial judge is requested to nonsuit or direct a verdict, his duty is, as is well expressed by *Lord Chancellor Cairns* in *Metropolitan R. Co. v. Jackson*, 3 App. Cas. 193, to say whether any facts have been established by evidence from which negligence may be reasonably inferred. If none, there is no case to go to the jury; but if, from facts established, negligence may reasonably and legitimately be inferred, it is for the jury to find whether, from those facts, negligence ought to be inferred. In performing this function the trial judge must take care not to trench on the peculiar province of the jury to determine questions of fact, and must bear in mind that the question is not whether he would infer negligence from the established facts, but whether negligence can be reasonably and legitimately inferred by the jury.

It follows that, if the real facts have not been established by the evidence, but remain in substantial dispute, the trial judges must submit them, and the inferences to be drawn from those which the jury find established, to the determination of the jury. *Moebius v. Becker*, 46 N. J. L. 41; *Delaware, L. & W. R. Co. v. Shelton*, 55 N. J. L. 342; *Orus v. Caldwell*, 52 N. J. L. 215.

Applying these principles to the case here upon review, the trial judge should have submitted the question of the defendant's negligence, and the question of the plaintiff's contributory negligence, if it was alleged that any existed, to the jury. I shall therefore vote for a *reversal of the judgment of nonsuit*, and for a *venire de novo*.

Magie and Van Syckel, JJ., dissent.

MINNESOTA SUPREME COURT.

Rachel ELLIS'S APPEAL.

(.....Minn.....)

*1. Collusion and agreement between the parties to an action for divorce

*Headnotes by GILFILLAN, Ch. J.

NORM.—Effect of appearance by nonresident to give jurisdiction of divorce case.

Appearance generally.

An appearance by a nonresident defendant in a 23 L. R. A.

as to the judgment to be rendered does not affect the jurisdiction, nor render the judgment entered void.

2. The Act of 1889 known as the "Probate Code" was properly passed.

3. Proof that a deceased party executed a will, which he afterwards destroyed,

divorce suit, by filing an answer, gives the court jurisdiction to render a decree. *Jones v. Jones*, 108 N. Y. 415, affirming 36 Hun. 414; *Sanford v. Sanford*, 5 Day, 353; *Jones v. Jones*, 60 Tex. 451.

will not defeat an application for an administrator, unless its contents can be proved with such degree of certainty that it may be established as a will.

4. **A copy of the proceedings of a court of another state is admissible here if authenticated according to the statute of this state, though not according to the act of congress.**
5. **An authenticated copy of a judgment roll is evidence of all that is properly contained in it, and is evidence prima facie that the judgment was properly entered in the judgment book.**
6. **That an action was tried in a county other than that declared by statute the proper county for its trial does not go to the jurisdiction.**
7. **That the wife, the plaintiff in an action for divorce, was induced to bring it by persuasion, ill treatment, and threats by the husband that he would continue such ill treatment unless she brought the action, does not affect the validity of the judgment in a collateral proceeding.**
8. **Where, in an action in the court of another state for divorce, both parties voluntarily appear, and submit to the jurisdiction, they are bound by the judgment, and cannot avoid it in a collateral proceeding in this state by proof that when the action was brought and judgment rendered neither of them was a resident in that state, and that both were residents in this state.**

(December 6, 1893.)

A PPEAL by Rachel Ellis and others from an order of the District Court for Ramsey

County affirming an order of the Probate Court appointing Flora Ellis as administratrix of the estate of Matthew Ellis, deceased. *Affirmed.*

The facts are stated in the opinion.

Messrs. F. G. Ingersoll and Charles N. Bell, for appellants:

The Wisconsin statute applicable to divorce, chap. 109, § 2359, which is in evidence, reads as follows: "When divorce not to be granted.—No divorce shall be granted unless the plaintiff shall have resided in this state one year immediately preceding the time of the commencement of the action."

The groundwork of jurisdiction in each state is residence.

Hall v. Hall, 25 Wis. 600; *Hanover v. Turner*, 14 Mass. 227, 7 Am. Dec. 203; *Whitcomb v. Whitcomb*, 46 Iowa, 437; *Bacon v. Bacon*, 43 Wis. 202; *Barker v. Dayton*, 28 Wis. 367.

A court sitting in divorce proceedings is a court with local, limited, special, and statutory jurisdiction only.

State v. Armstrong, 25 Minn. 37; *Ditson v. Ditson*, 4 R. I. 93; *Cooley*, Const. Lim. 400, and notes; *Kerr v. Kerr*, 41 N. Y. 272; *Hoffman v. Hoffman*, 46 N. Y. 30, 7 Am. Rep. 299; *Hanover v. Turner*, *supra*.

The subject-matter of the divorce suit neither was, nor could be, within the jurisdiction of the court, if the parties had no domicile within the state from which the court derived its powers.

People v. Dawell, 25 Mich. 247, 12 Am. Rep. 260; *Re Walker's Will*, 186 N. Y. 29; *Wilmore v. Flack*, 96 N. Y. 519; *McMahon v. Rauhr*, 47

Or obtaining leave to answer. *Zycklinski v. Zycklinski*, 3 Swab. & T. 420, 31 L. J. Mat. 37, 5 L. T. N. S. 690.

Or by filing an appearance. *Garstin v. Garstin*, 4 Swab. & T. 73, 34 L. J. Mat. 45, 13 Week. Rep. 506.

And the same was held, where the nonresident moved to vacate a judgment obtained by fraud, the court holding that the complaint should still stand for trial. *Yorke v. Yorke* (N. Dak.) May 31, 1893.

A decree of divorce showing residence of the complainant wife, and appearance by the defendant, is entitled to full faith and credit, and such finding of actual residence will be conclusive unless overcome by adverse testimony. *Cheever v. Wilson*, 76 U. S. 9 Wall. 103, 19 L. ed. 604.

And a nonresident defendant may file a cross-petition in a divorce suit and obtain affirmative relief under section 14 of the Indiana Divorce Act, providing that the defendant may file a cross-petition and the court shall decree the divorce to the party entitled to the same. *Jenness v. Jenness*, 24 Ind. 355, 37 Am. Dec. 335.

A resident of Dublin appearing to a suit in the consistorial court of London, admitting the allegation of the bill that she was a resident of St. James, Westminster, gives that court jurisdiction of the person, where there is no collusion, and an intervenor cannot question such jurisdiction for her. *Donegal v. Donegal*, 3 Phillim. 597; *Chiochester v. Donegal*, 1 Add. Eccl. Rep. 5.

So in *Callwell v. Callwell*, 3 Swab. & T. 259, where the husband only had a temporary domicile in England, and the wife appeared and submitted to the jurisdiction of the court, a divorce was granted for adultery committed in England and on the continent; but the court does not discuss the question of jurisdiction.

In *Vischer v. Vischer*, 12 Barb. 640, it was stated 23 L. R. A.

that a divorce granted by a sister state on an appearance would be conclusive in New York, but that was not involved in this case.

A judgment of maintenance in favor of the wife in South Carolina, where the husband appeared, will be sustained as valid up to the date of a divorce decree obtained subsequently by him in Alabama. *Harrison v. Harrison*, 20 Ala. 629, 56 Am. Dec. 227.

But in *McCartney v. McCartney*, 30 W. N. C. 132, where the defendant, a resident of Scotland, filed an answer to a suit of divorce for desertion, admitting marriage but requiring proof of all other allegations, the court held that the Pennsylvania statutes did not give jurisdiction in divorce cases for desertion occurring in a foreign country.

And a special appearance to set aside an invalid judgment rendered on publication, for defective service, will not give the court jurisdiction to then render a decree, although the affidavit showing special appearance only, was filed, but the attention of the court was not called to it. *Green v. Green*, 42 Kan. 654.

In *Maguire v. Maguire*, 7 Dana. 181, the court of appeals held that there was no appeal from divorce (*a vinculo*) under the statute, but that as regarded property involved, the decree would be considered, and in reviewing that question said that a wife who was in good faith a resident of that state could not obtain a divorce from a nonresident husband although he appeared in the action, and reversed the decree as to the property but dismissed the writ of error as to revising the divorce decree.

Fraud and collusion.

Collusion and fraud by a nonresident in appearing and obtaining a decree or allowing a court to render a decree of divorce, will preclude such person from claiming that the court had not juris-

N. Y. 67; *Barney v. Flower*, 27 Minn. 404; *Griffin v. Chadbourne*, 32 Minn. 128; *Fari-bault v. Misener*, 20 Minn. 396; *Ames v. Boland*, 1 Minn. 365 (Gil. 271); *Rahilly v. Lane*, 15 Minn. 451; *Chandler v. Kent*, 8 Minn. 524 (Gil. 483).

Flora Ellis claims what she claims in this case, not by deed, not by purchase, but as privy by or through Matthew Ellis, as privy by marriage. She has no better right to resist the claim of Rachel than Matthew Ellis would have.

The doctrines of estoppel find no legitimate place in such a case as this in the probate court or in any other court.

Hardy v. Smith, 136 Mass. 328; *State v. Armstrong*, 25 Minn. 87; *People v. Dawell*, *supra*; *Smith v. Smith*, 18 Gray, 210; *Ditson v. Ditson*, *supra*; *Cooley*, Const. Lim. 400, and notes; *Maynard v. Hill*, 125 U. S. 210, 81 L. ed. 658; *Reed v. Reed*, 53 Mich. 117.

Want of jurisdiction can be shown at all times to invalidate a decree of court.

Thompson v. Whitman, 85 U. S. 18 Wall. 457, 21 L. ed. 897; *Prosser v. Warner*, 47 Vt. 687, 19 Am. Rep. 182; *Kerr v. Kerr*, *supra*; *Sevall v. Sevall*, 123 Mass. 161, 28 Am. Rep. 299; *Chase v. Chase*, 6 Gray, 157; *Com. v. Blood*, 97 Mass. 538; *Williams v. Williams*, 68 Wis. 58, 53 Am. Rep. 253; *Cook v. Cook*, 56 Wis. 195.

There can be no estoppel any further than jurisdiction of the subject-matter has been obtained.

diction. Ellis v. White, 61 Iowa, 644; *Ellcott v. Wohlfrom*, 55 Cal. 384; *Nichols v. Nichols*, 25 N. J. Eq. 60; *Kirrihan v. Kirrihan*, 15 N. J. Eq. 146.

These cases fully sustain the decision in the main case.

And a wife who appeared as a defendant in a divorce suit in another state, and thereafter executed a release of dower, homestead and alimony, reciting such decree, cannot then claim that the decree is invalid for want of jurisdiction, where she does not allege or show that the husband went to such state in order to procure a divorce in violation of Mass. Gen. Stat., chap. 107. *Loud v. Loud*, 129 Mass. 14. See also *Smith v. Smith*, *infra*.

But in *Jackson v. Jackson*, 1 Johns. 424, it was held that a New York court would not enforce a decree for alimony obtained by a resident of New York, in a Vermont court on a cause of divorce not recognized in New York, even if the defendant who also lived in New York, appeared in the Vermont action. The court puts the decision on the further ground that she was incapable of acquiring other domicile than that of her husband, and that the whole proceeding was an attempt to evade the New York laws.

This decision has been doubted and partially overruled in *Kinnier v. Kinnier*, 45 N. Y. 535, 6 Am. Rep. 134, which holds that where the parties did not reside in New York but in Massachusetts, and the husband went to Illinois and procured a divorce there his wife appearing in such suit, this decree will not be held invalid in a suit by a second husband in New York to annul his marriage on the ground that the former marriage of his wife is still in force, where he does not allege that her former husband was not a resident of Illinois.

This case distinguishes *Jackson v. Jackson*, *supra*, and denies the position there taken that a wife cannot obtain a separate domicile and holds that a husband voluntarily submitting his case to a court is bound thereby.

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Williams v. Williams, *supra*.

It is not pretended that by the mere consent of the parties the marriage contract may be dissolved.

True v. True, 6 Minn. 458 (Gil. 819).

A divorce is not to be granted simply because the parties are willing that it should be, nor because the defendant makes default, or neglects to assert, or waives a defense.

Young v. Young, 17 Minn. 186.

It could not be tolerated that a party anxious to secure a divorce should bring about a judicial separation by an action against himself, and commenced and managed by himself, in his own interest, using his wife as a mere figure-head,—a fraud alike upon her and the court.

Olmstead v. Olmstead, 41 Minn. 298; *Bomsta v. Johnson*, 38 Minn. 283.

The Wisconsin court could not get or take jurisdiction of the status or subject-matter of the action, nor could it get or take jurisdiction of the status for the purpose of getting jurisdiction of the persons; and it could not make a decree as to alimony or as to their property rights, save as incidental to the decree of divorce. The decree must stand or fall as an entirety.

Griffin v. Chadbourne, 32 Minn. 128.

If the marriage relation is of the character and public interest outlined in *People v. Dawell*, *Cook v. Cook*, *Smith v. Smith*, and *True v. True*, *supra*, then no court has any authority in the performance of its official and public duty to send the state or the public into the background,

This decision was approved in *Ruger v. Heckel*, 25 N. Y. 483.

But an Indiana divorce where neither party resided there but were married in New York will not be recognized in New York although the decree shows an appearance by one purporting to be attorney for the defendant's wife where no process was ever served on her and she had no knowledge of the proceedings and the court held that she was entitled to administer on his estate in New York. *Kerr v. Kerr*, 41 N. Y. 272.

It was held in *People v. Dawell*, 25 Mich. 247, 12 Am. Rep. 261, that in a prosecution for bigamy in Michigan, the state may prove that the husband and his former wife were residents of that state at the time of the rendition of a decree of divorce by appearance or collusion in Indiana, and such decree is no protection to the husband—as the state is a party interested.

And children of a marriage made in Scotland where their mother went there to obtain a divorce from her former husband when both were married and were residing in England, cannot inherit from her, as the divorce in Scotland is void, the jurisdiction having been fraudulently conferred by collusion. *Shaw v. Gould*, L. R. 3 H. L. 55.

And under Mass. Rev. Stat. chap. 76-129, providing that a divorce obtained in another state, for causes arising in Massachusetts, where such parties resided, but who had gone to such other state to procure a divorce on grounds for which it would not be granted in Massachusetts, will be void, and an appearance will not preclude either party from repudiating such a decree. *Smith v. Smith*, 18 Gray, 200; *Hardy v. Smith*, 136 Mass. 328; *Chase v. Chase*, 6 Gray, 157. See also *Loud v. Loud*, *supra*.

For note on the validity of a divorce obtained on publication or service out of the state where the defendant did not appear, see *Butler v. Washington*, (La.) 19 L. R. A. 814.

L. T.

into solitude or into some profound retreat, while it is considering and deciding this case.

If the court of the domicile of the parties in a divorce action gets no jurisdiction save by a strict observance of statutory rules, under what theory or logic can a court of a sister state take or acquire jurisdiction in a case between non-residents?

Cheely v. Clayton, 110 U. S. 701, 28 L. ed. 293.

The Wisconsin decree is not entitled to respect and full faith and credit over the status of the parties in Minnesota or any property there may be in Minnesota.

Turner v. Turner, 44 Ala. 437; *Cook v. Cook*, 56 Wis. 195; *Platt's App.* 80 Pa. 501; *Colvin v. Reed*, 55 Pa. 375; *Mansfield v. McIntyre*, 10 Ohio, 27; *Re Vetterlein*, 14 R. I. 378; *Kline v. Kline*, 57 Iowa, 386, 42 Am. Rep. 47.

A husband cannot by threats and duress, or by clubbing, bring his wife into submission, and then be permitted to claim that such submission is good ground for an estoppel.

Williams v. Williams, 63 Wis. 58, 53 Am. Rep. 253.

Estoppel cannot validate that which is prohibited by law.

Whitlock v. Gosson, 35 Neb. 829; *Alt v. Banholzer*, 39 Minn. 511; *Conrad v. Lane*, 26 Minn. 889; *Herman, Estoppel and Res Adjudicata*, §§ 68, 581; *Law v. Butler*, 9 L. R. A. 856, 44 Minn. 482.

The contents of a lost will may be proved by the testimony of a single witness, although the statute requires two subscribing witnesses to render it valid.

Skeggs v. Horton, 82 Ala. 352; *Thornton v. Thornton*, 39 Vt. 122; *Re Page*, 118 Ill. 576, 59 Am. Rep. 395; *Hall v. Gilbert*, 31 Wis. 691; *Dickey v. Malecht*, 6 Mo. 177, 34 Am. Dec. 130. *Early v. Early*, 5 Redf. 876, declares that only the substance of the will need be established.

Re Page, supra; *Steels v. Price*, 5 B. Mon. 58; *Kitchens v. Kitchens*, 39 Ga. 169.

The Probate Code of 1889 never became a law as required by section 20 of article 4 of the Constitution of this state.

This constitutional provision was not observed in the passing of the Probate Code of 1889.

The journals of the house and senate are before this court, and it will take judicial notice of the records and journals.

It must appear on the face of the journal that the bill passed by a constitutional majority.

Hull v. Miller, 4 Neb. 508; *Cooley, Const. Lim.* 140; *Spangler v. Jacoby*, 14 Ill. 297, 58 Am. Dec. 571; *People v. Mahaney*, 13 Mich. 481; *Fordyce v. Goodman*, 20 Ohio St. 1; *McCulloch v. State*, 11 Ind. 424; *Ryan v. Lynch*, 68 Ill. 160.

Messrs. M. L. Countryman and Stringer & Seymour, for respondent:

The law always presumes testamentary capacity until the want of it has been clearly proven by the party who denies the capacity. Destruction of a will being shown, there is a strong presumption that it was done *animo revocandi*.

McBeth v. McBeth, 11 Ala. 596; *Weeks v.* 23 L. R. A.

McBeth, 14 Ala. 474; *Bounds v. Gray*, 3 Ga. Dec. 136; *Lively v. Harvell*, 29 Ga. 409; *Holland v. Ferris*, 2 Bradf. 384; *Minkler v. Minkler*, 14 Vt. 125; *Applying v. Eades*, 1 Gratt. 286; *Smock v. Smock*, 11 N. J. Eq. 156; *Brown v. Brown*, 19 Yerg. 84; *Hairston v. Hairston*, 30 Miss. 276; *Re Philips' Will*, 46 N. Y. S. R. 356; *Behrens v. Behrens*, 47 Ohio St. 323; *Collyer v. Collyer*, 110 N. Y. 486; *McOoon v. Allen*, 45 N. J. Eq. 708.

It was not necessary that the copy of the judgment roll should be certified by the presiding judge in the manner provided by the act of congress.

2 Black, Judgm. 876; *Kingman v. Cowles*, 108 Mass. 283; *Ritchie v. Carpenter*, 2 Wash. 512; *Latterett v. Cook*, 1 Iowa, 1, 63 Am. Dec. 428.

A judgment of divorce cannot be impeached in a collateral proceeding merely because the parties to it had been guilty of collusion and fraud on the court.

Hood v. Hood, 11 Allen, 196, 87 Am. Dec. 709; *Greene v. Greene*, 2 Gray, 861, 61 Am. Dec. 454; *Baugh v. Baugh*, 37 Mich. 59, 26 Am. Rep. 495; *Zoellner v. Zoellner*, 46 Mich. 511; *Anderson v. Anderson*, 8 Ohio, 103; *Sanford v. Sanford*, 28 Conn. 6; *Smith v. Smith*, 13 Gray, 209. See also *Cone v. Hooper*, 18 Minn. 581; *Hotchkiss v. Cutting*, 14 Minn. 537; *Prudam v. Phillips*, Hargraves, Law Tracts, 456, note; *Homar v. Fish*, 1 Pick. 435, 11 Am. Dec. 218; *McRae v. Mattoon*, 13 Pick. 53; *Union Trust Co. v. Rochester & P. R. Co.* 29 Fed. Rep. 609; *Christmas v. Russell*, 72 U. S. 5 Wall. 290, 18 L. ed. 475; *Maxwell v. Stewart*, 89 U. S. 22 Wall. 77, 22 L. ed. 564; *Graham v. Boston, H. & E. R. Co.* 118 U. S. 161, 30 L. ed. 196; *Kinnier v. Kinnier*, 45 N. Y. 585, 6 Am. Rep. 132; *Ruger v. Heckel*, 85 N. Y. 483.

The Wisconsin decree of divorce granted to Rachel Ellis is entitled to full faith and credit in the courts of this state, and must be held, as against her, final and conclusive upon the question of her residence, the Wisconsin court having found and adjudged that her allegation of residence in Wisconsin was true.

U. S. Const. art. 9, § 1; *Hotchkiss v. Cutting*, 14 Minn. 587; *Cone v. Hooper, supra*; *Dequindre v. Williams*, 31 Ind. 444; *Lance v. Dugan*, 22 W. N. C. 132; *Hall v. Williams*, 6 Pick. 235, 17 Am. Dec. 356; *Waldo v. Waldo*, 52 Mich. 94; *Kinnier v. Kinnier*, and *Ruger v. Heckel, supra*; *Sheldon v. Wright*, 5 N. Y. 497; *Porter v. Purdy*, 29 N. Y. 106, 86 Am. Dec. 283; *Stoddard v. Johnson*, 75 Ind. 20; *Wenz v. Wenz*, 11 Mo. App. 26; *Re Shoemaker's Estate*, 139 Pa. 132; *Gunn v. Howell*, 85 Ala. 144, 73 Am. Dec. 484; *Wyatt v. Rambo*, 29 Ala. 510; *Hudson v. Guestier*, 10 U. S. 6 Cranch, 281, 3 L. ed. 324; *Grignon v. Axtor*, 48 U. S. 2 How. 319, 11 L. ed. 288; *White v. Crow*, 17 Fed. Rep. 98; *Lacasse v. Chapuis*, 144 U. S. 119, 36 L. ed. 368.

Conceding that the question of Rachel Ellis's residence was a jurisdictional one, yet it belonged to that class of jurisdictional facts which the court must find from the evidence; and if the court found this fact upon insufficient evidence, or without competent evidence, and thereupon proceeded to exercise jurisdiction, the action of the court in this respect was

not void, but merely erroneous, and subject only to direct attacks as by appeal, and not a collateral attack.

Goldtree v. McAlister, 86 Cal. 98; *Freem. Judgm.* §§ 118, 608; *Irwin v. Scriber*, 18 Cal. 500; *Calloway v. Cooley*, 50 Kan. 743; *Waldo v. Waldo*, *supra*.

The appellant, Rachel Ellis, having applied as plaintiff to the circuit court in Wisconsin for an absolute divorce, upon a sworn petition, alleging that she was a bona fide resident of that county, and having obtained the relief she sought, including a large amount of permanent alimony or distributive share of Matthew Ellis's property, is forever estopped, as against this respondent his second wife, to deny the jurisdiction of that court to grant such relief.

Behr v. Connecticut Mut. L. Ins. Co. 2 Flipp. 692; *Ellis v. White*, 61 Iowa, 644; *Carlisle v. Carlisle*, 96 Mich. 128; *Arthur v. Israel*, 10 L. R. A. 693, 15 Colo. 147, 18 Colo. 158; *Smith v. Smith*, 13 Gray, 209; *Zoellner v. Zoellner*, 46 Mich. 511; *Simons v. Simons*, 47 Mich. 253.

A party accepting and retaining the fruits or benefits of a void judgment is effectually estopped to impeach such judgment at any time or in any proceeding.

Kile v. Yellowhead, 80 Ill. 208; *Town v. Blackberry*, 29 Ill. 187; *Felch v. Gilman*, 22 Vt. 89; *Embury v. Conner*, 3 N. Y. 511, 53 Am. Dec. 325; *Hitchcock v. Danbury & N. R. Co.* 25 Conn. 516; *Duff v. Wynkoop*, 74 Pa. 300; *Cohen v. Broughton*, 54 Ga. 296.

This rule applies to a judgment void for want of jurisdiction of the parties or subject-matter.

Denver City Irrigation & Water Co. v. Mid-dough, 12 Colo. 434; *Fahnestock v. Gilham*, 77 Ill. 637; *Bigelow, Estoppel*, p. 211.

Whatever rights Rachel Ellis may claim to have had originally, to vacate or set aside the decree of divorce obtained by her, she has clearly lost by her own laches, having acquiesced in the decree for nearly nine years. It will be noticed that she makes no attempt to excuse the long delay.

Earle v. Earle, 91 Ind. 27; *Richeson v. Simons*, 47 Mo. 20; *Nichols v. Nichols*, 25 N. J. Eq. 60; *Zoellner v. Zoellner*, and *Carlisle v. Carlisle*, *supra*.

Even though Rachel Ellis had never been divorced at all, yet her conduct during the past nine years has been so inconsistent with the relation of wife, that she would not be allowed to claim or assert property rights as wife, as against innocent third parties.

Re Rusko, 84 Hun, 384; *Nuhn v. Miller*, 5 Wash. 405; *Sadler v. Niese*, 5 Wash. 282.

Section 36 of the Probate Code provides that no lost or destroyed will shall be established unless its provisions are clearly and distinctly proved by at least two credible witnesses.

Re Ruser, 6 Dem. 81; *Sheridan v. Houghton*, 6 Abb. N. C. 234; *McNally v. Brown*, 5 Redf. 372; *Re Kidder's Estate*, 66 Cal. 487; *Todd v. Bennick*, 13 Colo. 546.

This court has effectually disposed of the objection that the journal fails to show a suspension of the rules.

State v. Peterson, 88 Minn. 148; *Schuyler County Supra. v. People*, 25 Ill. 181.

23 L. R. A.

Gillilan, Ch. J., delivered the opinion of the court:

Appeal from an order appointing an administratrix. Stating the history of the matters involved in chronological order, in 1869 Matthew Ellis and Rachel Cottrell, then residents in Wisconsin, intermarried in that state, and resided therein—the latter part of the time at Hudson—from the time of their marriage till October, 1883, when they came to St. Paul, Minnesota. February 29, 1884, she commenced by proper personal service of summons an action against him for divorce in the circuit court for the county of St. Croix (in which Hudson is situated), in said state. Her complaint was sworn to by her, and it alleged, among other things, that she then was, and for more than three years last past had been, a resident of said county and state, and that for more than a year prior to bringing the action the defendant had willfully deserted and refused to live and cohabit with her; and it demanded judgment dissolving the marriage, and requiring the defendant to pay her the sum of \$8,000 alimony. The defendant filed an answer, not raising any substantial issues, and the parties made and filed a stipulation agreeing upon the alimony at \$6,150 and a horse, carriage, robes, etc., and all the defendant's household goods, except his library. The answer and stipulation suggest an agreement between the parties for a divorce,—a suggestion which ought to have caused the court, and we must assume that it did, to require strict and ample proofs of the facts showing a cause of action, and which would have been influential upon an application to vacate the judgment rendered on the ground of collusion and fraud upon the court. But that did not go to the jurisdiction of the court over the case. A reason for deciding against the plaintiff, or a fraud upon the court as to the judgment to be rendered, or the character of the motive that induced the bringing the action, does not affect the jurisdiction. March 27, 1884, judgment in that action was rendered, dissolving the marriage between the parties, and allowing the plaintiff therein the alimony stipulated; and that alimony was paid. September 2, 1886, Matthew Ellis and Flora Wilson intermarried, and they lived together as husband and wife until December 7, 1892, when he died in St. Paul, Ramsey county, in this state. Flora Ellis, the second wife, filed a petition in the probate court of said county, stating the necessary jurisdictional facts, alleging that Matthew Ellis died intestate, and that she was his widow, and asking to be appointed his administratrix. On the day appointed for the hearing Rachel Ellis appeared, denied that Flora was the widow, alleged that she was the widow, and asked that she be appointed administratrix. At the same time appeared a brother and sister of deceased, representing that the deceased had made a will, still in force, and asking the court to make the proper order or decree in the premises. The probate court appointed Flora administratrix, and on an appeal to the district court, in which the court heard all the parties, that court affirmed the decision of the probate court.

Before taking up the principal question in the case, the only one which seems to us of sufficient importance, as presented by the evidence, to call for consideration at any length, we will dispose of others of less importance. It is claimed by appellants that the Act of 1899 known as the "Probate Code" was not passed in the house of representatives in the manner prescribed by the constitution, because it does not appear from the house journal that the bill was read on three different days, or that the rule was suspended, as required by the constitution. It is not clear to us what the Probate Code has to do with the case, for the rule providing who shall be entitled to administration was the same under the prior law as under that act, and the evidence of a will offered was not sufficient to establish a will, not produced, either under the prior law or the Probate Code. Every bill signed and approved as required by the constitution is presumed to have been properly passed. And, as held in *State v. Peterson*, 38 Minn. 143, the absence from the journal of either house of an entry showing that a particular thing was done, is no evidence that it was not done, unless the constitution requires the entry to be made; and there is no such requirement in respect to the reading of a bill on three different days, or its passage under a suspension of the rule. The objection, therefore, is not well taken.

Ellis executed two wills,—one in 1890, which he destroyed, with intent to revoke, in July, 1891, when he executed another. He destroyed that will, apparently with intent to revoke it, December 31, 1891. The appellants offered evidence tending to prove that at that date he had not sufficient mental capacity to make or revoke a will. On the respondent's objection this evidence was excluded, on the ground, as we understand, that it was immaterial, because there was not sufficient evidence of the will. It must be apparent that, in order to defeat an application for the appointment of an administrator, proof of a will, not forthcoming, must be such as to show that it can be established. Proof that one was executed will not suffice without proof to a reasonable certainty of its contents. To establish a will without such proof would be to make a will for the party. The evidence afforded no means of determining with any degree of certainty what disposition the will of July, 1891, made of the testator's property. The most that could be made of it was that it left to Flora Ellis one third of the property, and something more, but how much or what more did not appear; that there were specific devisees or legacies to others, but to whom, except one, or how much to any one of them, did not appear; and that there was a residuary devisee or legatee, but who, did not appear; and there were no means of determining how much would be the residue. Of course, a will, not produced, could not be established on any such evidence, and evidence that the testator had not capacity to revoke it would be immaterial. That leaves only the question which of the two, Flora or Rachel, was the widow of Matthew Ellis? That depends

on the validity of the judgment divorcing Rachel and Matthew. It is objected that the judgment was not sufficiently proved, because—First, the authentication was not in conformity with the act of congress; second, the copy authenticated is a copy of the judgment roll, and it does not appear the judgment was ever entered in the judgment book. When the proceedings of a court of another state are authenticated as provided by act of congress, they must be received as evidence; but it is competent for the legislature of each state to provide that proof of such proceedings may be received in the courts of such state by authentication less than is prescribed by act of congress, and the authentication in this case was in accordance with the statute of the state. We will assume that the laws of Wisconsin are the same as our own in respect to entering judgments and making up the judgment rolls. The roll, or an authenticated copy of it, is evidence of all that is properly contained in it, including the judgment, and is evidence, *prima facie* at any rate, that the judgment was properly rendered and entered so as to have effect. It is objected to the judgment that by the laws of Wisconsin (which on this point were proved) the action for divorce is a local action,—that is, that it is properly triable in the county where the parties, or one of them, resides; that by the pleadings it appears that the only county in which either party resided was the county of St. Croix, but that the hearing in the action was had in the county of Eau Claire. And it is urged that in hearing the case the court acted without jurisdiction. We are not referred to any decision in that state as to the effect on the jurisdiction of a trial (by the same court) in one county when the statute provides that the trial ought to be in another. In this state it might be an irregularity, and, if objected to, error, but would not affect the jurisdiction of the court so as to render the judgment void. *Gill v. Bradley*, 21 Minn. 15; *Kipp v. Cook*, 46 Minn. 535; *Tullis v. Bradley*, 3 Minn. 277 (Gill, 191). And we assume that the rule is the same in Wisconsin.

The appellants offered, in order to impeach and avoid the judgment, to prove that Rachel Ellis was compelled to bring the action by the defendant's course of conduct towards her, which consisted in endeavoring to persuade her to bring the action; that during the period of two years he abandoned her at different times, at first for a week at a time, gradually lengthening the periods of absence until they became three months at a time, leaving her unprovided with the necessities of life, and threatening, whenever he returned, that he would continue that course of conduct unless she consented to bring the action, and that unless she so consented he would run away, and leave her without a penny; and also to prove other acts of his of a similar character, all of which had such effect upon nerves and health and mental condition that she was not a free agent, in which condition she brought the action; from all which it is claimed she brought it under duress. Whether at any time, and especially whether after she has received and enjoyed

the fruits of the action, and has acquiesced for years, until the defendant has married again, and has died, and there is left solely the matter of distributing his property, a woman plaintiff could, because of such facts, obtain any relief in the same action, we will not undertake to say. Certainly it would be no ground for assailing the judgment in a collateral proceeding at any time. In the majority of actions for divorce by wives on the ground of desertion or of ill usage, the same claim of duress to bring the action might be made as in this case, and the stronger the grounds for divorce the stronger would be the ground to avoid the judgment whenever it might be convenient or profitable to do so. The court properly excluded the evidence.

The principal question in the case was presented by the appellants' offer to prove, and the ruling of the court excluding the evidence, that at the time of bringing the action in Wisconsin and of the divorce decree neither of the parties to it was a resident of that state, but that both were residents of this state. It is claimed for the evidence that, if admitted, it would have shown that the Wisconsin court had no jurisdiction of the subject-matter of the action, to wit, the marital relation between the parties; that consequently the decree was void; Rachel remained the wife, and is now the widow, of Matthew; and that the marriage with Flora was void. The question thus raised is of great importance, and difficult to satisfactorily determine. It is an undisputable general proposition that the tribunals of a country have jurisdiction over a cause of divorce, wherever the offense may have occurred, if either of the parties have an actual, bona fide domicile within its territory. This necessarily results from the right of every nation or state to determine the status of its own domiciled citizens or subjects without interference of foreign tribunals in a matter with which they have no concern. But when in the court of a state an action for divorce is brought, and a decree of divorce rendered, the court is presumed to have determined the facts essential to its jurisdiction among them the residence of the parties. When, as between whom, and to what extent is such determination binding in the state in which the parties are in fact residents? The cases in which the question may arise may be divided into three classes: First, in proceedings between the state of the parties' actual residence and one of the parties; second, in proceedings between the parties in the state of their actual residence, where the divorce in the other state was procured on the application of one of them, the other not appearing in the action to procure it; third, in proceedings between the parties when both voluntarily appeared in the action in which the divorce was granted, and consented to the jurisdiction, or that the court might determine the facts on which the jurisdiction depended. In the second class of cases, since it was settled that a judgment of another state can be assailed on the ground of want of jurisdiction in the court to render it, the decisions have been practically uniform that the party who did not submit to the jurisdiction is not bound by the judgment. Of

the decisions in cases coming under the first class we refer to four,—*Hood v. State*, 56 Ind. 263, 26 Am. Rep. 321; *Van Fossen v. State*, 87 Ohio St. 817, 41 Am. Rep. 507; *People v. Dawell*, 25 Mich. 247, 12 Am. Rep. 280; and *State v. Armington*, 25 Minn. 29,—all cases between the state of actual residence and one of the parties. In the first of these the record of the judgment showed that neither of the parties was a resident of Utah, where it was rendered, so that the record impeached itself. It was, of course, held that the judgment was void. In each of the others it was held that, in order to show want of jurisdiction in the court rendering the judgment, it might be shown that neither of the parties resided within the state in which it was rendered, and, that being shown, it was void. In the opinion in each case language is used apparently sustaining the proposition that such would be the rule however the question of the validity of the judgment might arise. In *People v. Dawell*, Mr. Justice Cooley delivered the prevailing opinion, Mr. Chief Justice Christianity concurring, and Mr. Justice Campbell dissenting. It was enough for the purpose of that case to decide whether the judgment was valid as against the state of residence. Whether it was valid as between the parties was not before the court; and such was the case in *Hood v. State*, and *State v. Armington*. So far as the state of residence is concerned, it must be taken upon the authorities, and certainly in this state, upon the *Armington Case*, that it is not bound by a judgment divorcing two of its resident citizens, rendered by a court of another state. There are reasons why it should not be bound, however it may be between the parties which we will presently refer to.

It does not follow that the judgment is void in the third class of cases. A judgment operating on a *res* may be binding between the parties to the action without binding one not a party, but interested in the *res*. In an action for divorce the *res* upon which the judgment operates is the status of the parties. There are three parties interested in that,—the husband, the wife, and the state of their residence. This was in the mind of Mr. Justice Cooley in writing the opinion in the *Dawell Case*. He said: "But it is said if the parties appear in the case the question of jurisdiction is precluded. That might be so if the matter of divorce was one of private concern exclusively." "As the laws now are, there are three parties to every divorce proceeding,—the husband, the wife, and the state; the first two parties representing their respective interests as individuals; the state concerned to guard the morals of its citizens, by taking care that neither by collusion nor otherwise shall divorce be allowed under such circumstances as to reduce marriage to a mere temporary arrangement of conscience or passion." "Such being the case, suppose we admit that the parties may be bound by their voluntary appearance in the foreign jurisdiction. How does that affect the present case? How, and in what manner, did the Indiana court obtain jurisdiction of the third party entitled to be heard in this proceeding; that is to say, of the state of Michigan?" This

line of reasoning was applied by the same court in *Waldo v. Waldo*, 52 Mich. 94. One question in that case was whether the plaintiff was the widow of Jerome B. Waldo, just as in this it is whether Flora Ellis is the widow of Matthew. Previous to her marriage to Jerome B. she had been married to one Carey, from whom she had obtained a divorce in Indiana, both parties appearing in the action for it. The court held the judgment could not be assailed by showing want of residence in Indiana and residence in Michigan, saying in one part of the opinion: "This state has never complained of that judgment, and neither party has objected to it." The *Dawell Case* was not referred to, and we may from both cases take the rule in that state to be that, while the state cannot be bound by its resident citizens appearing in and consenting to the jurisdiction of a court in another state in an action for divorce, the parties may so bind themselves in respect to their individual interests. In *Kinnier v. Kinnier*, 45 N. Y. 535, 6 Am. Rep. 132, a private action, it was held that a judgment of divorce by the court of another state, both parties appearing in the action, could not be assailed on the question of residence. In the course of the opinion the court, Church, Ch. J., said: "Nor can I assent to the reason given for allowing the husband to repudiate the binding force of the judgment upon him, after voluntarily submitting himself to the jurisdiction of the court, and litigating the case upon its merits;" thus recognizing the effect of the voluntary submission upon the parties' right to question the judgment. Cases in Massachusetts, to which we are cited by appellants, are hardly of authority on the point, because the decisions were based mainly on a statute of that state. *Ellis v.*

White, 61 Iowa, 644, has only bearing on one phase of this case. It was there held that a plaintiff in an action for divorce and alimony cannot question the jurisdiction of the court after accepting the benefits of the judgment.

It may seem anomalous that a judgment of divorce can be so far effectual between the parties as to extinguish all rights of property dependent on the marriage relation, without being effectual to protect them from accountability to the state for their subsequent acts. One reason why they ought not to be permitted, by going into another state and procuring a divorce, to escape accountability to the laws of their state, is that their act is a fraud upon the state, and an attempt to evade its laws, to which it in no wise consents, and it may therefore complain. But the parties do consent, and why should they be heard to complain of the consequences to them of what they have done? Why should they be permitted to escape those consequences by saying: "It is true that by a false oath made by one of us, and connived at by the other, we committed a fraud in the Wisconsin court, and induced it to take cognizance of the case; but now we ask to avoid its judgment by proof of our fraud and perjury or subornation of perjury." Because we do not think it can be done the parties must, so far as their individual interests are concerned, abide by the judgment they procured that court to render; and, of course, what will bind them will bind those who claim through them, or either of them, which is the case with the appellants other than Rachel. There were other minor questions raised by the assignments of error, but we do not see any merit in any of them.

Order affirmed.

MARYLAND COURT OF APPEALS.

Alexander SHAW, *Appt.*,

v.

Henry G. DAVIS *et al.*

(.....Md.....)

1. A minority stockholder cannot invoke the jurisdiction of equity for himself and those who may subsequently join him to prevent the majority of stockholders from making a contract which is neither *ultra vires*, fraudulent, nor illegal.

2. The fact that the same persons constitute the majority stockholders in

each of two companies does not enlarge the jurisdiction of equity to interfere with the management of one of those corporations in its relation with the other at the suit of a minority stockholder.

3. An injunction against the leasing by a railroad company of another railroad without the court's leave is in excess of the power of the court, as the court cannot prescribe the terms of such a lease, and can, at the most, prevent only such a lease as is illegal, *ultra vires*, or fraudulent.

(January 11, 1894.)

NOTE.—Most cases in which the right of a minority stockholder to sue arises are those which involve fraud, illegality, or *ultra vires* acts, and which do not involve the distinct question of the right of the majority to control the management of the corporation.

The limits of equitable jurisdiction as to interference with such management at suit of minority stockholders are very clearly shown in the above case in accordance, as we believe with the established authorities on the subject.

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For cases in which stockholders may sue, see notes to *Mack v. De Bardeleben Coal & Iron Co.* (Ala.) 9 L. R. A. 650; *Re Oshkosh Mut. F. Ins. Co.* (Wis.) 9 L. R. A. 273; *Chicago Mut. L. Indemnity Assn. v. Hunt* (Ill.) 2 L. R. A. 549.

As illustrating different sides of the question as to the power of equity to protect minority stockholders by ordering an accounting and dissolution though involving different facts, see *Miner v. Belle Isle Ice Co.* (Mich.) 17 L. R. A. 412, and *Wheeler v. Pullman Iron & Steel Co.* (Ill.) 17 L. R. A. 812.

APPEAL by plaintiff from a decree of the Circuit Court of Baltimore City dissolving a temporary injunction and dismissing the bill in a suit brought to compel an accounting of transactions between two railroad companies, and to enjoin the perfection of a lease by one company to the other of its road. *Affirmed.*

The facts are stated in the opinion.

Messrs. Charles Marshall, John L. Thomas, and W. Irvine Cross for appellant.

Messrs. W. Pinkney Whyte, Bernard Carter, and Frank Wood for appellees.

McSherry, J., delivered the opinion of the court:

We have given most patient and laborious study to the voluminous record now before us, as well as to the full and exhaustive briefs filed by the distinguished counsel who so ably argued the cause; and, after mature deliberation, we now proceed to state as concisely as possible the reasons upon which the conclusions we have reached are founded. The West Virginia Central & Pittsburg Railway Company was incorporated by the legislature of West Virginia with an authorized capital stock of 60,000 shares of the par value of \$100 per share. Of these shares, when the pending bill of complaint was filed, 5,000 were held in trust for the company's treasury; 7,200 were owned by the appellant, Alexander Shaw; 2,600 by other members of his family; 30,194 by Henry G. Davis, Thomas B. Davis, and Stephen B. Elkins, and their families; and the residue by Thomas F. Bayard, James G. Blaine, William Windom, William Keyser, and quite a number of other persons. The road extends from West Virginia Junction, near Piedmont, on the line of the Baltimore & Ohio Railroad, in a southerly direction to Davis, in West Virginia, a distance of some fifty-eight miles. The company owns large tracts of coal and timber land, and is chiefly a coal and lumber carrying road. Its sole outlet was, originally, the Baltimore & Ohio Railroad at West Virginia Junction. Not long after it began operations, it encountered serious difficulties with the Baltimore & Ohio, and, as described by Mr. William Keyser, it soon became apparent that the business of the West Virginia Central was largely diminished, and that it was greatly embarrassed by the lack of harmonious relations. In fact, the West Virginia Central property became almost sidetracked by the lack of facilities, the want of a cordial understanding, and its consequent inability to make contracts which it would be able to fulfill; and at last the necessity was forced upon this road to get another outlet, or accept the situation of being entirely bottled up. As a result of this condition, the Piedmont & Cumberland Railway Company was organized and incorporated, with a capital stock of 18,000 shares, for the construction of a road, parallel to the Baltimore & Ohio, from Piedmont to Cumberland. Of the capital stock Henry G. Davis, H. G. Davis & Bro., and Stephen B. Elkins hold 7,295 shares, the Pennsylvania Railroad Company holds 4,000 shares, and

the residue is held in smaller lots by other persons,—Mr. Shaw owning none of it. On May 21, 1886, a tripartite agreement was entered into between the West Virginia Central, the Piedmont & Cumberland, and the Pennsylvania Railroad Companies, whereby the latter agreed to set apart 5 per cent of its receipts from traffic coming to its road from the West Virginia Central and going from its road to the latter, as a fund to guarantee the payment of the interest on the bonds of the Piedmont & Cumberland road, which were to be issued to the extent of \$650,000, that the money might be thereby raised for the construction of the new road. The West Virginia Central agreed to deliver to the Piedmont & Cumberland all traffic it could control, and the Piedmont & Cumberland agreed to deliver to the Pennsylvania Railroad one half of all traffic hauled by it to Cumberland; and this agreement was ratified by the stockholders of the West Virginia Central, at a meeting in January, 1887, by a vote of 37,395 shares. With the money raised by the negotiations of these bonds, and by a call of a small installment of the stock subscribed, the Piedmont & Cumberland Railroad was built. When finished, in August, 1887, it was operated by the West Virginia Central under a verbal agreement for 60 per cent of the gross earnings. Subsequently, and as will be stated more at large later on, the stockholders of the West Virginia Central appointed a committee to consider, and report at an adjourned meeting to be held on March 15, 1890, a permanent lease of the Piedmont & Cumberland road. On the 14th of March the appellant, Alexander Shaw, as a minority stockholder of the West Virginia Central, in behalf of himself and of other stockholders who might come in and be made parties, filed the bill of complaint which inaugurated the pending litigation. The averments of the bill relate to two distinct and disconnected subjects. From paragraph 1 to and including paragraph 7 the bill is confined to a statement of transactions between the West Virginia Central, on the one side, and Henry G. Davis, Thomas B. Davis, and Stephen B. Elkins, on the other, and these are introduced, apparently, for the purpose of showing the mode in which these majority stockholders dealt with the company in matters pertaining, not to this proceeding, but to something totally different. The remaining paragraphs of the bill have reference to transactions between the West Virginia Central and the Piedmont & Cumberland, and to the dealings of Henry G. Davis, Thomas B. Davis, and Stephen B. Elkins, as officers and directors of these corporations, with the corporations themselves, and they may be briefly stated as follows: That Messrs. Davis and Elkins, having subscribed for a majority of the stock of the Piedmont & Cumberland road, gave value to their shares by the following process: (1) With a view of constructing a road that could be cheaply built, they selected a location so low in the valley as to expose the road to heavy and destructive damages in times of floods in the Potomac; that the road was in other respects defectively

constructed, and that it is ruinously expensive to operate; that it was designedly so constructed, with a view of having it operated by the West Virginia Central, and of throwing upon the latter company the heavy cost of operating it. (2) Before the Piedmont & Cumberland road was in a condition for the transportation of freight or passengers, the Messrs. Davis and Elkins used their official power in the West Virginia Central to make the latter company complete the construction of the Piedmont & Cumberland road, and, without authority from the stockholders of the West Virginia Central, they,—the Messrs. Davis and Elkins,—as officials of the two companies, made an arrangement by which the West Virginia Central Company began the operation of the Piedmont & Cumberland road in its incomplete condition, whereby the West Virginia Central was made to pay, not only the ordinary cost of operation, but to complete the Piedmont & Cumberland road, and to put upon it betterments and improvements for the benefit of themselves as the principal stockholders therein. (3) While the Piedmont & Cumberland road was still a most precarious property, and sure to entail immense expense in its operation, the Messrs. Davis and Elkins determined, at the annual meeting in January, 1890, to risk the attempt to make the stockholders of the West Virginia Central ratify a permanent lease of the Piedmont & Cumberland road, which had been prepared and presented to the meeting; and that the lease was most disadvantageous to the West Virginia Central, and most advantageous to the Piedmont & Cumberland Company; and that the rate of earnings proposed in said lease as a compensation to the West Virginia Central was inadequate, and would be a fraud on the stockholders of that company. (4) When the lease was proposed to the stockholders, the plaintiff made a violent protest against any lease being executed until the account between the two companies should be first adjusted, without which adjustment the earning capacity of the Piedmont & Cumberland road, the expense incident to maintaining it, or a fair rate of rental could not be ascertained; that the confused state of the accounts kept by the West Virginia Central renders any accurate statement impossible, and it would be a fraud on the stockholders of the West Virginia Central to have any lease made before a full settlement of these accounts between the two companies; that Messrs. Davis and Elkins consented to adjourn the stockholders' meeting until March 15, 1890, and that it is their design at that meeting to use the power which they have as the holders of the majority of the stock of the West Virginia Central to compel the ratification and acceptance of the lease, which they, as officers of the West Virginia Central, have agreed upon with themselves, as officers of the Piedmont & Cumberland Company. The prayers for relief are—First, for a discovery of the ownership of the stock of the Piedmont & Cumberland Railway; second, for a discovery of the holdings of the stock of the Piedmont & Cumberland Company by the West Virginia Central Com-

pany, and the moneys spent by the latter company on the road of the first-named company; third, for an account as to how much money is due to the West Virginia Central by the Piedmont & Cumberland Company for advances made by the West Virginia Central on any account, and particularly, on account of the completion of the Piedmont & Cumberland, which was paid by the West Virginia Central out of the 60 per cent operating expenses received under the verbal lease, and which ought to have been charged to the Piedmont & Cumberland and paid out of the 40 per cent of the gross earnings received by it; and, fourth, for an injunction to restrain the execution of the proposed lease, or any other lease, until the court can ascertain what would be a proper apportionment of the earnings between the leased road and the operating road, and what, in a word, ought to be the terms, conditions, and covenants of such a lease. An injunction as prayed was granted on March 14, 1890, and on April 24 the defendants answered, denying the material allegations of the bill, and moved for a dissolution of the injunction. A general replication was filed, and a large mass of evidence, covering nearly a thousand printed pages, was taken. At the hearing the circuit court of Baltimore city on March 23, 1893, dissolved the injunction and dismissed the bill. From that decree this appeal was taken.

It will be observed at the threshold that the relief prayed for has no relation whatever to the first seven paragraphs of the bill, and whether the averments contained therein be true or be false is purely a speculative question under the present structure of the bill of complaint. If those averments had been conceded by the answer to be true, relating as they do exclusively to alleged transactions between Messrs. Davis and Elkins and the West Virginia Central Company, it is not perceived how they could influence or affect, one way or the other, totally different transactions, in no way connected with or dependent on them. No relief is sought as to anything averred in these seven paragraphs. The case, then, before us is that of a minority stockholder filing a bill in his own behalf, and in behalf of others who may subsequently join him, to restrain by injunction the majority stockholders of one railroad company from leasing, except with the leave of a court of equity, and upon the terms which it may prescribe, the road of another railway company, in which latter company the majority stockholders are the same persons who are the majority stockholders in the proposed lessee company; and also praying for an account between the two companies of antecedent financial transactions. Naturally, the inquiries which such a case suggests at the very outset are—First, what jurisdiction has a court of equity to control the internal management of a corporation at the instance of a minority stockholder? and, secondly, in what manner does the circumstance that the majority of the stock is held by the same persons in both the companies, affect the question of jurisdiction? And, first, it may be stated, as the result of all the authorities,

that whenever any action of either directors or stockholders is relied on in a suit by a minority stockholder for the purpose of invoking the interposition of a court of equity, if the act complained of be neither *ultra vires*, fraudulent, nor illegal, the court will refuse its intervention because powerless to grant it, and will leave all such matters to be disposed of by the majority of the stockholders in such manner as their interests may dictate, and their action will be binding on all, whether approved of by the minority or not. "In this country," said the late Mr. Justice Miller, in speaking for the Supreme Court of the United States in *Hawes v. Oakland*, 104 U. S. 450, 26 L. ed. 827, "the cases outside the federal courts are not numerous, and, while they admit the right of a stockholder to sue in cases where the corporation is the proper party to bring the suit, they limit this right to cases where the directors are guilty of a fraud, or a breach of trust or are proceeding *ultra vires*." And so, in *MacDougall v. Gardiner*, L. R. 1 Ch. Div. 14, James, L. J., said: "I think it is of the utmost importance in all these companies that the rule, which is well known in this court as the rule in *Mosley v. Alston*, 1 Phil. Ch. 790, and *Lord v. Governor & Co. of Copper Miners*, 2 Phil. Ch. 740, and *Foss v. Harbottle*, 2 Hare, 461, should be always adhered to; that is to say, that nothing connected with internal disputes between the shareholders is to be made the subject of a bill by some one shareholder in behalf of himself, and others, unless there be something illegal, oppressive, or fraudulent,—unless there is something *ultra vires* on the part of the company, *qua* company, or on the part of the majority of the company, so that they are not fit persons to determine it; but that every litigation must be in the name of the company, if the company really desire it. Because there may be a great many wrongs committed in a company, there may be claims against directors, there may be claims against officers, there may be claims against debtors, there may be a great variety of things which a company may be well entitled to complain of, but which, as a matter of good sense, they do not think it right to make a subject of litigation; and it is the company as a company which will make anything that is wrong to the company the subject of litigation, or whether it will take steps to prevent the wrong being done. . . . Everything in this bill, so far as I can see, if it is a wrong, is a wrong to the company. Whether it ought to have been done, or ought not to have been done, depends on whether it is for the good of the company it should have been done, or for the good of the company it should not have been done; and, putting aside all illegality on the part of the majority, it is for the company to determine whether it is for the good of the company that the things should be done, or should not be done, or left unnoticed." In the same case Mellish, L. J., after observing that very often, in companies, things are done which ought not to be done, proceeds: "Now, if that gives a right to every member of the company to file a bill to have the question decided, then, 23 L. R. A.

if there happens to be a cantankerous member, or one member who loves litigation, everything of this kind will be litigated; whereas, if the bill must be filed in the name of the company, then, unless there is a majority who really wish for litigation, it will not go on. In my opinion, if the thing complained of is a thing which, in substance, the majority are entitled to do, or if something has been done irregularly which the majority of the company are entitled to do regularly, or if something has been done illegally which the majority has the right to do legally, there can be no use in having litigation about it, the ultimate end of which is only that a meeting has to be called, and then, ultimately, the majority gets its wishes. Is it not better that the rule shall be adhered to that, if it is a thing which the majority are the masters of, the majority, in substance, shall be entitled to have their will followed? If it is a thing of that nature, it only comes to this, that the majority are the only persons who can complain that a thing which they are entitled to do has been done irregularly; and this is what as I understand, was decided by the cases of *Mosley v. Alston* and *Foss v. Harbottle*. In my opinion this is the rule to be maintained." See also *Gray v. Lewis*, L. R. 8 Ch. App. 1050.

Secondly. The fact that the same persons hold the majority of the stock in both companies does not, of itself, enlarge the court's jurisdiction. The act complained of furnishes the test of jurisdiction, and it must be *ultra vires*, fraudulent, or illegal. Nothing short of this will suffice. This is true even in a case where directors, and not stockholders, do the act complained of. *Booth v. Robinson*, 55 Md. 441. And for stronger and more obvious reasons is it also true in a case where stockholders themselves act directly. They are not trustees or quasi trustees for each other. Even a director is not, strictly speaking, a trustee. *Spring's App.* 71 Pa. 11, 10 Am. Rep. 684; *Smith v. Anderson*, L. R. 15 Ch. Div. 247. In *Pender v. Lushington*, L. R. 8 Ch. Div. 70, Jessel, M. R., in speaking of the rights of a stockholder, said: "I cannot deprive him of his property, though he may not make use of the property in the way I approve. This is really the question, because, if these stockholders have a right of property, then I think all the arguments which have been addressed to me as to the motives which induced them to exercise it, are entirely beside the question." Then, after referring to a decision by Mellish, the master of the rolls proceeded: "In other words, he [Mellish, J.] admits a man may be actuated, in giving his vote as stockholder, by interests adverse to the interests of the company as a whole. He may think it was for his particular interest that a certain course may be taken which may be, in the opinion of others, adverse to the interests of the company as a whole; but he cannot be restrained from giving his vote in what way he pleases, because he is influenced by that motive. There is, if I may so say, no obligation on a shareholder of a company to give his vote merely with a view to what other persons may consider the interests of the com-

pany at large. He has a right, if he thinks fit, to give his vote from motives or promptings of what he considers his own individual interests. This being so, the arguments which have been addressed to me, as to whether or not the votes which were given would bring about the ruin of the company, or whether or not the motive was an improper one which induced these gentlemen to give their votes, or whether or not their conduct shows a want of appreciation of the principles on which this company was founded, appear to me to be wholly immaterial." And, in *Manhattan Elev. R. Co's Case*, 11 Daly, 516, the court says: "It is argued that, if common directors are disqualified from acting, so are common stockholders incapable to ratify agreements between their companies, and that the holder of one share of stock in each company could prevent any action at a stockholders' meeting relating to the two companies, no matter how advisable that action might seem to the holder of every other share. I do not say that the disqualification extends to a shareholder. I see no reason why it should. The disqualification rests entirely on the fiduciary relation. A shareholder is trustee for nobody. He has only his own interests to look after as such stockholder. Closely connected, undoubtedly, he is in practice with every other stockholder, but he holds no such fiduciary relation to the corporation as stockholder as he holds as director." *Beach, Corp. chap. 13, § 247.*

Accepting these propositions as the fixed and settled law, it remains now to inquire whether the proof sustains the allegations of the bill, and brings the case within the legal principles to which reference has just been made. If the Messrs. Davis and Mr. Elkins selected, as alleged, an improper location for the Piedmont & Cumberland road, and improperly constructed that road, so that it would be ruinous to operate it, and if they did this with a view to throwing the heavy cost of operating it on the West Virginia Central, it is difficult to assign a reason for such singular conduct. On its face the allegation is, to say the least, improbable. Those gentlemen owned over 30,000 shares of the 55,000 issued shares of the West Virginia Central Company, while they owned but 7,295 shares of the Piedmont & Cumberland road; and that they would purposely and designedly wreck their larger and more valuable holdings in the West Virginia Central merely for the purpose of realizing an income from a smaller and dependent road, in which their aggregate shares were not one fourth of the amount owned by them in the main enterprise, is quite incomprehensible. Certainly, no motive for such a strange course has been shown. But, apart from the improbable character of the allegation, it is not supported by the evidence. The Piedmont & Cumberland road was located by an experienced and competent engineer, who was the chief assistant of the late J. N. Du Barry, at that time second vice-president of the Pennsylvania Railroad Company. He made a careful examination of the route of the proposed road, and selected, according to his

testimony, the most suitable location that was available. He submitted his surveys and profiles to the engineering department of the Pennsylvania Railroad Company, and even laid them before Mr. George B. Roberts, the president of that company, and an engineer of high reputation, and they were fully approved by both. He testified that the grades were arranged as high as was deemed necessary to keep beyond the reach of extreme high water, and that, taking into consideration its location, alignments, its grades, and the mode in which it was built, the road, for economical operation, was equal to that of the Baltimore & Ohio. Besides this, it was proved by Mr. Charles H. Latrobe, an accomplished engineer in no way connected with or interested in this litigation, that he had made an examination of the Piedmont & Cumberland road, that its general alignment was good, that it had a very considerable proportion of long tangents, and not more than the usual amount of curvature, which might be reduced at very moderate expense, and that it was superior in this respect to the West Virginia Central, because rectifications of the line could be more readily made. As opposed to this, the record contains the testimony of Mr. Wrenshaw, also an engineer, criticising the location and construction of the road. Though there is this difference of opinion between these engineers, and though, too, a freshet did some small amount of injury to the road in 1888, and an unprecedented flood in 1889 caused considerable damage to it, that might not have happened had the road been built higher above the Potomac river, still, we are not authorized to decide whether, in point of fact, the best location was selected that might have been selected, but only to determine from the evidence whether the location, as made, was made in good faith, or, on the contrary, with the fraudulent design imputed in the bill. We not only see nothing in the record to support this allegation of fraud, but, on the other hand, we are quite fully satisfied, after carefully considering the evidence, that the Piedmont & Cumberland Railway was projected, located, and constructed in entire good faith, with a view of furnishing a necessary outlet for the traffic of the West Virginia Central road, whereby the property of the latter company would be made valuable to its owners.

Now, as to the charge that, before the Piedmont & Cumberland road was in a fit condition for the transportation of freight and passengers, Messrs. Davis and Elkins used their powers as officers of the West Virginia Central to make that company complete the Piedmont & Cumberland, and that, without authority from the stockholders, but by virtue of their control over the West Virginia Central as majority stockholders, and in their capacity as officers of the two companies, they made an agreement under which the West Virginia Central undertook to operate the Piedmont & Cumberland upon such terms as would benefit themselves as stockholders of the Piedmont & Cumberland, and would permanently better and improve the latter road, to the detriment of the stockhold

ers of the former road. There is no foundation in the evidence to support this accusation. The West Virginia Central began to operate the Piedmont & Cumberland in August, 1887; and while the road was then, as is necessarily the case, to a greater or less extent, with all newly built railroads, less complete than it was made afterwards, yet, so far from its being unfit for the transportation of freight, it is in testimony by the superintendent that from that day up to the time he was examined as a witness there never had been a car derailed, or, as he states it, there never had been a wheel off the track. He further testified that the road was well ballasted with stone, except in a few bottoms, where sand ballast was used, and that, when turned over to the West Virginia Central to be operated, it was superior to the condition of the Parkersburg Branch of the Baltimore & Ohio when it was turned over to the latter company. Going no farther back than January, 1887, we find that Mr. Davis and the directors, among whom was the plaintiff, Mr. Shaw, stated, in the annual report to the stockholders of the West Virginia Central Company, that it would probably be found to the interest of the West Virginia Central to operate the Piedmont & Cumberland road, which was not then completed; and accordingly, at the meeting of the new board of directors, convened the next month, a resolution was adopted conferring upon the president, Mr. Henry G. Davis, full authority, with the advice and assistance of the company's counsel, the Honorable William Pinkney Whyte, to make such an agreement for the operation of the Piedmont Cumberland road by the West Virginia Central, as he might deem best, in the interest of the West Virginia Central, and directing him to report the result to the next stockholders' meeting. In January, 1888, Mr. Davis reported to the stockholders of the West Virginia Central, at their annual meeting, that no permanent arrangement had been made for the lease of the Piedmont & Cumberland road, but that the latter road was then being operated by the West Virginia Central for 60 per cent of the gross earnings of the new road. And this statement was repeated in the annual report made to the stockholders of the West Virginia Central in January, 1889. These reports of 1887, 1888, and 1889 were all unanimously adopted and approved by the stockholders of the West Virginia Central. This temporary arrangement, under which the West Virginia Central operated the Piedmont & Cumberland road up to the time of the filing of the bill, was therefore not made merely by the officers of the two companies, but its terms were known to, and fully and explicitly ratified and approved by, all the stockholders of the West Virginia Central who were present or represented at the annual meetings of 1887, 1888, and 1889, without dissent. At the annual meeting of the stockholders of the same company in 1890, where 54,268 shares out of the 55,000 issued shares were represented in person or by proxy, a resolution was offered by one of the stockholders proposing to lease the Piedmont & Cumberland road, the lessee to pay all the

costs and expenses of operating the road and to receive 60 per cent of the gross revenues, and accompanying the resolution was a draft of the proposed lease. A substitute was moved to the effect that the proposed lease be referred to the board of directors for examination, with a view that it might be determined whether its provisions would "promote and protect the interests of the company." Thereupon Governor Whyte proposed the following amendment, which was adopted without any dissenting vote, so far as the minutes disclose, though Mr. Shaw was present in person, viz.: "Resolved, that the lease proposed be referred to a committee of three stockholders, to report as to the propriety of its acceptance, to an adjourned meeting of the stockholders, and when this meeting adjourns, it shall be adjourned to the 15th day of March, 1890, at 12 M., at this place, when this subject shall be considered." On the 15th of March, when the meeting of stockholders reconvened, the committee appointed under Governor Whyte's resolution reported the form of a lease which they had prepared, varying somewhat the terms of the one proposed at the meeting in January, and recommended that the percentage of gross earnings to be paid to the West Virginia Central by the Piedmont & Cumberland should be 63 per cent instead of 60 per cent; but no action was taken by the stockholders, because the injunction applied for and issued the day previous was served before the meeting assembled. These facts demonstrably show the errors of the averment which charged that the Messrs. Davis and Elkins designed to use the power which they held as owners of a majority of the West Virginia Central's stock to compel the ratification and acceptance of a lease which they, as officers of the West Virginia Central, had agreed on with themselves, as officers of the Piedmont & Cumberland road.

We come now to the averment that large sums of money, expended on account of construction of the Piedmont & Cumberland road after August 1, 1887, were improperly charged to the West Virginia Central, and improperly paid by it out of the 60 per cent of gross earnings received by it for operating the Piedmont & Cumberland road, while they should have been charged to the Piedmont & Cumberland, and should have been paid out of its 40 per cent of those earnings. The total aggregate of these alleged erroneous charges, as calculated by Maj. Buckley, an expert accountant produced by the plaintiff, is the sum of \$82,248, and without pausing to examine the lengthy statement item by item, we will assume that the aggregate amount was improvidently charged to the West Virginia Central, and that upon a strictly technical system of accounting the whole of this should have been paid by the Piedmont & Cumberland company; but still the material question recurs, Was the charge of this sum to the West Virginia Central, as made, made merely in error, or in bad faith, or fraudulently? If made in good faith, though inaccurately made, a court of equity has no jurisdiction, at the suit of a stockholder, to readjust the account. Under such conditions,

the company injuriously affected must itself seek the appropriate redress. Courts cannot intervene, in the absence of fraud or illegality, or where the act is not *ultra vires*, to control, manage, or regulate corporate business. The question of *ultra vires* has nothing to do with this branch of the case. The leasing of the one road by the other was perfectly lawful, and a mere dispute as to the method of keeping certain of the accounts between them could not raise an issue of *ultra vires*, especially when there is no unvarying, fixed, or unbending system controlling the classification of items in such an account as this. But the evidence signally fails to show any fraud whatever in this transaction. It is often a debatable matter whether particular items ought to be charged to operating expenses or to construction account. Different accountants may honestly disagree as to which of the two accounts a given item should be charged. Necessarily, then, some officer of the lessee company must, in the first instance, decide the question. If he decides wrongly, it does not follow that he has decided wrongfully or fraudulently. This is made perfectly clear by Mr. Keyser in his intelligent testimony, from which we now quote briefly: "Taking the two accounts together and looking at them from all the light that I can get, I should say the president of the West Virginia Central & Pittsburgh Railway Company had dealt liberally by the Piedmont & Cumberland road in his method of charging these accounts. If the system of an accountant was to be adopted, and every item charged upon the strict basis of a construction account, I think the carrying out of that principle would eliminate a large amount of these charges against the Piedmont & Cumberland road growing out of the flood. In other words, I cannot see how the president could be tied down to any strictly defined method of accounting that would enable him to accept, on the one side, Mr. Bulkley's accounts, and, on the other side, justify him in his method of charging the Piedmont & Cumberland road with these large items of practical repairs,—because that is what they were,—growing out of an unusual and disastrous flood. . . . I think the discretion in a case of this kind should be placed in the hands of the president, in the absence of anything which binds it down by any definite rule, as adopted by the two companies. . . . I think, in this case, and I speak now as a stockholder in the West Virginia Central road, that, looking at these accounts, and looking at the lease as I did when I was on the committee, and in the absence of anything in the way of a definite, clear provision for this business between the two companies, that the matter of stating the accounts has been a fair one on the part of the president, and if I were to criticise it at all, I should say he leaned against the interests of the Piedmont & Cumberland Railroad in charging rather too much." But there is still another view of the subject. While President Davis charged up this sum of \$32,248 to the West Virginia Central, he charged to the Piedmont & Cumberland a much larger sum for other and different expenses, which ought

to have been paid by the West Virginia Central; and, therefore, whatever error he made in the first instance was more than counterbalanced by the subsequent error against the Piedmont & Cumberland road. There is one other account alluded to, which may be disposed of in a very few words. There is an allegation that there is money due by the Piedmont & Cumberland for advances made to it by the West Virginia Central for original construction, and growing out of other dealings since. The evidence, however, shows that it is the West Virginia Central which is indebted to the Piedmont & Cumberland.

What we have said in considering the subjects just discussed applies equally to so much of the prayer of the bill as relates to the relief sought by way of account; and, without repetition, we need only add that the plaintiff has failed to support by evidence the averments upon which the jurisdiction to grant that particular relief depends. There is no pretense that the two companies had not the necessary powers, under their charters and under the laws, to enter into the business relations out of which these questions of account arose. The transactions themselves were not illegal, and, however erroneous the accounts may be conceded to be, when considered from the standpoint of a professional accountant, there has been literally nothing adduced to show that the alleged errors were fraudulently or designedly committed, with a view of benefiting the stockholders of the Piedmont & Cumberland Company at the expense of the stockholders of the West Virginia Central Company. Nor does the making of a lease by the Piedmont & Cumberland road to the West Virginia Central Company necessarily depend upon the state of antecedent accounts between the two companies. Whatever unadjusted or erroneously adjusted accounts there may be can as readily be balanced and settled after, as before, a lease has been executed. And if the proposed lease be not *ultra vires* or unlawful or fraudulent, no court, at the instance of a minority stockholder, or at the instance of any one else, has the power or the right to restrain the majority from dealing with the property as they may deem most advantageous to their own interests. Any other doctrine would put it in the power of a single stockholder, owning but one share out of many hundreds, to transfer the entire management of a corporation to a court of equity, and would effectually destroy the right of the owners of the property to lawfully control it themselves. It would make a court of equity practically the guardian, so to speak, of such a corporation, and would substitute the chancellor's belief as to what contracts a corporation ought, as a matter of expediency, or policy, or business venture, to make, instead of allowing such questions to be settled by the persons beneficially interested in the property. No such arbitrary or dangerous power has ever been claimed by any court, and, if laid claim to, it would never be tolerated in a free government. The injunction granted on March 14, 1890, prohibited the making of a lease upon

the terms of 60 per cent of the gross earnings, or any other lease, until the further order of the court. Apart from all questions of *ultra vires*, illegality, and fraud, this power, thus assumed, undertook to reserve to the court the authority to prescribe the terms of any lease, because it prohibited the making of any lease without the court's leave. When the terms are not agreed to, the conditions not named, and the covenants not formulated, what authority exists in the chancellor to assume in advance that an act *ultra vires*, or that fraud or illegality, will be attempted? In the case at bar the lease which was actually prepared under the circumstances we have already stated at large—which are a flat negation of any fraud or secrecy—made no

provision for a 60 per cent, but for a 63 per cent, proportion of the gross earnings, and there is nothing to show, even if we had the right to go into an examination of the subject, that such a proportion of the gross earnings would be an unfair or inadequate rental. As the court had no power to decree a lease, so it had no power to prescribe the terms of one. It could prohibit the doing of an act *ultra vires*, illegal, or fraudulent. Beyond that it could not go. As no such act was before it, it did right in dissolving the injunction, and in dismissing the bill. For the reasons we have given we will affirm the decree appealed from.

Decree affirmed, with costs above and below.

GEORGIA SUPREME COURT.

City of ATLANTA, *Plff. in Err.*,

v.

Mary J. WARNOCK.

(.....Ga.....)

*1. The municipal government of Atlanta, though invested by statute with

*Headnotes by BLOOMLEY, Ch. J.

NOTE.—Injunction against a nuisance maintained by a municipal corporation.

Drainage generally.

Ordinarily, a city will be enjoined from using or constructing a sewer or drain so as to create a nuisance by causing a deposit of filth or noisome smells adjacent to private property. *Vick v. Rochester*, 46 Hun. 607; *Pettigrew v. Evansville*, 25 Wis. 223, 3 Am. Rep. 60; *Stoddard v. Saratoga Springs*, 127 N. Y. 261; *Beach v. Elmira*, 22 Hun. 158; *Dierks v. Addison Twp. Highway Comrs.* 149 Ill. 197; *Butler v. Thomasville*, 74 Ga. 570; *Danbury & N. R. Co. v. Norwalk*, 37 Conn. 100, approved, *Mootry v. Danbury*, 45 Conn. 550, 20 Am. Rep. 703; *Flouer v. Local Board of Low Leyton*, L. R. 5 Ch. Div. 347, 46 L. J. Ch. 621, 35 L. T. N. S. 760, 25 Week. Rep. 545.

An injunction will be granted against a city discharging sewage on lands of an adjacent town under provision of the statute authorizing a board of health to restrain by injunction such nuisance. *Gould v. Rochester*, 105 N. Y. 48, reversing 39 Hun. 72.

And a license for discharge of sewage from a particular district will not authorize the discharge of sewage from a larger one. *New York Central & H. R. R. Co. v. Rochester*, 127 N. Y. 591.

The foregoing cases support the doctrine in the main case.

But in the case of *Atty-Gen. v. Clerkenwell* [1891] 3 Ch. 527, 60 L. J. Ch. 738, 65 L. T. N. S. 812, an injunction was refused to restrain the discharge of sewage from one district into another, where the first district had authorized private connections with the sewer, the remedy being a private suit against the inhabitants.

And equity will not restrain the construction of a sewer if there is adequate remedy at law. *Iron Works v. Borough*, 3 Lanc. L. Rev. 107; *Olapp v. Spokane*, 33 Fed. Rep. 615.

And an injunction will not be granted where the evil anticipated was uncertain and contingent, and 23 L. R. A.

plenary powers over the subject of streets, sewers, drainage, water supply and sanitation, has no right to create and permanently maintain a nuisance dangerous to health and life, which nuisance consists of openings, called "manholes," in a sewer located in a public street contiguous to the dwelling of a citizen, the manholes being allowed to emit poisonous gases in large quantities through perforated covers placed over them.

could not arise for several years. *Morgan v. Binghamton*, 103 N. Y. 600.

Where the main sewer has been used for twenty-four years, a sanitary authority which did not construct sewers which are a nuisance but only permitted them to be used as formerly, cannot be restrained by injunction under the Public Health Act or the River Pollution Act of 1876. *Atty-Gen. v. Guardians of Poor of Dorking Union*, L. R. 20 Ch. Div. 595-609, 51 L. J. Ch. 585, 46 L. T. N. S. 573, 30 Week. Rep. 579.

Drainage into watercourses.

A city will be enjoined from discharging sewage into a stream, polluting the water and causing a large deposit of filth. *Goldsmid v. Tunbridge Wells Imp. Comrs.* L. R. 1 Ch. 349, 35 L. J. Ch. 322, 12 Jur. N. S. 808, 14 L. T. N. S. 154, 14 Week. Rep. 562; *Woodward v. Worcester*, 121 Mass. 245; *Spokes v. Banbury Board of Health*, L. R. 1 Eq. 42; *Demby v. Kingston*, 60 Hun. 294; *O'Brien v. St. Paul*, 18 Minn. 176; *Holt v. Rochdale*, L. R. 10 Eq. 364, 39 L. J. Ch. 761, 23 L. T. N. S. 43, 18 Week. Rep. 886; *Bell v. Rochester*, 33 N. Y. S. R. 789; *Hardinge v. Southborough Local Board*, 33 L. T. N. S. 220.

Or into a pond. *Schrifer v. Johnstown*, 71 Hun. 232.

Under *Indiana Acts 1867*, p. 63, providing that a change in the grade of a street shall not be made before damages are tendered, a city will be enjoined from changing a highway so as to cause the drainage to ruin the water for a raceway of an hydraulic mill outside the city, where damages have not been tendered. *Columbus v. Hydraulic Woolen Mills Co.* 33 Ind. 455.

And 18 & 19 Vict., chap. 20, authorizing a sewer to be carried under a highway, does not grant power to convey into a river. *Atty-Gen. v. Metropolitan Board of Works*, 1 Hem. & M. 238, 9 L. T. N. S. 129, 11 Week. Rep. 820.

An injunction was granted to prevent a city from discharging its sewage into a private river,

This is true, at least, where the dangerous character of the nuisance results, in all probability, not from defects inherent in the general system, but from defective execution of the system, in failing to adapt it to local conditions, such as steep grade in the particular street in which the unwholesome sewer is constructed and maintained.

2. There was no abuse of discretion in granting the temporary injunction, enjoining the city "from continuing said man-hole in such condition as to allow the escape of noxious gases." In the light of the pleadings and the evidence, the terms of the order were sufficiently definite and specific.

(November 9, 1892.)

ERROR to the Superior Court of Fulton County to review a judgment in favor of complainant in an action brought to enjoin the

where the act under which it was constructed, provided that nothing in the act shall be construed to render lawful any act which is a nuisance at common law. *Atty-Gen. v. Birmingham* 4 Kay & J. 628.

But the decree was not binding upon a board created by act of parliament covering this and other districts. *Atty-Gen. v. Birmingham Drainage Board*, L. R. 17 Ch. Div. 685, 50 L. J. Ch. 736, 44 L. T. N. S. 906, 29 Week. Rep. 793, 46 J. P. 36.

Where the surface flow of water has been concentrated into an artificial channel insufficient for the purpose, an injunction will not be granted against a city to prevent the enlargement of the channel so as to carry off the natural flow of water. *Scranton's App.* 121 Pa. 97, reversing *Goulden v. Scranton*, 8 Lanc. L. Rev. 340.

And an injunction in favor of an aqueduct board against a city, was denied on the ground that the apprehended pollution of the water from sewage had not yet taken place, and it was doubtful whether it would be deleterious to the city. As to whether or not the complainant could sue for pollution of water injurious to the city, was not decided. *Newark Aqueduct Board v. Passaic*, 46 N. J. Eq. 552, affirming 45 N. J. Eq. 393.

And it was held in the case of *Glossop v. Heston & L. Local Board*, L. R. 12 Ch. Div. 102, 49 L. J. Ch. 89, 40 L. T. N. S. 736, 28 Week. Rep. 111, that where the local board had not caused a nuisance but neglected to provide a system of drainage, an injunction will not be granted a private person against the discharge of sewage in an abutting river, but the remedy is by mandamus.

And where the bill does not allege any negligence of the city either in the manner in which the sewage was discharged from the mouth of the sewer, or in omitting to take proper precautions to purify it, and the city is proceeding in a statutory manner, injunction will be denied. *Washburn & M. Mfg. Co. v. Worcester*, 116 Mass. 458.

Or when the injury was too trifling. *Atty-Gen. v. Gee*, L. R. 10 Eq. 131, 23 L. T. N. S. 299.

And in the case of *Biltz v. Borough*, 3 Pa. Co. Ct. Rep. 412, an injunction was refused against concentrating sewage into an insufficient culvert so as to injure the plaintiff by its overflow, as these matters belonged to the discretion of the borough, and no negligence was charged, and there was adequate remedy at law; and the culvert was made by private parties along the watercourse.

See also "*Docks and navigation.*"

Docks and navigation.

The owner of a dock may have an injunction against a city to prevent the discharge of sewage 28 L. R. A.

maintenance by the defendant of an alleged nuisance in permitting the gases to escape from sewers through perforated covers to the manholes, in the vicinity of complainant's property. *Affirmed.*

The case sufficiently appears in the opinion.

Messrs. J. B. Goodwin and J. A. Anderson, for plaintiff in error:

The injunction, under the facts and circumstances of this case is an illegal invasion of the legal discretion of the city government to establish and use a system of sewers.

Dill. Mun. Corp. §§ 94, 95, and last clause of 96, 475, 478, 912, last clause; *Frederick v. Augusta*, 5 Ga. 567; *Rome v. Omberg*, 28 Ga. 46 (waterworks case); *Wells v. Atlanta*, 48 Ga. 67; *Georgia Penitentiary Cos. Nos. 3 and 3 v. Nelms*, 71 Ga. 351; *Cartersville v. Baker*, 78 Ga. 686; *Conyers v. Kirk*, 78 Ga. 480; 15 Am. & Eng. Encyclop. Law, par. 5,

at that place obstructing navigation and destroying the use of the dock. *Breed v. Lynn*, 126 Mass. 367; *Haskell v. New Bedford*, 108 Mass. 208.

So an injunction will be granted against draining sewage into a private canal ruining navigation, although this had continued for about eighteen years; but up to that time no material injury had been done. *Boston Rolling Mills v. Cambridge*, 117 Mass. 396.

And a city owning one half a pier in connection with another party, is not authorized to use its part as an offal dump, preventing plaintiff from the use of his property. *New York Consolidated Act, Laws 1882, chap. 410*, authorizing the use of piers, does not contemplate the use of one half a pier. *Hill v. New York*, 139 N. Y. 496.

But where the use of the pier as an offal dump is not the sole cause of the injury to plaintiff, nor so irreparable that compensation cannot be had, and where it is questionable whether the odors resulted from that part used by the street-cleaning department or that occupied by the board of health, an injunction will not be granted because, if, from that part used by the street-cleaning department it had legislative sanction. *Cornell v. New York*, 20 N. Y. Supp. 814.

And under N. Y. Laws 1862, chap. 110, and its amendment, authorizing the use of a pier as a dumping ground, an injunction, at the instance of a private person, to restrain such use, will be denied. *Hill v. New York*, 63 Hun. 633, affirming 15 N. Y. Supp. 393.

The proposed use of a dock in the city of New York in the midst of a residence neighborhood, for the purpose of landing emigrants, endangering the health and impairing the comfort of the residents of that vicinity, will be enjoined. *Brower v. New York*, 3 Barb. 254.

And an action may be maintained by the state of Illinois against the city of St. Louis, enjoining such city from obstructing a channel of the Mississippi river, by dyking the Illinois shore, this being an obstruction to navigation. *People v. St. Louis*, 10 Ill. 351, 48 Am. Dec. 339.

But where the legislature has determined that a dam can be erected so as at least not to materially obstruct navigation, a writ of injunction against the erection of a dam will not be granted. *State v. Eau Claire*, 40 Wis. 533; *Atty-Gen. v. Eau Claire*, 37 Wis. 400.

And under Cal. Stat. 1863, p. 414, providing that no action will lie against the city until demand of the board of trustees, a complaint by a private person for abatement of a dam built by the city of Sacramento which fails to allege the demand, will be dismissed. *Yolo County v. Sacramento*, 36 Cal. 193.

p. 1046, and notes, p. 1148 (b); 6 Am. & Eng. Encyclop. Law, par. 4, p. 19; *Americus v. Eldridge*, 64 Ga. 524, 37 Am. Rep. 89, discretionary powers; *Van De Vere v. Kansas City*, 107 Mo. 83, 35 Am. & Eng. Corp. Cas. p. 104, note; *Kingman v. Brockton*, 11 L. R. A. 123, 153 Mass. 255, 85 Am. & Eng. Corp. Cas. p. 113 (fire engine house); *Hutchinson v. Delano*, 46 Kan. 345, 33 Am. & Eng. Corp. Cas. 87, 90. See also cases cited in pp. 98-95, notes; *Bohan v. Port Jervis Gaslight Co.* 9 L. R. A. 711, 122 N. Y. 18, 84 Am. & Eng. Corp. Cas. 61.

Messrs. Hall & Hammond, for defendant in error:

The plaintiff's evidence showed clearly that the open manholes, directly in front of her property, where she resided, permitted the free escape of foul sewer gas from the main sewer on Wheat street, and caused great annoyance, inconvenience, and damage to her and the inmates of her house. This constitutes a nuisance.

Market houses and buildings.

An injunction will be granted against the obstruction of a street, by the erection or use of a market house. *State v. Mobile*, 5 Port. (Ala.) 279, 30 Am. Dec. 564; *Harrisburg's App.* (Pa.) Oct. 3, 1887; *Columbus v. Jaques*, 80 Ga. 506.

Or to prevent the erection of a building designed as a market house and a pound for hogs and animals, and a jail, in a street in close proximity to a residence. *Lutterloh v. Cedar Keys*, 15 Fla. 303.

After a decree on information by the state in the name of certain citizens, any citizen may interfere by proceeding in revivor, to have the decree executed. *State v. Mobile*, 24 Ala. 701.

But in the case of *Higgins v. Princeton*, 8 N. J. Eq. 309, an injunction was denied against the erection of a market house on a street at the instance of a private residence owner on the ground that a market house is not a nuisance *per se*; but if it was a public nuisance irreparable damages were not shown and the party was left to his action at law.

This was in effect overruled in the case of *McDonald v. Newark*, 42 N. J. Eq. 136, which held that the use of a street for a market place is a public nuisance, and the city will be enjoined from such use at the instance of a private citizen, annoyed by noises, smell, smoke from torches, and other disturbances which attend a market.

But the erection of an engine house by a city under its charter will not be enjoined at the instance of an adjoining owner, as an engine house is not *per se* a nuisance. *Van De Vere v. Kansas City*, 107 Mo. 83.

Railroads and other uses of streets.

A city council, violating an injunction against allowing a railroad the use of a street, will be punished. *People v. Dwyer*, 90 N. Y. 402; *Negus v. Brooklyn*, 10 Abb. N. C. 132; *Davis v. New York*, 1 Duer, 501.

But in this last case, *supra*, a taxpayer who does not reside or own property upon a street affected cannot enjoin the city from granting a railroad the right to use the street, and under New York practice, it is improper to authorize an amendment, adding, as a party plaintiff, the attorney-general in such a case. *Davis v. New York*, 14 N. Y. 506, 67 Am. Dec. 186.

Where a city closed up part of a street and permitted wooden buildings to be placed thereon, to the danger and annoyance of complainant, he will

Cooley, Torts, 2d ed. p. 713.

A court of equity has power to enjoin the continuance of a nuisance.

Code, § 3002; *Charleston & S. R. Co. v. Johnson*, 78 Ga. 306; *Russell v. Napier*, 80 Ga. 77; *Chapman v. Rochester*, 1 L. R. A. 296, 110 N. Y. 273; Wood, Nuisances, § 796, and note 4.

The power to abate a nuisance within the corporate limits of a city is conferred upon the municipality (Code, 4095); but a court of equity has jurisdiction where the nuisance is created by the municipality itself.

Butler v. Thomsville, 74 Ga. 570; *Broomhead v. Grant*, 83 Ga. 451.

A municipal corporation is not relieved from liability because a nuisance is caused by it in the exercise of its legislative or corporate powers.

2 Dill. Mun. Corp. §§ 1045, note 2, 1046, 1047, 1051, 1051 (a); *Ashley v. Port Huron*, 35 Mich. 296, 24 Am. Rep. 552; *Reid v. Atlanta*, 73 Ga. 523; *Smith v. Atlanta*, 75 Ga. 110.

not be granted an injunction until the matter has been tried at law. *Dunning v. Aurora*, 40 Ill. 431.

A mandatory injunction in favor of a lessee was granted against a city, directing the removal of a bridge built in a street adjoining property occupied by him. The act authorizing it provided no compensation for the party damaged. *Knox v. New York*, 55 Barb. 404, 38 How. Pr. 67.

A private individual will not be granted an injunction to prevent a city from tearing up part of a street, rendering it impassable at a place not near his property, unless he makes a showing that he is especially injured. *Chicago v. Union Bldg. Asso.* 102 Ill. 379, 40 Am. Rep. 598.

Cemetery.

In the case of *Dunn v. Austin*, 77 Tex. 189, an injunction was refused to restrain the city from enlarging a cemetery, on the ground that the bill of complaint did not show how plaintiff would be injured, or that the anticipated result would be injurious, and did not allege that any part of the lands owned by complainant are contiguous to that intended to be added to the cemetery. Proximity to the cemetery itself is not ground for an injunction.

Public urinals.

Under 23 & 39 Vict., chap. 55, authorizing the erection of a public urinal, a local board will be enjoined from erecting one on land partly belonging to plaintiff and in such close proximity to plaintiff's premises as to constitute a nuisance. *Sellers v. Matlock Bath Local Board*, L. R. 14 Q. B. Div. 223, 52 L. T. N. S. 762.

Under 18 & 19 Vict., chap. 123, authorizing a vestry to erect public urinals, an injunction will not be granted against erection of one on a garden wall on one side of a public street some distance from the house, as, under act of parliament, it is not assumed to be a nuisance in advance of its erection. *Biddulph v. St. George's, Hanover Square*, 3 De G. J. & S. 493, 33 L. J. Ch. 411, 9 Jur. N. S. 953, 8 L. T. N. S. 553, 11 Week. Rep. 739, reversing 33 L. J. Ch. 411, 9 Jur. N. S. 434, 8 L. T. N. S. 44, 11 Week. Rep. 524.

But where one is proposed to be built under this act, and it is to be placed in close proximity to the door of a private place, an injunction will be granted. *Vernon v. St. James, Westminster*, L. R. 16 Ch. Div. 449, 50 L. J. Ch. 81, 44 L. T. N. S. 229, 29 Week. Rep. 222.

L. T.

Bleckley, Ch. J., delivered the opinion of the court:

1. There was evidence indicating that the system of sewerage adopted by the city was a good and safe one, and that the nuisance complained of, or its dangerous character, did not result from any defect inherent in the system itself, but was due to defective execution, in failing to adapt the system properly to the steep grade of the street in which this particular unwholesome sewer was constructed and is maintained. There was ample evidence that poisonous gases, in large quantities, were emitted through the manholes in this sewer, which were dangerous to health and life, and that the plaintiff, whose residence was on adjacent premises, was subjected to special injury and annoyance thereby. If such a nuisance owed its origin, not to the general system of which this sewer was a part, but to a defective execution of the same at this particular place, there can be no doubt of the power to restrain the city from continuing the nuisance, notwithstanding the municipal government is, by statute, invested with plenary powers over
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streets, sewers, drainage, and sanitation. Whether a nuisance attributable to a mistaken exercise of the legislative power of the city in adopting an unsafe or unwholesome system of sewerage might be the subject-matter of injunction, is a question on which no decisive opinion need be expressed, the strong probability being that the nuisance now under consideration had a different origin.

2. In granting the temporary injunction restraining the city "from continuing said manholes in such condition as to allow the escape of poisonous gases," the presiding judge did not abuse his discretion; and the terms of the order were sufficiently definite and specific, construing them in the light of the pleadings and the evidence. The city officials, if they honestly and conscientiously endeavor to comply with the injunction, will have no real difficulty in ascertaining, to a reasonable certainty, what manholes they are to deal with, and what gases are to be kept from escaping through the same. Any affected ignorance on this subject is not to be anticipated.

Judgment affirmed.

MICHIGAN SUPREME COURT.

Frederick E. BRADLEY *et al.*, *Plffs. in Err.*,
v.

THOMPSON SMITH'S SONS.

(.....Mich.....)

1. A creditor cannot set off against an assignee of an executory contract of the debtor with the creditor on which nothing was due at the time of the assignment a claim which has matured in favor of the creditor against the debtor at that time where the statute allows a demand against an assignor to be set off against his assignee only where it might have been set off against the assignor while it belonged to him, and provides further that a set-off can be allowed only in actions founded upon demands which could themselves be the subject of a set-off.
2. A creditor who fails to state his intent to apply an existing claim

against his debtor on a contract between them when a guaranty is made of the debtor's contract including the payment of men to be employed by him and when the guarantor requires a change in the contract to make it payable in installments, is estopped as against such guarantor who takes an assignment of the contract to set off against it his claim against the debtor.

(January 26, 1894.)

ERROR to the Circuit Court for Bay County to review a judgment permitting defendant to set off against the claim of plaintiffs upon a contract with defendant which had been assigned to them by W. H. Doyle a claim held by defendant against Doyle prior to the assignment. *Reversed.*

The facts are stated in the opinion.

NOTE.—*Set-off against assigned claim of debtor's demand against assignor.*

The general rule is that the assignee of a chose in action for the assignment of which no protection is specially provided by law takes subject to all rights of set-off then held by the debtor against the assignor.

The assignee of a chose in action takes subject to set-off. *Clopton v. Morris*, 6 Leigh, 278.

At least if the chose in action is not assignable. *Tuscumbia, C. & D. R. Co. v. Rhodes*, 8 Ala. 206.

If, at the time of the assignment of a chose in action, an equitable right of set-off exists against the assignor, the assignee will take subject to such right. *Ainelle v. Boynton*, 3 Barb. 256.

An assignee takes subject to the right to set off an existing claim on a promissory note. *Cary v. Bancroft*, 14 Pick. 815. 25 Am. Dec. 393.

A chose in action for which assignment is not provided by law remains subject to all set-offs acquired prior to notice of its assignment. *Burkett v. Moses*, 11 Rich. L. 432.

Under the Pennsylvania statute, the assignee of a chose in action takes subject to set-offs then existing. *Rider v. Johnson*, 20 Pa. 190; *Thompson v. McClelland*, 29 Pa. 475; *Eldred v. Hazlett*, 33 Pa. 307; *Faulk v. Tinsman*, 36 Pa. 108; *Keagy v. Com.* 48 Pa. 70.

An assignee, although a creditor taking in satisfaction of his debt, takes subject to a set-off. *Peters v. Soame*, 2 Vern. 423.

Originally choses in action were not assignable so as to give the assignee any rights whatever, but finally equity began to protect the rights of the assignee, and still later statutes were passed providing in a greater or less degree for such assignments and defining the assignee's rights.

Under the New York statute, set-off against an assignor is available against an assignee of a chose in action. *Mollvaine v. Egerton*, 2 Robt. 423.

If it existed at the time of the assignment, and was acquired by defendant before notice of the assignment. *Faulkner v. Swart*, 55 Hun. 261.

The fact that under the code the action is brought in the name of the assignee does not change the rights of the parties. *Martin v. Kunzsmuller*, 37 N. Y. 398, 10 Bosw. 23.

There has been some question as to how far equity will protect the right of set-off since the assignment is provided for by statute and equitable protection of the assignment is no longer required to the same extent as formerly.

In *Greene v. Darling*, 5 Mason, 201, the question

is quite elaborately discussed but no definite conclusion seems to have been arrived at, although the inclination seems to be against the set-off.

Kinds of choses in action to which set-offs are applicable.

It seems that the only kinds of choses in action which can be assigned free from the right of set-off are those made so by the law-merchant or some statutory provision.

A contract, in the absence of value paid and notice given at the time of the assignment, is subject to set-off. *McGowan v. Budlong*, 79 Pa. 470.

The assignee of a claim upon a recognizance takes subject to the right of set-off. *Burton v. Willin*, 6 Houst. 522.

Under the Iowa statute the assignee of an account takes it subject to all set-offs obtained by the debtor against the assignor before suit is commenced. *Reynolds v. Martin*, 61 Iowa, 324; *Zugg v. Turner*, 8 Iowa, 223.

An equitable assignee of an account takes subject to set-off. *Andrews v. McCoy*, 8 Ala. 920, 43 Am. Dec. 669.

The assignee of a bond takes subject to existing set-offs. *Ragsdale v. Hagy*, 9 Gratt. 409; *Miller v. Centerville*, 57 Iowa, 640.

An assignee of a bond after maturity takes subject to all set-offs existing before notice of the assignment. *Pugh v. Grant*, 86 N. C. 39.

The assignee of a bond takes it subject to every defalcation which the obligor had against the obligee at the time of the assignment, or notice of the assignment. *Wheeler v. Hughes*, 1 Dall. 23.

The surety on a sheriff's bond, who takes an assignment of the lien of the commonwealth upon the sheriff's right of action against the deputy for breach of duty, must allow a set-off of a claim by the deputy to reimbursement for money previously paid as surety for the sheriff. *Harian v. Lumsden*, 1 Duv. 86.

But an assignable certificate of stock is not within the Alabama statute of set-off, so as to render it subject in the hands of the assignee to set-off for the debts of the assignor. *Spence v. Whitaker*, 8 Port. (Ala.) 297.

The assignee of a mortgage takes it subject to the right of the mortgagors to set off against it an existing judgment against the mortgagor. *Roosevelt v. Bank of Niagara*, Hopk. Ch. 579, 2 L. ed. 630.

Mortgages are quite frequently given merely as security for promissory notes, and the question of their assignability free from set-off is then deter-

Myers, Hatch & Cooley, for plaintiffs in error:

Because at the time of the assignment of Doyle's interest to the plaintiffs, and at the time when defendant received notice of the assignment, nothing had been earned under the contract, the right of set-off never accrued to the defendant.

The right of set-off is a statutory right, and is governed by the provisions of 8 How. Stat., p. 3722, § 7865.

Defendant can now set-off its claim against Doyle if it could have used it as a set-off against Doyle before the assignment was made.

Doyle did not assign a debt. When the time came that two debts did not exist, they were not opposing debts, for they did not exist between the same parties. Therefore, "the demand" of the defendant was not "such as might have been set off against" Doyle, "while the contract belonged to him."

Lockwood v. Beckwith, 6 Mich. 168, 73 Am.

mined largely by whether or not the note is so assignable. Upon that question see *note* to *VANN v. MARBURY*, post, 325.

The assignment of a mortgage securing an unmatured note is not subject to set-off. *Dutton v. Ives*, 5 Mich. 519.

But in New Jersey it has been held that the assignee of a mortgage is not subject to set-off in the absence of an agreement between the original parties that the set-off claimed should be applied on the mortgage. *Conover v. Sealy*, 45 N. J. Eq. 589.

And that is put on the general ground of no set-off to mortgages. *Dubois v. Schaffer*, 23 N. J. Eq. 401.

The assignee of a policy in a mutual insurance company after the loss has occurred takes subject to the right of the company to set off an unpaid assessment. *Archer v. Merchants & Mfrs. Ins. Co.* 43 Mo. 434.

Assignment will not defeat set-off.

So the general rule is that an assignment will not defeat the right of set-off, if both causes of action existed at the time it was made. *Bent v. Peirce*, 60 Me. 381.

But in *Howe v. Sheppard*, 2 Sumn. 409, it is said that where there are mutual debts which may be set off in law or equity, the right of set-off is extinguished by a bona fide assignment of one of the debts, but in that case the debt on one side was joint and was assigned without any separate title of the cross-debtor ever attaching to it.

Where rights become fixed.

Both the statutes and courts of equity have generally fixed some point of time claims existing before which could be allowed in set-off and these acquired later could not be made available.

The right of set-off is determined by the date at which notice is given of the assignment. *Miller v. Kreiter*, 76 Pa. 78.

Under the Oregon statute, any demands may be set off which were acquired by the debtor prior to notice of the assignment. *Rayburn v. Hurd*, 20 Or. 329.

Under the Michigan statutes, claims are a proper set-off which belong to the defendant before notice of the assignment. *Smith v. Warner*, 16 Mich. 390.

Notice of the assignment is necessary to prevent claims against one to whom rent is due from being procured and set off by the obligor against the assignee. *Adams v. Lavens*, 20 Conn. 73.

A judgement against a mortgagee purchased be-
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Dec. 69; *Kull v. Thompson*, 38 Mich. 635; *Myers v. Davis*, 22 N. Y. 489; *Coffin v. McLean*, 80 N. Y. 560; *Munger v. Albany City Nat. Bank*, 85 N. Y. 580.

Set-off can be allowed only when the parties have a mutual right to sue each other.

Lee v. Perry, 6 Kulp. 839.

Debts to be set off must be mutual subsisting debts at the time the action is commenced.

Weader v. First Nat. Bank of Crawfordsville, 126 Ind. 111.

Notes paid by an accommodation indorser for an insolvent debtor, after an assignment by the latter for the benefit of creditors cannot be set off as against the assignee, upon a debt due from an indorser, although they were due before the assignment was made.

Huse v. Ames, 104 Mo. 91.

An assignee for the benefit of creditors who receives a negotiable order before it becomes due, as an asset of the trust property, is clothed with all the rights of an assignee before maturity of the instrument, and the drawer is not

fore notice of assignment is a good set-off to a suit on the mortgage by the assignee. *McCabe v. Grey*, 20 Cal. 510.

The one seeking the set-off must show that he held it prior to notice of the assignment. *Freeland v. Man, 1 Smedes & M. 531.*

An assignment by a banker of a bond given to secure money loaned is subject in the hands of the assignee to set-off of money on deposit with the banker when he becomes bankrupt, if no notice of an assignment is given. *Cavendish v. Greaves*, 24 Beav. 168, 27 L. J. Ch. 814, 3 Jur. N. S. 1086.

Claims accruing after notice of the assignment cannot be set off, although they arise out of transactions previously entered into, unless they are connected, or the parties intended that they should be set off. *Watson v. Mid-Wales R. Co.* L. R. 2 C. P. 568, 36 L. J. C. P. 285, 17 L. T. N. S. 94, 15 Week. Rep. 1107.

If a debtor has notice that his debt has been assigned to a third person, he cannot buy up a claim against his original creditor which can be used as a set-off against the claim in the hands of the assignee. *Whitaker v. Pope*, 2 Woods, C. C. 463.

Set-offs arising after notice of the assignment are not available. *Bowman v. Halstead*, 2 A. K. Marsh. 201, 12 Am. Dec. 380.

Demands procured after notice of the assignment are not available as set-offs. *Thompson v. Emery*, 27 N. H. 274.

When notice of the assignment and the credit sought to be set off by the debtor was received by the same mail, the debtor cannot acquire such title to the claim as to make it available against the assignee. *Goodwin v. Cunningham*, 12 Mass. 196.

Where notice of an assignment is given to the debtor he cannot plead in set-off a note given subsequently to the notice, although the debt in consideration of which it was given existed prior to the notice. *Weeks v. Hunt*, 6 Vt. 15.

An assignee of marginal receipts, given by a banker as security for deposits to insure against loss on discounted drafts, takes subject only to such set-offs by the bank as had accrued at the time they became payable upon obligations contracted prior to notice of the assignment. *Jeffries v. Agra & Masterman's Bank*, L. R. 3 Eq. 674, 35 L. J. Ch. 686, 14 Week. Rep. 899.

The time of giving notice has not, however, been accepted by all the courts as the time when the rights of the parties became fixed. At one time it was held that under the New York statutes, demands acquired after the assignment cannot be set

entitled to counterclaim an amount due from the assignor's firm.

Richards v. Union, 48 Hun, 268. See also *Jordan v. National Shoe and Leather Bank*, 74 N. Y. 487, 80 Am. Rep. 319; *Patterson v. Patterson*, 59 N. Y. 574, 17 Am. Rep. 384; *Martin v. Kunsmüller*, 87 N. Y. 398; *Keep v. Lord*, 2 Duer, 78; *Murray v. Deyo*, 10 Hun, 8; *Wells v. Stewart*, 3 Barb. 40; *Watt v. New York*, 1 Sandf. 23; *Catron v. Cross*, 8 Helsk. 588; *Spaulding v. Backus*, 122 Mass. 553, 23 Am. Rep. 391; *Fuller v. Steiglitz*, 27 Ohio St. 355, 22 Am. Rep. 812; *Shepherd v. Turner*, 3 McCord, L. 295; *Graham v. Tilford*, 1 Met. (Ky.) 112; *Gatewood v. Denton*, 3 Head, 380.

In several of the Michigan cases the rule is stated that the assignee of a contract takes it subject to antecedent equities.

But the cases relied upon in support of that rule are none of them cases where the statute of set-off was involved.

Warner v. Whittaker, 6 Mich. 133, 72 Am. Dec. 65; *Bloomer v. Henderson*, 8 Mich. 395,

77 Am. Dec. 453; *Spinning v. Sullivan*, 48 Mich. 5; *Houell v. Medler*, 41 Mich. 641; *Edson v. Gates*, 44 Mich. 258; *Seligman v. Ten Eyck*, 49 Mich. 104; *First Nat. Bank of Port Huron v. Carson*, 60 Mich. 482; *Fisken v. Milwaukee Bridge & Iron Works*, 86 Mich. 199.

The fact that the action is brought in the names of the assignees instead of the name of the assignor, in no way affects the rights of the parties.

Spinning v. Sullivan, *supra*.

The defendants having kept silent until the guarantors had completed their contract and having thereby entrapped the plaintiffs into the obligation, the law will not hold the defendant estopped from making the set-off.

Hoover v. Mowrer, 84 Iowa, 48; 2 Brandt, Suretyship, p. 420.

He who, by his language or conduct, leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted.

off, although they were acquired without notice of the assignment. *Mead v. Gillett*, 19 Wend. 397.

But a later decision seems to have recognized the time of giving notice as the time established to fix the rights of the parties. *Faulkner v. Swart*, 55 Hun, 231.

In some other jurisdictions the time of assignment seems to be recognized as the dividing line, and in some of the cases it is stated that claims cannot be set off which did not accrue prior "to the assignment or notice of it." *Francis v. Leak*, 6 Ind. App. 411; *Brisban v. Caines*, 10 Johns. 45; *Mason v. Knowlson*, 1 Hill, 218; *Fay v. Jones*, 18 Barb. 340; *Martine v. Willis*, 2 E. D. Smith, 524; *Solomon v. Holt*, 3 E. D. Smith, 139; *Westlake v. Bostwick*, 3 Jones & S. 253; *National Bank of Chambersburg v. Grimm*, 109 N. C. 98; *Richter v. Selin*, 3 Serg. & R. 425; *Newman v. Crocker*, Bay, 246; *Williams v. Hart*, 2 Hill, 143.

The transferee of a mortgage does not take subject to the right to set off a claim against the mortgage purchased after the transfer. *Blakely v. Twining*, 69 Wis. 238.

A claim cannot be assigned, after suit brought, to the attorney so as to defeat the right of set-off then existing. *Norwich Printing Co. v. Kloppenberg*, 50 Conn. 205.

Under the English doctrine of mutual credits it seems that the fact that the claim sought to be set off had not accrued at the time of the assignment is not in all cases fatal for the doctrine has been there stated to be that the assignee of a chose in action takes it subject to the right of set-off of claims then existing, or flowing out of and inseparably connected with the previous dealings of the parties. *Smith v. Parkes*, 18 Beav. 119.

Under this doctrine of claims not existing at the time of the assignment are the decisions upon claims which were held by the debtor but had not matured at the time of the assignment. The general rule is that a claim not matured at the time of the assignment cannot be set off. *Chambles v. Matthews*, 57 Miss. 306; *Beckwith v. Union Bank*, 9 N. Y. 211, 4 Sandf. 604; *Watt v. New York*, 1 Sandf. 23.

Defendant cannot set off a note which fell due after the assignment of the subject-matter of the action was made. *Martin v. Kunsmüller*, 37 N. Y. 283, 10 Bosw. 23.

A note of the assignor, unmatured at the time of the assignment, cannot be set off against the claim in the hands of the assignee. *Wells v. Stewart*, 3 Barb. 40; *Graham v. Tilford*, 1 Met. (Ky.) 112.

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The assignment of a chose in action before due defeats a set-off of an independent cross-demand on which no right of action had accrued at the time of the assignment. And this rule is applicable to assignees for creditors. *Fuller v. Steiglitz*, 27 Ohio St. 355, 22 Am. Rep. 312.

The insolvent maker of a note, who assigns for value his account against an indorser, passes the title free from the indorser's claim to reimbursement for the amount which he is compelled to pay, if his liability was not fixed at the time of the assignment. *Kinsey v. Ring*, 38 Wis. 536.

A surety cannot set off a demand which he had paid after notice of the assignment. *Walker v. McKay*, 2 Met. (Ky.) 295.

That the assignment was before the cross-demand became due must be shown by the assignee. *Jervay v. Straus*, 11 Rich. L. 376.

An assigned bond is subject to set-off of a debt due but not payable at the time of the assignment, but not of a debt which becomes due afterwards. *Mann v. Dungan*, 11 Serg. & R. 75.

An assigned claim cannot be set off on a demand that had not matured when the assignment was made. *Kull v. Thompson*, 38 Mich. 685.

Equity generally follows the law upon this question. So it has been held that equity will not prevent the set-off on the ground of the assignment of the contract before the debt accrued if no notice of the assignment was given until after the subject-matter of set-off had accrued. *Wilson v. Gabriel*, 4 Best & S. 243, 3 L. T. N. S. 502, 11 Week. Rep. 803.

Although it has also been held that equity may protect the liability of a surety, although it is not fixed at the time of an assignment. *Feazle v. Dillard*, 5 Leigh, 34.

The authorities upon this question of setting off claims not mature at the time of the assignment in case of insolvency will be found fully collated in a note to *Fera v. Wickham* (N. Y.) 17 L. R. A. 456.

Rights connected with assigned contract.

The assignment of a contract is generally held to be subject to the equities including set-off growing out of the contract itself, regardless of when they mature.

Breach of the contract out of which the claim arose is available to extinguish the cause of action in the hands of the assignee. *Newton v. Lee*, 69 Hun, 90.

The assignee of a claim due under a contract takes subject to the right to set off damages for

Dickerson v. Colgrove, 100 U. S. 578, 25 L. ed. 618.

Every one is responsible for the belief which he intentionally creates, whether by words or otherwise, and will be precluded from profiting by any unconscionable use of an obligation which he has wrongfully obtained thereby. It is no defense to fall back upon the literal meaning of the language alone.

Misner v. Russell, 29 Mich. 229.

No rule is more necessary to enforce good faith than that which compels a person to relinquish claims which he has induced others to suppose he would not rely on; not because he obtains any advantage thereby, but because he has induced others to act so as to be seriously prejudiced if he is allowed to fall in the performance of what he has encouraged them to expect.

Faxton v. Faxton, 28 Mich. 159.

No notice of the assignment was required.

Beckwith v. Union Bank, 9 N. Y. 211.

Mr. Oscar Adams, for defendant in error:

The contract being for personal services, and for services requiring skill and proficiency, care and judgment is unassignable, so as to vest in the assignee without the consent of the other party the right to perform the services. Doyle could not put plaintiffs in his place without the consent of defendant.

Hayes v. Willio, 4 Daly, 259; *Davenport v. Gentry*, 9 B. Mon. 427; *Flanders v. Lamphear*, 9 N. H. 201; *Bethlehem v. Annis*, 40 N. H. 34, 77 Am. Dec. 700; *Burger v. Rice*, 3 Ind. 125; *Henry v. Hughes*, 1 J. J. Marsh. 454; *Arkansas Valley Smelting Co. v. Belden Min. Co.*, 127 U. S. 379, 32 L. ed. 246; *Devlin v. New York*, 63 N. Y. 17; *Gregory v. Wendell*, 40 Mich. 432; *McGrass v. Dole*, 63 Mich. 1; *Glover v. First Universalist Parish of Douagiac*, 48 Mich. 595.

To support an assignment at law the subject-matter thereof must have actual or potential existence at the time of the assignment. But

breach of the contract. *Young v. Kitchin*, L. R. 3 Exch. Div. 127, 47 L. J. Exch. 579, 26 Week. Rep. 408.

Under a contract by the government to subsidize a railroad company, it may set off against the subsidy a claim for breach of the construction contract in the hands of an assignee. *New Foundland v. New Foundland Railway Co.*, 13 App. Cas. 213, 57 L. J. P. C. 35, 58 L. T. N. S. 255.

The assignee of money to be earned under a contract to furnish timber takes the assignment subject to the right of the debtor to set off against the claims the amount which he is damaged by the failure of the contracting party to perform his contract prior to the time when anything becomes payable under the contract. *Smith v. Wall*, 12 Colo. 363.

The assignee of a bond given by one member of a dissolved partnership to the other to pay the debts of the firm takes it subject to the right of the obligor to set off a note given him by his co-partner in settlement of a balance of account which the latter owed the former. *Merrill v. Green*, 55 N. Y. 270.

The assignee of a vendee under a land contract, with notice of the rights of a sub-vendee of a portion of the property, takes subject to the latter's right to set off against his assignor a claim which will satisfy the purchase price, although he has subsequently acquired an assignment of the rights of the original vendor. *Cavill v. Allen*, 57 N. Y. 515.

A claim against the landlord for breach of the contract contained in the lease may be set off against the assignee of the rent. *Brown v. Coleman*, 55 Hun. 501.

One seeking to reach, under the mechanics' lien statutes, the amount due a contractor as damages for the breach by the owner of his contract to permit a completion of the building, must recognize the right of the owner to set off his claim against the contractor for money loaned, etc., the same as though he was assignee of the claim. *Miner v. Hoyt*, 4 Hill. 193.

In that case the court reviews some of the cases in which it was held that the absolute assignee of a promissory note, even after it was due, takes free from the right of set-off, and holds that the case before it was not within the principle of those cases, because the assignor still continued to be the real owner of the claim, as its recovery would satisfy his debt to the claimant. *Ibid.*

But the counter-demands must flow directly from the contract itself. It is seldom held sufficient 33 L. R. A.

in this country that such demands exist growing out of other transactions. Thus—

The assignee of a contract does not take subject to the right to set off damages arising out of the failure of the contractor to perform another contract with the same person. *Howell v. Medler*, 41 Mich. 441.

After notice of an assignment of a claim for wages, the employer cannot set off his demand for house rent and goods furnished to the employé, if the duty to furnish them was not a part of the contract of employment. *St. Andrew v. Manchaug Mfg. Co.*, 134 Mass. 42.

The assignee of the income of a *cestui que trust* takes free from any claim by the trustee to set off an individual demand for money loaned to the *cestui que trust*, the claim to which is based simply on the relation of the parties. *Abbott v. Foote*, 146 Mass. 333.

Although it has been held that one who has several contracts to do work for a municipal corporation cannot assign some of them, on which a balance is due to him, so that they may escape a set-off of the amount then due by him to the corporation on other contracts. *Estlin v. District of Columbia*, 22 Ct. Cl. 365.

Effect of agreement to set off.

If the set-off has practically been reached by the parties to the knowledge of the assignee before the assignment, he will be bound by it. *Fitch v. Gates*, 39 Conn. 373.

But in California it was held that the assignee, without notice of a street improvement contract, does not take subject to the right of a taxpayer to set off his claim against the original contractor, although an agreement had been made between the original parties that such set-off might be made. *Himmelmann v. Reay*, 38 Cal. 163.

Perhaps that agreement was, however, so far collateral to the main contract that within the authorities the assignee would not be affected by it.

Assignee of bank.

After a bank has bona fide assigned a claim, it cannot be paid in the bills of the bank. *Pancoast v. Ruffin*, 1 Ohio. 381.

The assignee of a bond given to a bank receives it subject to the right to pay in bills of the bank then held by the obligor. *Northampton Bank v. Ballier*, 8 Watts & S. 311, 42 Am. Dec. 257.

The assignee of a deposit account takes it subject to the right of a bank to set off against it the amount of a protested draft of the depositor, although it was in the hands of a third person at the

courts of equity will uphold assignments not only of choses in action, but of contingent interests and expectancies, and of things having no present actual existence, but resting in mere possibility, if fairly made, and not against public policy; not as a transfer operative *in presenti* for that can only be of things *in esse*, but as a present contract to take effect and attach as soon as the thing comes *in esse*.

1 Am. & Eng. Encyclop. Law, p. 880.

An assignment of money to become due upon performance of an existing contract is valid as an equitable assignment.

Hassie v. God is With Us Congregation, 85 Cal. 888; *Hall v. Buffalo*, 2 Abb. App. Dec. 307; *Declin v. New York*, 63 N. Y. 15; *First Nat. Bank of Wellsburg v. Kimberlands*, 16 W. Va. 592; *Ruple v. Bindley*, 91 Pa. 299; *Field v. New York*, 6 N. Y. 179, 57 Am. Dec. 435.

Now if Doyle's assignment to plaintiffs did not operate *in presenti*, because there was no chose in action then in existence, but only at-

tached and became operative when the work was completed and the money earned, then there was complete mutuality between defendant's claims against Doyle, and Doyle's claims against the defendant. The statute of set-off does not stand in the way, because if, when the work was completed and the money earned and became due (the first instant in which Doyle could sue) Doyle had commenced a suit, then the statutes would be complied with.

Smith v. Warner, 14 Mich. 156, 16 Mich. 890; *Wallace v. Finnegan*, 14 Mich. 170, 80 Am. Dec. 248.

The fact that plaintiffs guaranteed the performance of the contract does not injure or defeat defendant's right of set-off.

The contract of guaranty, as well as the main contract, must be so construed as to carry into effect the intentions of the parties, which must be ascertained from the language of the instrument, and the facts and circumstances attending.

time of the assignment, if the bank regains possession of it before receiving notice of the assignment. *Robinson v. Howes*, 20 N. Y. 84.

A certificate of deposit payable on demand, for which no demand has been made at the time that the bank indorses a note made by the depositor and transfers it to a third person, cannot be set off against a suit by such third person on the note. *Munger v. Albany City Nat. Bank*, 85 N. Y. 580.

As to the right of an assignee of a bank deposit to recover the deposit free from the claim of the bank to retain it to apply on the unpaid note of the depositor, see *Nashville Trust Co. v. Fourth Nat. Bank of Nashville*, 15 L. R. A. 710, and *note*, 91 Tenn. 336.

Claims by and against corporation generally.

The assignee from a director of claims against the corporation procured by him from third persons does not take subject to the right of the corporation to set off against them a judgment afterwards recovered against the director for misfeasance in respect to his shares. *Re Milan Tramway Co. L. R. 23 Ch. Div. 122*, 52 L. J. Ch. 20, 48 L. T. N. 8, 213, 31 Week. Rep. 107.

The assignee from a stockholder of debentures of a corporation takes them subject to calls made before the assignment, but free from those made afterwards, although the event of the company's being wound up had occurred at the time of the assignment, if the proceedings were not commenced until afterwards. *Christie v. Taunton* [1893] 2 Ch. 175, 41 Am. & Eng. Corp. Cas. 584.

In *Ex parte McKenzie*, L. R. 7 Eq. 244, 38 L. J. Ch. 190, it is held that the assignee of claims against a corporation after it has begun to be wound up takes subject to the right of the company to set off claims, and *Grissell's Case*, L. R. 1 Ch. 385, 35 L. J. Ch. 752, 12 Jur. N. S. 718, 14 L. T. N. 8, 843, 14 Week. Rep. 1015, which is set out in the *note* next following this one, is explained as not meaning that if both the claim and call are due at the same time one cannot be set off against the other.

What set-off proper.

Under the New York code, to a suit by the assignee of an award of damages for injunction, the defendant may set off a claim it holds against the assignor before notice of the assignment. *Newburger v. Manneek Mfg. Co.* 10 Daly, 275.

The fact that a claim against a city had not been presented so as to become the basis of a cause of action at the time it was assigned will not prevent the city from using as a set-off against it, when suit

is brought by the assignee, a claim which it had against the assignor at the time of the assignment. And the same is true with regard to a claim against a county which could not have been directly collected by suit. *Taylor v. New York*, 83 N. Y. 10, 20 Hun, 202.

In an action by an assignee upon a liquidated demand, an unliquidated claim for damages for breach of contract existing in favor of defendant at the time of the assignment is not a proper set-off. *Frisk v. White*, 57 N. Y. 103.

A clearing house committee which has received an assignment of notes from a bank as collateral to a loan to make good the bank's credit at the clearing house may retain the notes for all indebtedness which the rules of the clearing house make such collateral applicable to, unaffected by the claim of the makers of the notes to set off the amount of their deposit in the pledging bank at the time of its insolvency. *Philer v. Woodfall*, 33 W. N. C. 183.

Equitable causes for set-off.

In some instances when the facts were not within the statute of set-offs relief has been sought in equity on the ground of the existence of some peculiarly equitable cause for relief.

Where insolvency is the one equity for enforcing a set-off contrary to the provisions of the statute, such equity gives no right to compel the insolvent to pay before the demand against him becomes due. *Keep v. Lord*, 2 Duer, 78; *Hicks v. McGrorty*, 1d. 205. Insolvency occurring after notice of the assignment has been given will not entitle to a set-off. *Wathen v. Chamberlin*, 8 Dana, 164.

The removal of an assignor from the state of the assignment is not a sufficient equitable cause to allow a set-off against an assignee. *Talbot v. Warfield*, 3 J. J. Marsh. 83.

In case insolvency of the assignor and assignment without value are present, still, to cause equity to take jurisdiction of the case, the demands must be liquidated. *Barnes v. McMullins*, 78 Mo. 260.

Estoppel.

There may be an estoppel to claim set-off. *Fireman v. Blood*, 2 Kan. 496; *Russell v. Owen*, 61 Mo. 185; *Trow v. Braley*, 56 Vt. 590; *McMullen v. Wenner*, 16 Serg. & R. 13, 16 Am. Dec. 543.

One who conceals has claim on a promissory note against a deputy sheriff, after receiving notice that a third person having an execution against such deputy for wrongfully levying upon his property, against the consequences of which levy he has himself given the sheriff a bond of indemnity, is about

Locke v. Mc Vean, 88 Mich. 478; *Mathews v. Phelps*, 61 Mich. 327.

The assignee of a non-negotiable chose in action takes it subject to such equities and defenses as exist against it, at the date of notice of the assignment.

Warner v. Whittaker, 6 Mich. 188, 72 Am. Dec. 65; *Bloomer v. Henderson*, 8 Mich. 395, 77 Am. Dec. 453; *Spinning v. Sullivan*, 48 Mich. 5; *Howell v. Medler*, 41 Mich. 641; *Edson v. Gates*, 44 Mich. 258; *Seligman v. Ten Eyck*, 49 Mich. 104; *First Nat. Bank of Port Huron v. Carson*, 60 Mich. 482; *Fisken v. Milwaukee Bridge & Iron Works*, 86 Mich. 199; 1 Am. & Eng. Encyclop. Law, p. 842, and numerous cases cited; *Bebes v. People*, 1 Johns. 578.

Hooker, J., delivered the opinion of the court:

The defendant was a creditor of one Doyle. On March 24, 1891, it and Doyle made a written contract, by which Doyle agreed to drive a quantity of logs for it. On the same

day, plaintiffs guaranteed said contract, and the payment of the men promptly, by W. H. Doyle, in writing, upon the contract, and in defendant's presence. Immediately below this guaranty was the following, viz.: "I hereby sell and assign to F. E. Bradley & Co. all my right, title, and interest in and to the within contract, and direct that all payments to become due on this contract to me be paid to them. W. H. Doyle. Dated March 24th, 1891." On April 7, 1891, a contract was made by telegraph between Doyle and the defendant, whereby Doyle was to "break in" the logs for 20 cents per 1,000 feet. This contract was also assigned to plaintiffs, of which defendant was notified April 17. Under these contracts, Doyle earned \$2,202, of which \$367 was for breaking in. The first work was done April 23. The plaintiffs offered evidence to show that the work was done at their expense, but this was excluded, and plaintiffs excepted. The defendant proved its claim against Doyle, amounting to \$1,524.89, which the court al-

to take an assignment of the sheriff's claim on the bond, until after the assignment has been made and the remedy on the execution gone, will not be permitted to set off his claim on the note against the claim on the bond. *King v. Fowler*, 16 Mass. 397.

In an action by an assignee against one who has covenanted to pay a mortgage, claims by the covenantor against the mortgagor cannot be set off. *Boyle v. Youmans*, 29 N. Y. S. R. 888.

If the debtor accepts an order for the transfer of the claim, he will not afterwards be permitted to set off his own claim existing against the assignor at that time against the claim in the hands of the assignee. *McLellan v. Walker*, 26 Me. 114.

The fact that a bank does not apply a deposit upon the depositor's note when it becomes due, but proceeds to obtain judgment on the note, will not prevent it from making the application after the judgment is obtained, although the deposit has then been assigned to a third person. *Marsh v. Oneida Central Bank*, 34 Barb. 398.

It will not bar a right of set-off against a non-negotiable note, that at the time it was given the maker owned the accounts against the payee which are relied on as the subject-matter of the set-off. *Rayburn v. Hurd*, 20 Or. 229.

An agreement to pay the surplus of securities to the debtor will not prevent the creditor from retaining it as a set-off to a claim, if at the time there was an agreement for extension which was not fulfilled by the debtor, so that the debt again became payable immediately before the proceeds were available for repayment. *Miller v. Florer*, 15 Ohio St. 148.

It seems that when notified of the assignment notice must be given of the set-off. *Albee v. Little*, 5 N. H. 277.

Counter set-off.

A debtor will not be holden to an assignee for a debt due from him to the assignor, if he was liable in a greater or equal amount to another person as surety for the assignor, which he has to pay, although it was not due at the time of the assignment. *Barney v. Grover*, 28 Vt. 391.

A note procured by the assignee after the date of the assignment cannot be set off against a bond due from the bankrupt to the maker of the note. *Mo-Iver v. Wilson*, 1 Cranch, C. C. 423.

What assignment may be sufficient.

The fact that a mortgage given to secure promiss-

ory notes is not actually transferred until after set-offs are acquired against the mortgagee will not make it subject, in the hands of the assignee, to such set-offs, if the notes were indorsed and the mortgage delivered to the assignee prior thereto. *Breen v. Seward*, 11 Gray, 118.

What notice of assignment sufficient.

Under Mass. Pub. Stat., chap. 168, § 10, which provides that if the demand on which the action is brought has been assigned and the defendant had notice of the assignment, he shall not set off a demand that he acquires against the original creditor after such assignment, notice to the attorney representing the claim is sufficient. *Smith v. Brown*, 151 Mass. 383.

Counterclaims.

An assignor's debt cannot be used as a counterclaim in a suit against the assignee. *Mantanye v. Montgomery*, 47 N. Y. S. R. 114.

The demand cannot be pleaded as a counterclaim, but must be pleaded as a defense. *Ferreira v. Depew*, 4 Abb. Pr. 181; *Dillaye v. Niles*, 1d. 253.

Under the New York statute which provided for a judgment in favor of the one having the largest claim, no set-off could be allowed except it existed between the parties to the record. *Alsop v. Caines*, 10 Johns. 396.

The assignee is not bound to pay the excess of the demand sought to be set off over the amount of his claim. *Kast v. Katherin*, 3 Denio, 344.

The right cannot extend to an independent recovery against the assignee. *Duncan v. Stanton*, 30 Barb. 533.

In *Wolf v. H—*, 13 How. Pr. 54, it is held that the right of set-off against the assignor cannot be set up as a counterclaim against the assignee, but must be set up as a defense in the same manner as the set-off before the code.

But where the original creditor has assigned the claim to himself and his wife, who brings suit, the debtor can avail himself of a demand against the husband alone, which was due before the assignment, as a counterclaim, and recover a personal judgment against the husband for the amount of excess. *Davidge v. Mayo*, 5 N. Y. Supp. 475.

Notes on set-off against receivers or assignees in insolvency, on set-off against commercial paper, and on set-off against assigned judgments, follow this case in the order named. B. P. F.

lowed to be set off against plaintiffs' claim, to which plaintiffs excepted.

This raises the question whether a creditor can set off against the assignee of a chose in action not due at the time of the assignment a claim which was mature before that time. Had both claims been mature, *i. e.* due and payable, at the time of the assignment, no doubt of the right to set off either could be entertained. And it is equally clear that, if the assigned claim had been mature, an immature one could not be set off. We find numerous cases sustaining this proposition, and in one of them (*Coffin v. McLean*, 80 N. Y. 563) is a dictum which denies the right of set-off under the facts in this case. Mr. Justice Folger says: "Nor is it [set-off] permitted, except when the demands are mutual; that is, where both were due and payable before the transfer of either to a third party." In that case the claims sought to be set off were of two kinds. Some fell due before the assignment to the plaintiff, and some after. As to the former, we see no reason why it should not have been set off, except that the obligation was joint, while that sued upon was several. This is one ground upon which that decision is based, and applies to all of the claims sought to be set off. The other claim was open to the objection that it did not fall due until after the assignment. But the question of the right to set off a claim mature at the time of the assignment against a plaintiff assignee of an immature claim does not arise. Three New York cases are cited to sustain the two reasons for the decisions: *Beckwith v. Union Bank*, 9 N. Y. 211; *Patterson v. Patterson*, 59 N. Y. 574, 17 Am. Rep. 384; *Jordan v. National Shoe & Leather Bank*, 74 N. Y. 468, 30 Am. Rep. 319. The cases of *Beckwith v. Union Bank* and *Jordan v. National Shoe & Leather Bank* were cases where the claims attempted to be set off matured after the assignment to the respective defendants. That of *Patterson v. Patterson* was where a bond was taken by plaintiff's testator, in his lifetime, conditioned to pay a sum to his executor after testator's death. This was held to be a claim against which a debt due from the testator in his lifetime could not be set off. The opinion in this case was also written by Mr. Justice Folger. In demonstrating that the cause of action upon the bond did not arise until after testator's death, he asserts that a cause of action does not arise from the contracting of an indebtedness alone, but out of the nonperformance of it as well; and he cites authorities to sustain the proposition that a cause of action does not run from the making of the promise to do something at a future time, but only from the expiration of that time. Were we to apply this logic to the present case, we should be compelled to admit that at the time of the assignment the plaintiff's assignor had no demand whatever, except a contract to be performed, whereby the defendant might later become indebted. Had the assignment not been made, the obligation would have matured immediately upon the performance of the contract by Doyle, and the right of set-off by either Doyle or the defendant would have been com-

plete. In such case, Doyle's subsequent assignment would not deprive the defendant of the right of set-off. But defendant's contention is that if Doyle assigned his contract before it matured, though it were but an hour before, his assignee could collect the consideration, to the exclusion of the defendant's set-off. Doyle is permitted to sell his claim before it matures. Plaintiff says: "I bought my claim against the defendant before it was due, and therefore it was not the subject of set-off when I bought it. It is true that by the terms of your contract with Doyle you had a right to become Doyle's debtor, and all rights that I have acquired are those which Doyle had under the contract. I own the claim against you because I bought it, and I will collect it from you because when I bought it there was no claim against you. It not being due, there was no debt." The right of set-off has its origin in the injustice of allowing a person to collect a debt when he is at the same time indebted to his debtor in a sum as large or larger than his own claim. And one who buys a claim against another, not negotiable, takes it subject to all rights of set-off due at the time of his purchase. If A. buys a claim due to-day, B. can set off a debt which is due. If, however, A. has bought the claim half an hour before midnight, the rule is said to be otherwise, though it is difficult to see much difference in defendant's equities in the two cases.

It is urged that the assignor had merely a contract, which performance would ripen into a valid demand. This he sold, and plaintiffs took it with all its obligations and equities. As the assignor could not avoid defendant's right of set-off, if he had kept it, and could not convey any greater right than he had, it is said that plaintiffs took no more than the assignor could convey. Until performance, the plaintiffs had no claim against defendant. Coincident with the maturity of the demand, the right of set-off attached. There is apparent force in this reasoning. The case of *Atkinson v. Mutual Assur. Soc. against Fire on Bldgs. of Virginia*, 10 U. S. 6 Cranch, 202, 3 L. ed. 199, is a case decided by Mr. Justice Johnson, which seems to recognize this doctrine that the assignment of a claim before maturity does not relieve it from set-off. On April 25, 1807, A. gave H. a note, which came to the hands of plaintiff, S., by assignment, on August 14; being before maturity, the note being due about October 25, 1807. On June 29, H. gave A. a note payable in sixty days, *i. e.* September 1, 1807. Stewart brought an action against A., who was allowed to set off his note against H. It will be observed that Stewart acquired a claim that was not due, yet the set-off was allowed, and this, too, though the note set off was not due; the case differing from, and going further than this, in that particular. It should be remembered that the act of the Virginia assembly under which this decision was made provided that: "Assignments of bonds . . . shall be valid; and an assignee . . . may thereupon maintain an action of debt, in his own name, but shall allow all just discounts, not only against himself, but against the assignor,

before notice of the assignment was given to the defendant." It was argued upon the trial that a "claim could not be just discount until it became payable, and that money cannot be offset until it be due." This case appears to support defendant's contention. But it differs from the present case, in that there was a debt to be set off. It was not a case of executory contract, under which a debt might at a future time be created. True, this debt was not due, but the consideration had passed. The sum had been earned, as the giving of the note implies. The maker of such note was a debtor before maturity, and the holder a creditor. Unless by reason of its negotiability, he could only dispose of such note subject to equities; and while we do not find it necessary to hold that the maker had an equity to the right to set off his existing claim, already due, when the note should mature, and do not so hold, we can see that such a conclusion, as in the Cranch case, falls far short of the doctrine that such right should apply to a case of a promise to pay at a subsequent date, when the promisee should have earned the amount. It is a difference between an existing obligation to pay money already earned, at a future date, and an existing contract, where the debt does not exist, and will not, unless the consideration, whatever it may be, shall be performed. In the one case the holder of the promise to pay has an existing liquidated demand, contingent upon nothing, which he will inevitably have the right to demand and collect at the end of a specified time. In the other, he has no such demand, but an executory promise to pay upon the performance of something else. His right of action, when it accrues, may be a mere action for damages for a breach of contract. He could not set off such right, if the promisee should sue him upon the cross-demand, and it is a matter which may never become a debt. The case in Cranch, under the Virginia statute, seems to have permitted set-off in the former case, but we have found no authority that extends the rule to the latter. Furthermore, there is no opportunity to enlarge the doctrine of set-off. It is a statutory right, in derogation of the common law, and must be strictly construed. *Woods v. Ayres*, 89 Mich. 848, 83 Am. Rep. 396; *Robbins v. Brooks*, 42 Mich. 63. Section 7365 of Howell's Statutes provides that, "in the following cases, . . . a defendant may set off demands which he has against the plaintiff." First, then, it must be a demand, as contradistinguished from a right of action. *Hanna v. Pleasants*, 3 Dana, 269; *Gould v. Kelley*, 16 N. H. 560; *Drew v. Tootle*, 27 N. H. 412, 59 Am. Dec. 880; *Heppburn v. Hoag*, 6 Cow. 614. If the demand has been assigned to the plaintiff, a demand existing against his assignor at the time of the assignment, and belonging to such defendant before notice of assignment, may be set off, if it was such as might have been set off against the assignor while it belonged to him. How. Anno. Stat. § 7365, 28 L. R. A.

subd. 8. The language of this subdivision is a little blind, by reason of the use of the word "by," instead of "to," in the second line, but we think that its meaning is unmistakable. This claim of defendants was a proper subject of set-off against the plaintiff assignee only if it was such against the assignor while he was the owner of it. That it was not is plain, because this claim, *i. e.* that assigned, was not then due; and subdivision 5 provides that "it can be allowed only in actions founded upon demands which could themselves be the subject of set-off according to law." Under these provisions, defendant's claim, though due, did not become a subject of set-off before the assignment, because the assignor never had a right upon a demand subject to set-off. As there never was a time, while Doyle owned the contract, when, under this statute, it might have been set off against him, it is not such a demand as can be set off against the assignees. Subdivision 8; *Richards v. La Tourette*, 53 Hun, 623; *Richards v. Union*, 48 Hun, 263.

The evidence shows that the contract for driving the logs was altered before it was executed, at the suggestion of the plaintiffs, who were to guarantee performance by Doyle. The following language was inserted, *viz.*: "A payment of fifty cents per thousand is to be made when the jam has passed the East branch, and the balance when the rear is within the Boom Co's limits. It is understood that the jam mentioned is of the ——— logs." The request of the guarantors that the defendant so amend the contract as to provide for payment in installments is significant. Evidently, they were providing a way for Doyle to obtain money to do the job with, and thereby lessening the danger of their being subjected to loss upon their guaranty. The defendant could not shut its eyes to this, and was in duty bound to inform the guarantors of its intention to apply the existing claim against Doyle, of which the guarantors were ignorant, in payment. This is the more apparent when we consider that the guaranty which defendant was exacting included the payment of the men who were to be employed by Doyle, and which defendant was insisting that the plaintiffs should assure. Under such circumstances as the plaintiffs claim to exist, the defendant would be estopped from setting off its claim upon the larger contract (if not both), which it had not disclosed, to the extent, at least, of the amount paid by plaintiffs; and this might be so although there was an express agreement, of which they were ignorant, between Doyle and the defendant, that the work should be performed and applied in payment of defendant's claim against him. The question of estoppel would be one for the jury, under all the facts which could be shown to bear upon it.

The judgment should be reversed, and a new trial ordered.

The other Justices concur.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Edward O. MERRILL *et al.*
v.
CAPE ANN GRANITE CO.

(.....Mass.....)

Set-off may be allowed in equity of the dividend payable out of the assets of a corporation in the hands of a receiver to a stockholder who, after the receiver's appointment, made an assignment for the benefit of his creditors of whom the corporation was one, upon the corporation's claim against the stockholder; the equities of the other stockholders represented by the receiver being superior to those of the insolvent's remaining creditors represented by his assignee.

(March 30, 1894.)

NOTE.—*Right to set off insolvent's obligation upon a claim in the hands of a receiver, or assignee or trustee for creditors.*

As appears from the *note* to *BRADLEY v. THOMPSON SMITH'S SONS*, *ante*, 306, the general rule is that an assignee for value takes a chose in action subject to rights of set-off existing against it. When the case becomes that of one who has merely taken possession of the estate of an insolvent to pay debts and wind it up the equities against the right of set-off are not nearly so strong as in the former case, and in addition there is the influence of the English insolvency statutes which have for many years provided for the allowance of set-offs in such cases.

Assignees for creditors.

The general rule is that, an assignee for creditors takes subject to the right of set-off. *Rubey v. Watson*, 22 Mo. App. 428; *Richards v. La Tourette*, 119 N. Y. 64; *Nelson v. London Assur. Co.* 3 Sim. & Stu. 297; *Bean v. Cabbaness*, 6 Ala. 343; *Donelson v. Posey*, 13 Ala. 752; *Third Swedish M. E. Church v. Wetherell*, 43 Ill. App. 414; *Van Sandt v. Dowa*, 63 Iowa, 594, 50 Am. Rep. 759; *Martin v. Pillsbury*, 23 Minn. 175; *Benoist v. Darby*, 12 Mo. 196; *Jones v. Plening*, 85 Wis. 264; *Lewis v. Barber*, 3 Lanc. L. Rev. 116; *Stow v. Yarwood*, 20 Ill. 407.

This rule is stated with variations and sometimes with qualifications.

An assignee for creditors takes subject to the right to set off cross-indebtedness arising out of mutual dealings, if the assignor's liability had become fixed at the time of the assignment. *Schlietfein v. Hawkins*, 14 Abb. Fr. 112.

A set-off, if good against the insolvent, is good against the assignee. *Kinsler v. Pope*, 5 Strobb. L. 126.

An assignee for creditors takes, under the Missouri statute, subject to all set-offs existing at the time of the assignment. *Green v. Conrad*, 114 Mo. 651.

An assignee of an insurance company takes a claim against a borrower from the company subject to the right of the borrower to set off a claim for loss upon which the company was at the time liable. *Drake v. Rollo*, 3 Blas. 274.

An assignee for creditors of a bank takes subject to the right of a depositor to set off a deposit against a note not yet due. *McCagg v. Woodman*, 23 Ill. 84.

In a suit by the assignee of a bank upon a note which became due after the assignment, a debt to the maker from the bank before the assignment may be set off. *Smith v. Spengler*, 32 Mo. 408, 23 L. R. A.

APPEAL by the administrators of the estate of Benjamin F. Butler, deceased, from a decree of the Superior Court for Suffolk County distributing assets in the hands of the receivers of the Cape Ann Granite Company. *Reversed.*

The facts sufficiently appear in the opinion. *Messrs. George O. Shattuck and Frank L. Washburn*, for the estate of Benjamin F. Butler:

When the company went into the hands of a receiver that its affairs might be wound up, a trust was created to apply the assets as far as might be necessary to the payment of debts, and to distribute the balance among the stockholders *pro rata*. It was precisely like the case of the estate of a deceased intestate; the debts are first to be paid and the balance is to go to the distributees. But it

The insolvency assignee of an heir takes the latter's claim against the estate subject to the right of the administrator to set off against the claim the insolvent's debts to the estate. *Gosnell v. Flack*, 18 L. R. A. 158, 76 Md. 423.

In *Shipman v. Lansing*, 25 Hun, 290, the court says that the assignee, as such, takes such rights as the assignor had at the time of the assignment; and it was held that where a firm holding a deposit of trust funds became insolvent and assigned for creditors, and the individual debts were paid out of individual assets, the trustee could set off against the partnership liability in the hands of the assignee a fund which became payable from the trust to one of the individual partners after the assignment, which the assignees were attempting to reach.

The current is, however, not unbroken, for some cases have denied a right of set-off against the assignee.

In *Ryall v. Larkin*, 1 Wils. 155, it was held that the statute allowing set-off in case of bankruptcy did not extend to the assignee.

But the right to set-off against the assignee in bankruptcy was recognized in *Edmeads v. Newman*, 1 Barn. & C. 418, 2 Dowl. & R. 568.

And *Ryall v. Larkin*, *supra*, is overruled in *Ridout v. Brough*, Cowp. 125, in which it is said the assignees are the bankrupt.

While it was decided that the assignee in bankruptcy takes subject to set-off, under 4 Anne, chap. 17, in *Lanesborough v. Jones*, 1 P. Wms. 325.

And in *Hicks v. McGrorty*, 3 Duer, 205, it was held that the assignees for creditors are entitled to the same protection as assignees for value.

The Massachusetts court took the same position in case of assignment of commercial paper. See *Holland v. Makepeace*, 4 Wya.

And in Alabama it has been held that if a note to a bank has been assigned for creditors, notes of the bank are not a good set-off against it. *Gee v. Bacon*, 9 Ala. 690.

Receiver.

The general rule is that a receiver takes subject to the right of set-off. *Van Wagoner v. Paterson Gas Light Co.* 23 N. J. L. 288; *Darby v. Freedman's Sav. & T. Co.* 3 McArthur. 349; *Re Middle Dist. Bank*, 9 Cow. 413, 1 Paige, 585, 3 L. ed. 762, 19 Am. Dec. 453; *Farmers Deposit Nat. Bank v. Penn Bank*, 3 L. R. A. 273, 128 Pa. 283; *Smith v. Felton*, 43 N. Y. 419; *Smith v. Fox*, 48 N. Y. 674; *Miller v. Franklin Bank*, 1 Paige, 444, 2 L. ed. 706; *Mel v. Holtbrook*, 4 Edw. Ch. 539,

was settled prior to any statute that if a distributee owed the estate anything, the debts were to be offset. The fact that it might be uncertain until the debts were paid whether there would be any distributive share did not prevent the offset.

Blackler v. Boott, 114 Mass. 26.

Under the laws of Massachusetts the debt of a stockholder can be offset against his claim to a dividend.

Sargent v. Franklin Ins. Co. 8 Pick. 90, 19 Am. Dec. 306.

The insolvency and the assignment give additional force to the claim to a set-off.

Aldrich v. Campbell, 4 Gray, 285; *James v. Woodruff*, 10 Paige, 541, 4 L. ed. 1083; *Quick v. Lemon*, 105 Ill. 578; *Gay v. Gay*, 10 Paige, 369, 4 L. ed. 1015; *Davidson v. Alfaro*, 80 N. Y. 680; *Knapp v. Burnham*, 11 Paige, 333, 5 L. ed. 154; *Littlefield v. Albany County Bank*, 97 N. Y. 586; *Cavalli v. Allen*, 57 N. Y. 515; *Ainslie v. Boynton*, 2 Barb. 258.

4 L. ed. 267; *Hughitt v. Hayes*, 136 N. Y. 163; *Jones v. Robinson*, 26 Barb. 310; *Re New Amsterdam Sav. Bank v. Tarter*, 54 How. Pr. 886; *Re Van Allen*, 37 Barb. 225; *Armstrong v. Warner*, 17 L. R. A. 466, 49 Ohio St. 376; *Cook v. Cole*, 55 Iowa, 70.

Under the New Jersey statute, the receiver is bound to allow all just set-offs. *State Bank at New Brunswick v. Receivers Bank of New Brunswick*, 3 N. J. Eq. 266.

If there has been an appropriation of deposits to a debt prior to the insolvency, the receiver is bound by it. *Chase v. Petroleum Bank*, 66 Pa. 169.

The receiver of an insurance company, which becomes insolvent holding an unpaid premium note and owing an unadjusted loss, takes the note subject to a set-off for the loss. *Osgood v. De Groot*, 86 N. Y. 348; *Holbrook v. American F. Ins. Co.* 6 Paige, 220, 3 L. ed. 922.

But the receiver is not bound to allow in set-off debts or credits which are not so mutual as to have been proper subjects of set-off against the insolvent. *Gray v. Rollo*, 86 U. S. 18 Wall. 629, 21 L. ed. 927.

A right of set-off perfect and available against a bank is not affected by the bank's becoming insolvent and the appointment of a receiver. *Hade v. McVay*, 31 Ohio St. 231.

The assignee of a bank takes subject to set-offs. *Terry v. Wooding*, 2 Patton & H. (Va.) 178.

A receiver of a bank takes subject to a right of a depositor to set off deposits against the amounts which become due on his note to the bank, after it passes into the receiver's hands. *Platt v. Bentley* (N. Y.) 11 Am. L. Reg. N. S. 171.

A debtor of a bank whose charter is repealed has an equitable right to set off every demand which he had against the bank at the time, but not demands subsequently purchased. *McLaren v. Pennington*, 1 Paige, 102, 2 L. ed. 677.

The receivers of a bank, appointed under Mass. Stat. 1851, chap. 127, in a suit upon a debt contracted before the institution of insolvency proceedings, must allow as a set-off debts held by the debtor prior to the commencement of such proceedings. *Colt v. Brown*, 12 Gray, 238.

Under the Kentucky act for winding up insolvent banks the commissioners must allow set-offs. *Finell v. Nesbit*, 16 B. Mon. 361.

And the provisions of the National Banking Act do not prevent his setting off against a debt to a bank, at the time of its passing into the hands of a receiver, a claim against the bank payable at the 28 L. R. A.

Messrs. Charles Almy and William H. Coolidge, for assignees of Jonas French:

Article 12 of French's deed of assignment is as follows:

"We, the undersigned, creditors who have signed these presents, parties of the third part, do severally (each of us contracting for himself and not for any other) covenant and agree to take, and do hereby accept and take, full payment, satisfaction, and discharge of our respective debts, demands, claims, actions, and causes of action against the party of the first part existing at the date hereof, whether payable now or in the future, which shall be payable to us respectively under the provisions of this instrument out of the proceeds of the property herein conveyed in trust, and do severally release, acquit, and forever discharge the party of the first part from all such demands, claims, actions, and causes of action, and these presents shall be pleadable in bar thereof, except as herein

time of its suspension. *Scott v. Armstrong*, 146 U. S. 499, 38 L. ed. 1050, reversing 36 Fed. Rep. 63.

Limitation upon the rule.

While the general rule is as above stated yet there are several limitations which are quite as important as the rule.

An assignee for creditors does not take subject to set-offs procured after the assignment. *Johnson v. Bloodgood*, 1 Johns. Cas. 51, 1 Am. Dec. 98; *Spencer v. Barber*, 5 Hill. 568.

Debts procured after the appointment of a receiver cannot be used in set-off. *Clarke v. Hawkins*, 5 R. I. 219.

A claim procured by a debtor to an insolvent bank after its insolvency is not available as a set-off. *Venango Nat. Bank v. Taylor*, 56 Pa. 14; *Thorp v. Wegefath*, 56 Pa. 82, 98 Am. Dec. 739.

Bills of a bank obtained after it becomes insolvent cannot be used as a set-off in a suit by the receiver. *Diven v. Phelps*, 34 Barb. 224.

Bills of an insolvent bank acquired after the insolvency are not available as set-offs. *Exchange Bank of Virginia v. Knox*, 19 Grant. 739; *Saunders v. White*, 20 Grant. 327.

Notes of a bank purchased after it is insolvent and after notice of the assignment of its claim against defendant, are not a proper set-off against a claim in the hands of an assignee. *Phillips v. Bank of Lewistown*, 18 Pa. 394.

But in North Carolina it has been held that a bank's assignee for creditors is bound to receive bills of the bank in payment of debts. This right is not based on the ground of set-off, but on a distinct provision of the statute. *Blount v. Windley*, 68 N. C. 1, 12 Am. Rep. 618.

And under the Maryland laws, the receiver of an insolvent bank is bound to receive bills of the bank in satisfaction of debts due it, regardless of when they were obtained. *Union Bank of Tennessee v. Ellicott*, 6 Gill & J. 393.

A receiver has no power to permit a set-off of claims procured after the estate passed into his hands. *Van Dyck v. McQuade*, 85 N. Y. 618.

A judgment recovered against the assignor after an assignment for creditors is not a set-off in a suit by the assignee. *Ordgen v. Prentice*, 33 Barb. 160.

An assignee for creditors is not charged with equities subsequently acquired. *Brown v. Brittain*, 84 N. C. 552.

A judgment assigned for benefit of creditors will not be opened to permit a set-off of a claim

otherwise provided: reserving unto ourselves, however, all our rights respectively against indorsers, sureties, and all other parties collectively or contingently liable as herein otherwise provided.

The receivers of the defendant company became parties to the assignment containing the above paragraph by leave of the superior court, with no fraud, misrepresentation, or mistake, and with full knowledge of the effect of it, as appears from their petition.

See *Horne Sav. Bank v. Peirce*, 156 Mass. 807.

It is a reasonable assumption that other creditors who became parties to the assignment were influenced to do so by the fact that a large creditor like the Cape Ann Granite Company had signed.

The receivers have waived any claim for a set-off.

Hall v. United States Ins. Co. of Baltimore, 5 Gill, 484.

Independently of the effect of the fact that

the receivers became parties to the deed of assignment, the question seems covered by the decision in *Merchants' Bank of Eastern v. Shouse*, 102 Pa. 488.

See also *Brent v. Bank of Washington*, 2 Cranch, C. C. 517.

A corporation has no lien on its capital stock for debts due it from a stockholder.

Massachusetts Iron Co. v. Hooper, 7 Cush. 183; *Steamship Dock Co. v. Heron*, 52 Pa. 280. Though it has for dividends.

Sargent v. Franklin Ins. Co. 8 Pick. 90, 19 Am. Dec. 806.

In order to have a set-off "the debts must be mutual—must be in the same right."

Savvyer v. Hoag, 84 U. S. 17 Wall. 610, 21 L. ed. 781.

A stockholder cannot set off a debt due him from an insolvent corporation in an action brought against him by the receivers for unpaid subscriptions to the stock, or for assessments on the stock.

against the insolvent acquired after the assignment. *Collins v. McKee* (Pa.) Oct. 25, 1886.

The precise act which fixes the rights of the parties does not appear to have been judicially determined. Perhaps the reason may be that the convention has not been so much over the general character of the act as over the question whether or not the act in the particular case was sufficient to cut off rights thereafter acquired.

A set-off acquired after the bankruptcy proceedings are instituted cannot be allowed. *Re Gillespie*, L. R. 14 Q. B. Div. 963.

Claims against an insolvent bank purchased after proceedings to wind it up are not good against the receiver. *Finnay v. Bennett*, 27 Gratt. 365.

Notes procured after proceedings to wind up a bank are not available in set-off. *Farmers Bank v. Willis*, 7 W. Va. 31.

In *Clark v. Brockway*, 8 Keyes, 18, the court held that claims procured after the commencement of a proceeding to set aside an assignment for creditors on the ground of fraud, which was successful and which transferred the property to a receiver, cannot be set off against claims which passed to the receiver against the holder on the ground that it would give a preference to the person holding the set-off inconsistent with the rights of the ones instituting the action to have the assets distributed ratably.

In a suit by a receiver of a bank, one seeking to set off a certificate of deposit has the burden of showing that he obtained it before the proceedings of insolvency were begun. *Smith v. Mosby*, 9 Heisk. 501; *Lanier v. Gayoso Sav. Inst. of Memphis*, Id. 505.

Claims existing at the time of the first publication of the notice of the issuing of the warrant in insolvent proceedings may be used as set-offs against suits by the assignee. *Aldrich v. Campbell*, 4 Gray, 284.

Notes may be set off if acquired after knowledge that the bankrupt had stopped payment, but before notice of the commission of an act of bankruptcy. *Hawkins v. Whitten*, 10 Barn. & C. 217, 5 Mann. & R. 219.

A set-off procured after notice of the assignment for creditors will not be allowed. *Anderson v. Van Allen*, 12 Johns. 343.

Some of the cases have gone so far as to make notice of insolvency preclude a right to obtain an available set-off.

Claims acquired after insolvency cannot be set off. *Craik v. Ballio*, 2 La. 82; *Case v. Cannon*, 23 La. Ann. 112, 28 L. R. A.

To enable the defendant to set off cash notes against the claim of the assignees of the bankrupt, he must show that they came to his hands before the bankruptcy. *Dickson v. Evans*, 6 T. R. 57.

The assignee of a bankrupt is not affected by a check of the bankrupt obtained by a debtor of the estate after the bankruptcy occurred. *Ogden v. Cowley*, 2 Johns. 274.

Debts purchased with knowledge of the debtor's insolvency and with reason to believe that the insolvency proceedings will be begun against him cannot be set off in an action by the assignee in insolvency upon a debt due from the purchaser to the debtor. *Smith v. Hill*, 8 Gray, 572.

As to the right to set off a claim purchased after notice of the insolvency, see *Stone v. Dodge* (Mich.) 21 L. R. A. 280, and *note*.

Claims not due.

Of the some character as claims procured after the assignment are those held before but which do not become due until afterwards. The authorities upon that question will be found in the *note* to *Fera v. Wickham* (N. Y.) 17 L. R. A. 458.

A sufficient number will, however, be inserted here to illustrate the trend of the authority.

A receiver is not liable to set-off for debts not due when he took possession. *Fogerty v. Philadelphia Trust, S. D. & Ins. Co.* 75 Pa. 125; *United States Trust Co. v. Harris*, 2 Bosw. 75; *Crosbie v. Leary*, 6 Bosw. 812.

The receiver of a national bank will not be compelled by equity to allow against a note due the bank a note of the bank which is not due at the time of the insolvency, if the transactions are not mutual or connected. *Balch v. Wilson*, 25 Minn. 209, 33 Am. Rep. 467.

A claim which first becomes payable after it reaches the hands of a receiver of a national bank is not subject to set-off of the defendant's deposit account. *Stephens v. Schuchmann*, 32 Mo. App. 338.

An insurer cannot set off claims for losses occurring after the insolvency of the insured and the amounts becoming subsequently due for return premiums upon the premium account of the bankrupt due at the time of the assignment. *Glennie v. Edmunds*, 4 Taunt. 775.

When the property of an insolvent insurance company has been sequestered and placed in the hands of receivers, under the Massachusetts statutes, a claim for a loss upon a policy which had occurred but was not adjusted at the time of the appointment of the receiver may be set off against

Ibid.; *Hobart v. Gould*, 8 Fed. Rep. 57; *Williams v. Traphagen*, 38 N. J. Eq. 57; *United States Trust Co. v. United States F. Ins. Co.* 18 N. Y. 199; *Lawrence v. Nelson*, 21 N. Y. 158; *Grissell's Case*, L. R. 1 Ch. 528; *Ex parte Black*, L. R. 8 Ch. 254.

Barker, J., delivered the opinion of the court:

The question for decision is raised by the appeal of the administrators, with the will annexed, of the estate of Benjamin F. Butler, from a decree of the superior court upon the petition of the receivers of the Cape Ann Granite Company for instructions as to the division among its stockholders of a considerable amount of money which remains in their hands after having discharged in full all the obligations of the corporation to its creditors. The corporation was organized in the year 1869, and its business was the quarrying and furnishing of granite for buildings, and for other purposes. In the autumn of

1891, finding itself unable to obtain money with which to carry on its operations, its stockholders, by vote, directed its president to cause proceedings to be instituted for the appointment of a receiver to take charge of its assets and effects, and the liquidation and closing up of its concerns, and especially to complete certain contracts to furnish stone for the erection of certain buildings. The capital stock of the corporation was divided into 500 shares, of the par value of \$100 each, 250 of which shares were held by Mr. Butler, 225 by Jonas H. French, and the other 25 by other persons. The vote mentioned was passed on November 15, 1891, by stockholders representing 475 shares, one of whom must therefore have been French; and the same stockholders united in a request in writing for the appointment of receivers. Thereupon, a petition to the superior court was signed on November 16, 1891, by the firm of E. O. & F. H. Merrill, who were creditors of the corporation to the amount of only

notes which had been given to the company for borrowed money. *Com. v. Shoe & Leather Dealers' F. & M. Ins. Co.* 112 Mass. 131.

A premium note on an insurance policy assigned by the officers of the company to be collected for the benefit of creditors is not subject to set-off of a loss upon a policy occurring subsequently to such an assignment. *Nelson v. Edwards*, 40 Barb. 279.

The holder of insurance policies not due at the time of the appointment of a receiver cannot set them off in a suit by the receiver on claims held against him by the company. *Newcomb v. Almy*, 96 N. Y. 308.

In *Richards v. Union*, 48 Hun, 263, a village had money on deposit with a banking firm and purchased supplies from one of the partners individually, giving him an order on the bank for the amount. The firm individually and collectively assigned for creditors and the court held that the assignees receiving the order before maturity took it freed from any right of the village to set off the amount of the bank deposit against it.

And a similar ruling was made in reference to an assigned mortgage in *Richards v. La Tourette*, 58 Hun, 623.

The assignee for creditors is not bound to permit a set-off of a liability of the assignor which does not accrue until after the assignment. *Chipman v. Ninth Nat. Bank*, 120 Pa. 88.

So in an action by an assignee for creditors for a deposit, the bank cannot set off notes of the depositor which did not mature until after the assignment. *Ibid.*

An assignee for creditors is not bound to allow a set-off of a debt not due at the time of assignment. *Thompson v. Hooker*, 4 N. Y. Legal Obs. 17.

But it has been held that if it is equitable, the assignee for creditors may be compelled to allow a set-off of a demand of the debtor not due at the time of the assignment. *Fry v. Boyd*, 8 Gratt. 73.

And that the assignee for creditors must allow a set-off of a claim maturing before the assigned claim, although it is not due at the time of the assignment. He is not entitled to be regarded as an assignee for value. *Maas v. Goodman*, 2 Hilt. 275.

Although that is a decision by an inferior court and has not been generally followed.

In *Nashville Trust Co. v. Fourth Nat. Bank of Nashville*, 15 L. R. A. 716, 91 Tenn. 236, the right of set-off was upheld against an assignee for creditors, although the debt of the insolvent was not due at the time of the assignment.

If a banker whose deposit accounts are not due 33 L. R. A.

because not demanded, assigns for benefit of creditors with a direction to apply the proceeds in the same manner as under the bankrupt law, the depositors are entitled to set off the amount of their deposits against debts due by them, although the rule might be otherwise if the assignment had not contained such provision. *Fort v. McCully*, 59 Barb. 57.

But the implication from that case seems to be negatived by the decision in *Seymour v. Dunham*, 24 Hun, 93, where a set-off was allowed although the assignment contained no such direction.

One indebted to a corporation, who, at the same time, holds the express contract obligation of the corporation to deliver a certain amount in value of manufactured goods, for which no demand has been made at the time the corporation becomes insolvent, and assigns for the benefit of creditors, may set off in equity against his indebtedness to the corporation the claim against the insolvent. *Laybourn v. Seymour* (Minn.) April 27, 1893.

Set-off between corporation and stockholder.

In the attempts of stockholders to procure a set-off of their claims against the corporation upon the receiver's demands upon them, the character of the demands is frequently so different as to preclude a set-off. In many instances the demand of the receiver is a trust fund while the stockholder's demand is not, which is of itself sufficient to defeat the set-off.

An ordinary claim against a corporation cannot be set off by a stockholder against his unpaid stock subscription after notice of insolvency, since after insolvency the debts are not of the same character, the one being a trust fund. *Sawyer v. Hoag*, 84 U. S. 17 Wall. 610, 21 L. ed. 731.

A stockholder of an insolvent bank, who is also its creditor, cannot set off an assessment upon his stock for payment of debts against his claim on the bank. *Re Empire City Bank* (United States Trust Co. of New York v. United States F. Ins. Co.) 18 N. Y. 199.

A stockholder of an insolvent bank cannot set off his deposits against his unpaid subscriptions to stock. *Williams v. Traphagen*, 38 N. J. Eq. 57.

A stockholder in an insolvent national bank cannot diminish his liability for assessments to make good its debts by set-off of amount of his claim against the bank. *Hobart v. Gould*, 8 Fed. Rep. 57.

A stockholder in an insolvent corporation cannot set off purchased claims on losses against his liability

\$71.24, and by Jonas H. French, praying that receivers might be appointed to take charge of the state and effects of the corporation, and to manage and control its affairs, and to close up its concerns, and dispose of its property, should such a course become necessary; to carry out the contracts, if found advisable; and to do such things in connection with the estate as the court should decree, and as should be proper and for the benefit of the corporation, its stockholders, creditors, and other persons interested. On November 20, 1891, receivers were appointed to take possession of all the assets of the corporation, and were authorized to carry out its contracts, and to incur and defray such expenses, consistent with the purposes of the corporation and the management of its business, as might be necessary for the protection and maintenance of the property received by them, and the winding up of the affairs of the corporation. At this time, French was

himself indebted to the corporation to an amount, as the receivers now allege, exceeding \$75,000, and which the agreed facts state is far in excess of the amount now in the hands of the receivers for distribution, and no part of which has since been paid. On November 25, 1891, French made a general assignment to trustees for the benefit of his creditors, to which a great majority of them, in number and amount, have assented, and his indebtedness to them far exceeds the assets of his estate. The receivers of the corporation, in accordance with an order of court granted May 13, 1892, assented to French's assignment, and became parties thereto, before June 1, 1892; and on August 17, 1892, they filed with the assignees or trustees of French a proof of the claim of the corporation against him, to which was annexed a statement that it was "without waiving any rights, in law or equity, which we may have, by way of set-off or otherwise on account of

ity to assessment on his stock. *Long v. Penn Ins. Co.* 6 Pa. 421.

In a suit against all the stockholders of an insolvent corporation to collect unpaid stock subscriptions, individuals will not be permitted to set off debts due to them by the corporation. *Mathis v. Pridham*, 1 Tex. Civ. App. 58.

In a suit by the receiver of an insolvent insurance company to recover dividends declared and paid when the company was insolvent, a stockholder defendant cannot set off claims for losses on policies, since the suit by the receiver is as representative of creditors and not as a representative of the company, and there is no mutuality in the demands. *Osgood v. Ogden*, 4 Keyes, 70, 3 Abb. App. Dec. 425.

Stockholders of a bank undertook to increase the capital but before the increase was perfected the bank became insolvent and passed into the hands of a receiver, and a stockholder, who was also a debtor to the bank, was permitted to set off the amount which he had paid as his share of the increase of stock upon the amount of his indebtedness. *Armstrong v. Law*, 27 Ohio L. J. 100.

Shareholders of a limited company are not entitled to set off a claim against the company against calls made necessary for winding up the concern; nor can they set off their shares of a prospective dividend. *Ex parte Grisell*, L. R. 1 Ch. 525, 35 L. J. Ch. 752, 12 Jur. N. S. 718, 14 L. J. N. S. 843, 14 Week. Rep. 1015.

And this was so although the claim against the company arises out of breach of the contract under which the shares were taken. *Ex parte Black*, L. R. 8 Ch. App. 254, 42 L. J. Ch. 404, 28 L. T. N. S. 50, 21 Week. Rep. 249.

A deposit account cannot be assigned free from liability to stock assessments after the insolvency of the bank, but before the appointment of a receiver. *King v. Armstrong*, 20 Ohio L. J. 376.

But if a receiver on taking possession of a bank converts into the general assets of the bank a trust fund which had been devoted to a special purpose, to a share of which a stockholder had a right which takes precedence to the rights of other creditors, he may set it off against an assessment on his stock to pay debts. *Welles v. Stout*, 38 Fed. Rep. 807.

On the other hand if a shareholder of a corporation has become bankrupt, the relative rights of the assignee and the liquidator of the corporation are settled under the bankrupt act and there may be a set-off. *Re Duckworth*, L. R. 2 Ch. App. 577, 36 L. J. Bankr. 24, 16 L. T. N. S. 580, 15 Week. Rep. 359; *Re Anglo-Greek Steam Nav. Co.* L. R. 4 Ch. App. 174.

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And the rule is the same although the bankrupt's claim has been assigned to a third person. *Ex parte Strang*, L. R. 5 Ch. App. 491, 29 L. J. Ch. 644, 23 L. T. N. S. 218, 18 Week. Rep. 475.

Claims by and against mutual insurance companies are usually not in the same right so as to permit a set-off.

One who gives his note as part of the guaranty fund to enable a mutual insurance company to begin business cannot set off against it, in case of the insolvency of the company, the amount which the company had agreed to allow him for the use of the note. *Hope Mut. L. Ins. Co. v. Weed*, 28 Conn. 51.

A loss claimed against an insolvent insurance company cannot be set off against notes given in payment of the capital stock of the company. *Scammon v. Kimball*, 22 U. S. 322, 23 L. ed. 483.

A member of a mutual insurance company cannot, upon its insolvency, set off against his indebtedness for premiums a loss sustained by him, adjusted and payable by the company. *Lawrence v. Nelson*, 21 N. Y. 158.

A claim for loss due by an insolvent mutual insurance company to one of its members cannot be set off against the member's liability for unpaid assessments. *Care v. Brown*, 31 W. N. C. 501.

A loss on a mutual policy is not subject to the set-off of a premium note, if the company is insolvent. *Hillier v. Allegheny County Mut. Ins. Co.* 3 Pa. 470, 45 Am. Dec. 656.

A loss on a policy in a mutual company which occurs after the appointment of a receiver cannot be set off upon claims upon premium notes. *Standard Mut. Livestock Ins. Co. v. Crawford*, 2 Pa. Dist. Rep. 601.

Likewise a depositor in an insolvent savings bank cannot set off the amount of his deposit upon the claim of the receiver against him for money borrowed from the bank. *Stockton v. Mechanics & Laborers Sav. Bank*, 32 N. J. Eq. 163; *Hannon v. Williams*, 34 N. J. Eq. 255, 38 Am. Rep. 373.

Depositors in savings bank cannot set off their deposits against loans, unless the deposits were special. *Cogswell v. Rockingham Ten Cents Sav. Bank*, 59 N. H. 43.

Savings bank depositors cannot set off the amount borrowed by them against their deposits when the bank becomes insolvent. But if one was a borrower and had deposited a small amount to meet the loan, it might be set off. *Osborn v. Byrne*, 43 Conn. 155, 21 Am. Rep. 641.

The effect of the doctrine of mutual credits.

A policy which matures after the winding up or-

dividend or dividends or payments from funds in our hands upon stock of the Cape Ann Granite Company standing in the name of Jonas H. French at the time we were appointed receivers of said Cape Ann Granite Company." The assignment executed by French recited that he was unable to pay his debts at maturity, and desirous to convey all his property for the benefit of his creditors, to be distributed in substantial conformity with the provisions of the law concerning insolvent debtors; and it transferred all his property, except that exempt by law from levy on execution, to the assignees, in trust to pay over and distribute the proceeds in the manner provided by the insolvent laws for the distribution of insolvent estates, with a clause providing that for the purpose of distribution all claims were to be made up as if due on November 25, 1891, interest being added or rebated as each case might require, and also with a clause providing that the credit-

ors who should assent and sign should thereby accept and take, in full payment and discharge of their respective debts existing at that date, the dividend payable under the provisions of the assignment, and that they severally released and discharged French from all such demands. The order under which the receivers of the corporation became parties to this assignment was entered upon a petition of the receivers filed April 23, 1892, reciting the facts of the existence of the claim against French, and of his assignment, and that it was necessary for the corporation to become a party in order to share in the dividends, and that it was for the interest of the corporation and its creditors, and of all persons having any interest in the corporation, that the receivers should become a party to the assignment, and accept the dividends thereunder in full discharge of the liability of French to the corporation, and praying that the receivers might be or-

der may be the basis of a set-off against sums borrowed from the company on the faith of the policy. *Sovereign L. Assur. Co. v. Dodd* [1892] 1 Q. B. 405.

The loss on the policy and the amount due on the premium notes are mutual credits which may be set off in a suit by the receiver on the premium notes. *Pardo v. Osgood*, 5 Robt. 348.

Money deposited by an insolvent corporation with a banker may, upon its insolvency, be set off by him upon his claim against it for a fire loss covered by one of its policies. *Seammon v. Kimball*, 22 U. S. 362, 23 L. ed. 483.

The insolvency assignee of a banker, who was a shareholder in a loan association, and with whom money had been deposited and loaned by the association, takes the bankrupt's rights to the withdrawal value of his shares subject to the right of the association to set off against it the amount of the loan and deposit. *Thirty-first Street Bldg. & L. Assn. v. Wetherell*, 43 Ill. App. 509.

Where one borrowed money of an insurance company to erect a building and then insured the building in the company, after which a fire destroyed the building and rendered the company insolvent, the amount due upon the mortgage may be set off against the claim on the policy. *Re Globe Ins. Co.* 3 Edw. Ch. 625, 3 L. ed. 915.

But the holder of an unmatured life policy in an insolvent insurance company from which he has borrowed money cannot set off against the claim of the receiver upon him for the money loaned, the amounts he has paid as premiums on the policy, nor the value of the policy. *Vanatta v. New Jersey Mut. L. Ins. Co.* 81 N. J. Eq. 15.

The English rule.

It is within the equity of Statute 5 Geo. II, to set off accounts due upon a bond debt to the bankrupt not payable at the time of the bankruptcy. *Ex parte Prescott*, 1 Atk. 230.

Under the English bankruptcy act, the assignee of the bankrupt was compelled to allow in set-off whatever mutual credits there might have been between the parties, and the questions raised in the cases were as to what were mutual debts or credits within the meaning of the act.

In some of the cases sometimes cited on this subject there was a claim to a lien on property already held by the debtor, and no claim to a set-off as such. See *Hewison v. Guthrie*, 2 Bing. N. C. 755; *Ex parte Deane*, 1 Atk. 228; *Green v. Farmer*, 4 Burr. 224, 1 W. Bl. 651; *Rose v. Hart*, 3 Taunt. 490, 3 Moore, 547.

In *Ex parte Ockenden*, 1 Atk. 235, a right to retain goods in defendant's possession was claimed, but 23 L. R. A.

the question is decided largely on its analogy to set-off.

A deposit account and discounted paper are mutual accounts, within the statute of set-off. *Boland v. Nash*, 8 Barn. & C. 105, 2 Mann. & R. 189.

But the credit must have been given to the one against whom the set-off is claimed to be available. *Ibid.*

And the credit cannot be changed after the bankruptcy occurs. *Ex parte Hale*, 8 Ves. Jr. 304; *Ex parte Button*, 1 Rose, 330.

A case of credit capable of becoming mutual within the statute of set-off arises when one ships goods in the name of another, and the shipper can recover the proceeds from the correspondent, or set off against them his own debt to him in case he becomes insolvent. *Easum v. Cato*, 5 Barn. & Ald. 861.

In *Haukey v. Smith*, 3 T. R. 507, it was held to be a case of mutual credit, where sugar was bought on faith of a bill which the buyer had discounted and held.

It was held a case of mutual credit where a merchant was indebted to his broker for insurance premiums and money advanced, and the broker received a loss under one of the policies, and it was held he might retain it to balance the account. *Olive v. Smith*, 6 Taunt. 56, 2 Rose, 123.

An acceptance not due until after the bankruptcy may be the basis of a mutual credit. *Ex parte Wagstaff*, 13 Ves. Jr. 65.

The overplus of payment upon a bill of goods due may be retained upon one not due at the time of the bankruptcy. *Atkinson v. Elliott*, 7 T. R. 378.

It was held a case of mutual credit, where certain persons jointly purchased some pearls, one paying the purchase money, and the others interest until the pearls could be sold, and one became bankrupt indebted to the one who advanced the money, so that upon the latter's selling the property he could set off his claim against the bankrupt's share of the profits. *French v. Fenn*, 3 Dougl. 257.

But a breach of contract to indorse paper cannot become the subject of mutual credit. *Rose v. Sims*, 1 Barn. & Ad. 521.

And the surplus of securities deposited with a bank as collateral for a loan does not, prior to the sale of the securities, constitute a credit so as to make the case one of mutual credit, enabling the bank to retain such surplus for the satisfaction of notes of the bankrupt previously discounted. *Young v. Bank of Bengal*, 1 Deacon, 622, 1 Moore, P. C. C. 150.

dered to become parties to the assignment, and thereby compound the liability of French to the corporation, and accept the dividends paid under the assignment in full discharge of that liability. The decree, in terms, allowed the receivers to become parties to the assignment, and thereby compound the liability of French to the corporation, and to accept the dividend paid under the assignment in full discharge of that liability.

The Cape Ann Granite Company has not been dissolved, but is an existing corporation. The certificate of stock which was held by French is now in the hands of his assignees. They have, as yet, paid no dividends under the assignment. The receivers of the corporation have sold all the property of the corporation, not including its claim against French, and have performed its contracts, and paid all its debts in full, both principal and interest, and have in hand about \$20,000, to be divided among the stockholders, or dis-

posed of as the court may order. Under these circumstances, the receivers have petitioned the superior court for instructions whether, in the division of the fund, the stock standing in the name of French is to be charged with the debts due from him to the corporation. Upon this petition the superior court has adjudged that the debt due from French cannot be set off against the claim of his assignees to a distributive share of the fund in the hands of the receivers; and the receivers have been ordered to distribute the fund among the stockholders in the proportion in which they owned stock when the receivers were appointed, paying to the assignees of French the share due to the stock which then stood in his name. From this decree the administrators of the estate of Mr. Butler have appealed, and the agreed facts conclude with the statement that the question presented is whether the debt due from French to the corporation can be set off against the claim of

Claims not owned.

An assignee for creditors is not affected by a claim which a debtor to the estate holds for the purpose of set-off against the estate, but in which he has no property. *Goodwin v. Cunningham*, 13 Mass. 198.

A claim held merely as agent for another cannot be set off against a bankruptcy assignee. *Forster v. Wilson*, 12 Mees. & W. 191, 13 L. J. Exch. 200.

But an agent *del credere* may set off a loss upon a policy happening before bankruptcy against his account for premiums for insurance. *Grove v. Dubois*, 1 T. R. 112.

And it is immaterial that the loss is not adjusted until after the bankruptcy. *Bize v. Dickason*, 1 T. R. 285.

So insurance brokers may set off losses on policies procured in their own names against liability for premiums in the hands of an assignee in bankruptcy. *Koster v. Eason*, 2 Maule & S. 112.

Special circumstances which will defeat right.

If commercial paper is assigned to the creditor for a particular purpose and he retains it to apply on his own debt, the assignee in bankruptcy is not compelled to allow it as a set-off. *Buchanan v. Findley*, 9 Barn. & C. 738, 4 Mann. & R. 593.

A bill received for a special purpose cannot be set off on general account. *Ex parte Flint*, 1 Swanst. 30; *Key v. Flint*, 8 Taunt. 21.

One to whom property is assigned for creditors cannot offset his own claim. *Vincent v. Gandolfo*, 13 La. Ann. 523.

A bank officer having possession of the assets at the bank cannot require the receiver to allow a set-off of his claim against the bank as a condition precedent to delivering possession of such assets. *State v. Commercial & S. Bank of Kearney* (Neb.) June 6, 1893.

Contingent claims.

A demand paid by a surety after assignment for creditors is not a good set-off. *Nettles v. Huggins*, 8 Rich. L. 273.

An indorser of a note, who is not compelled to take it up until after the maker has assigned for creditors, cannot set it off against a demand against himself which was transferred to the assignee. *Chance v. Isaacs*, 5 Paige, 593, 3 L. ed. 843, 2 Edw. Ch. 343, 6 L. ed. 423.

In a suit by an assignee for creditors, defendant cannot set off payments made by him after the assignment as surety for the assignor, although the payments were made on debts past due when the assignment was made. *Huse v. Ames*, 104 Mo. 91, 23 L. R. A.

Although insolvency assignees had been held bound to allow the amount paid by a surety after the assignment upon a demand due when the assignment was made in *Morrow v. Bright*, 20 Mo. 293.

The insolvency of an acceptor is not sufficient to cause equity to set off acceptances not due when the insolvency occurred against a note held by the insolvent and assigned for the benefit of his creditors, unless there was a mutuality between the accounts. *Lookwood v. Beckwith*, 6 Mich. 163, 72 Am. Dec. 69.

But under the English doctrine of mutual credits a contingent liability may be the subject of set-off.

Bills accepted for accommodation before the bankruptcy, which are paid afterwards but before suit brought, are good in set-off against claims in the hands of the assignee. *Russell v. Bell*, 8 Mees. & W. 277, 1 Dowl. N. S. 107.

A guaranty which becomes operative after the bankruptcy is not a mutual credit. *Sampson v. Burton*, 2 Brod. & B. 39, 4 Moore, 515.

An acceptance not taken up when bankruptcy occurs may be set off by the acceptor. *Smith v. Hodson*, 4 T. R. 211.

Under Statute 6 Geo. IV., chap. 16, § 50, the maker of a note, in part discount of which the banker has given a draft, which the maker of the note has indorsed for discount, may set off the draft against his liability on the note in case the banker becomes bankrupt, although at the time of the bankruptcy the bill is still in the hands of the one who discounted it. *Collins v. Jones*, 10 Barn. & C. 777.

And in Kentucky it was held that the maker of a note may set off as against the payee's receiver the payee's share of a joint debt of maker and payee, paid by the maker after the assignment. *Chenault v. Bush*, 84 Ky. 523.

Commercial paper.

There is some conflict as to the rights of the receiver or assignee in commercial paper.

On the one side it is held that—

An assignee for creditors takes an immature note subject to the right of set-off then existing against it. *Jordan v. Sharlock*, 84 Pa. 393, 24 Am. Rep. 193.

The receiver takes a note subject to the same rights of set-off which it may be subject to in the hands of the insolvent, although it is not due when it comes into his hands. *Berry v. Brett*, 6 Bosw. 637.

A set-off of a deposit against a note in the hands of the bank's syndio was allowed in *Beatty v. Souday*, 10 La. Ann. 404.

The receiver of a national bank takes notes due

his assignees to a distributive share of the fund in the hands of the receivers. In dealing with this question, we are not embarrassed by technical rules as to parties or pleadings, nor limited by statute provisions as to set-off, but are at liberty, in the exercise of a jurisdiction possessed by the court of chancery before the enactment of such statutes, to apply the doctrine of set-off, as grounded upon natural equity. *Ex parte Stephens*, 11 Ves. Jr. 27. No doubt the general rule in equity, as well as at law, is that the demands to be set off must be mutual, and that debts accruing in different rights cannot be set off against each other. But when there are peculiar circumstances which make it necessary, as the only way to prevent a clear injustice, to allow the set-off of debts not mutual, but accruing in different rights, this may be done by courts of full equity jurisdiction. It has been held that in such cases they look beyond forms, to the essence of transactions out of which the demands arise, and beyond the nominal parties, to those to be affected by the decree; and if a party to be so affected has a clear natural equity, arising out of the transactions, and superior to any equity which can be urged in favor of those for whose benefit the claim to an equitable set off is resisted, such courts may order debts not mutual, but accruing in

different rights, to be set off, and made to discharge each other. See *Holbrook v. American P. Ins. Co.*, 6 Paige, 220, 231, 3 L. ed. 962, 966; *Blake v. Langdon*, 19 Vt. 485, 47 Am. Dec. 701; *Brewer v. Norcross*, 17 N. J. Eq. 219; *Hannon v. Williams*, 34 N. J. Eq. 255, 38 Am. Rep. 878.

In the present case, those who have the ultimate interest are the creditors of French, on the one side; and, on the other, those who were his fellow stockholders when the receiver was appointed. No facts appear which give to the creditors of French a better equity or higher claim than he himself could urge. Before their rights to an interest in the corporation accrued through him, the corporation had been placed by his acts in such a position that the only possible advantage which he or any other stockholder could derive from the ownership of stock must come through the decree of a court of equity; and unless, for some reason, it should be found by the court just and equitable to discharge the receivership, and allow the corporation, as a going concern, to resume the exercise of its franchise, and again pursue the purposes of its charter, it must come in the form of a dividend to be made among the stockholders after the demands of all other persons should have been satisfied in full. No stockholder—and least of all

from a depositor subject to the right of the depositor to set off his deposit account. *Louis Snyders' Sons Co. v. Armstrong*, 37 Fed. Rep. 13.

On the other side it is held that—

The receiver of a bank has all the rights of a purchaser for value of notes indorsed to it before maturity. *Eastern Bank v. Capron*, 22 Conn. 639.

If there is no mutuality between two notes, an assignment of one for the benefit of creditors will not make it subject in equity to set-off of the other note, nor will the judgment obtained on it be so subject. *McConaughy v. Chambers*, 64 N. C. 234.

In *Haxton v. Bishop*, 3 Wend. 13, it is stated that receivers of a bank are trustees for its creditors; and that if, at the time of the transfer to the receivers, a note given to the bank is not payable, it is a transfer before maturity which would prevent a set-off of bills of the bank then held by the maker.

Under a statute in force in Massachusetts in 1812, the maker of a check, which passed into the hands of the payee's trustees for creditors, cannot set off against it a negotiable note of the payee purchased prior to the assignment. *Holland v. Makepeace*, 3 Mass. 418.

Upon the question of set-off against commercial paper generally, see note to *VANN V. MARBURY*, post, 325.

Equities connected with the assigned contract.

In *Cox v. Volkert*, 86 Mo. 505, it is stated that the receiver of a lessor takes subject to all the right of the lessee to set-offs arising under the lease contract.

Character of demands which may be set off.

Under the old United States bankrupt law an assignee in bankruptcy might be compelled to allow as a set-off against a claim of the bankrupt a partnership debt on which the bankrupt was jointly indebted with his copartner. *Tucker v. Oxley*, 9 U. S. 5 Cranch, 34, 3 L. ed. 29.

In a suit by the receiver of a bank against the state to recover money loaned by the bank to the

state, he must permit a set-off of a tax assessed against and due from the bank. *Com. v. Phoenix Bank*, 11 Met. 129.

Under the Massachusetts insolvent law, providing that the insolvent's assignee shall have the like remedy to recover as the insolvent might have had, a defendant in an action by the assignee to recover upon a covenant of warranty in a deed to the insolvent may set off notes and accounts due to him from the insolvent. *Bemis v. Smith*, 10 Met. 194.

There may be a set-off of a claim for money loaned against a demand for damages for not accepting a bill of exchange for goods sold and delivered by bankrupt to defendant. *Gibson v. Bell*, 1 Bing. N. C. 743, 1 Scott, 713, 1 Hodges, 135.

An assignee in bankruptcy suing on a policy for a loss occurring after the assignment must allow set-off of claims for premiums. *Graham v. Russell*, 5 Maule & S. 498, 3 Price, 227, 2 Marsh. 561.

A check held by a bank for collection may be used as a set-off against a claim against such bank on the part of the assignee in insolvency of the bank on which the check was drawn. *Penn Bank v. Farmers Deposit Nat. Bank*, 130 Pa. 209; *Farmers Deposit Nat. Bank v. Penn Bank*, 3 L. R. A. 273, 123 Pa. 233.

An assignee for creditors takes a claim against a debtor to the insolvent subject to the right of such debtor to set off against it an amount which had been fraudulently procured by the insolvent from the debtor just prior to the assignment. *Rothschild v. Mack*, 115 N. Y. 1.

A judgment on a replevin bond, which has been assigned for benefit of creditors, will not be reduced by a set-off of the debt for the purchase price of the property replevied, in equity, on the ground that the equity of the creditors of the assignor are superior to those of the judgment debtor. *Coffin v. McLean*, 80 N. Y. 560.

Effect of agreement.

An agreement cannot cut off a right to the set-off. *McGillivray v. Simpson*, 9 Dowl. & R. 25, 3 Car. & P. 320.

H. P. F.

French, upon whose petition the receivers were appointed—could justly or equitably claim the right thereafter, and while the receivership continued, to treat the corporation as a going concern, with the result of withholding from the fund to be raised to adjust its affairs the debt due to it from himself, and at the same time sharing in its dividends. The decree of receivership was equivalent, so far as his equitable rights in the adjustment of the corporate property were concerned, to a dissolution of the corporation; and his creditors, and the assignees of his estate, have succeeded only to his rights and equities.

While a corporation, ordinarily, has no lien on the shares of a stockholder who is indebted to it, it may set off the dividends of a stockholder against his debt. *Massachusetts Iron Co. v. Hooper*, 7 Cush. 188; *Sargent v. Franklin Ins. Co.* 8 Pick. 90, 19 Am. Dec. 306. The interests of stockholders in a corporation which has been put into the hands of a receiver to be wound up are thereby reduced, as in the case of a dissolution (see *James v. Woodruff*, 10 Paige, 541, 4 L. ed. 1088), "to mere equitable rights to their several distributive shares of the corporate funds, upon principles of equal justice and equity, among all the stockholders, after paying all debts and expenses," but, in the case of a receivership without a dissolution, with the additional possibility that, if the circumstances shall be found to justify such a course, the receivership may be discharged, and the corporation allowed to resume its functions, and manage its own affairs. To do equal justice and equity among these stockholders requires that the fund to be distributed should be made to repay to the corporation, so far as it is sufficient to do so, that share of the corporate funds which French, by becoming indebted to the corporation, had withdrawn for his individual use, to the detriment of the other stockholders. This is a plain, natural equity, and his insolvency makes it impossible to do justice to the other stockholders, except by making his distributive share of this fund compensate, so far as it will, the debt which he owes to the corporation, and is therefore a peculiar circumstance, which makes it the duty of a court of equity to order the debt to be set off against the dividend. His assignees took the stock after the receivership proceedings were commenced, and subject to the equities which had thereby sprung up; and no reason is shown why his creditors whom the assignees represent, as well as the debtor, have an equity superior to that of the other stockholders. Strict technical rights, in this instance springing from the relations of the stockholder to the corporation, must, as in other cases of set-off, give way to the substantial equities of the real situation, as in other instances in which the doctrine of set-off is applied. No doubt, if the assignees had sold, or should now sell, the shares of French, the price received would be assets

over which the court would have no control; but the purchaser, like the assignees themselves, taking title *lis pendens*, would be subject to all the equities to which French himself was subject, and could not successfully contend that a dividend on the shares should be paid without regard to the debt due to the corporation from French.

The case of *Merchants Bank of Easton v. Shoness*, 102 Pa. 488, is relied upon as an authority against the set-off in the present case. But that was not a case in equity. The transfer of the stock to the administrators was before the bank went into liquidation, and to have allowed the set-off claimed by the bank would have given it a preference. The case was the ordinary one of a corporation attempting to assert a lien upon the shares of a stockholder for his debt to the corporation. Nor are the numerous cases in point in which courts have refused to set off deposits in insolvent banks and similar corporations against liabilities of the stockholder to contribute to a fund to be used for the payment of all the debts of the corporation. There the controlling equity lies with the creditors of the corporation, and reverses the usual principle of set-off, which would prevail if the question were between the stockholder and the corporation alone. But here the creditors of the corporation to which French was indebted have been paid in full, so that those cases do not apply. The creditors of French have no equity, as against either the corporation or its other stockholders, because French, under whom they claim, had none either at the time when his assignment was made or before. His legal right to claim that his stock was property not subject to his debt to the corporation was not an equity, but a right of strict law; and the assignment to his assignees for the benefit of his own creditors was after he had charged it, by the institution of the receivership proceedings, with an equity in favor of his fellow stockholders.

In our opinion, the decree should be reversed, and the receivers should be directed to distribute the fund now in their hands to the holders of the other 275 shares of the capital stock, crediting upon what would otherwise be the amount of the debt due to the corporation from French a sum equal to that which would be required to pay upon his 225 shares of the stock the same dividend which the other stockholders will thus receive in cash. If, in future, the assignees of French shall pay a dividend to the receivers upon the debt of French to the corporation, its amount will be adjusted in view of the credit now to be given upon his debt to the corporation, and of such further credit as would be required by the distribution of that dividend, also, among the holders of the 275 shares to whom the present fund in the hands of the receivers is to be distributed.

Decree reversed, and decree to be entered in accordance with this opinion.

NORTH CAROLINA SUPREME COURT.

Junius DAVIS, Receiver of the Bank of New Hanover,

v.
INDUSTRIAL MANUFACTURING CO.
et al.

(.....N. C.)

The receiver of an insolvent bank in settlement with a creditor should deduct from his credit all those sums for which he is debtor, either as principal or surety, and whether or not his liability has matured; and in settlement with a debtor to the bank the receiver should allow him credit for all sums which the bank owed him when the receiver was appointed, whether the debts were then due or not.

(April 18, 1894.)

A PPEAL by defendants from a judgment of the Superior Court for New Hanover County disallowing a set-off claimed by defendants, in an action brought by the receiver of an insolvent bank to recover the amount alleged to be due on a promissory note. *Modified.*

The facts are stated in the opinion.

Mr. J. D. Bellamy, Jr., for appellants.

Mr. George Rountree, for appellee:

It has frequently been contended that a debtor could not plead a set-off against the personal representative or assignee of an insolvent, or against the receiver of an insolvent corporation, upon the ground that the effect of the plea, if allowed, is to give the debtor pleading it a preference—more than his *pro rata* share of the assets—and there are cases so holding.

Armstrong v. Scott, 36 Fed. Rep. 63.

The weight of authority probably is to the effect that if the right to the set-off is complete at death or insolvency, then it is not taken away by such death or insolvency.

Yardley v. Clothier, 49 Fed. Rep. 337, 17 L. A. 462, 51 Fed. Rep. 506.

But if the right to the set-off is not complete at the time of the assignment, or death, it cannot arise subsequently. It must be due and payable—capable of sustaining an action—at that time.

Brown v. Brittain, 84 N. C. 552; *Mauney v. Ingram*, 78 N. C. 96; *State v. Oliver*, 104 N. C. 458.

This is true at law and in equity.

Fera v. Wickham, 17 L. R. A. 456, 135 N. Y. 223; *Spaulding v. Backus*, 122 Mass. 553, 23 Am. Rep. 391; *Dougherty v. Central Nat. Bank*, 93 Pa. 227, 39 Am. Rep. 750.

There is no right of action upon a certificate of deposit in ordinary form issued by a bank until demand of payment.

Munger v. Albany City Nat. Bank, 85 N. Y. 589; *Shute v. Pacific Nat. Bank*, 136 Mass. 437.

In our case the certificates were not due by express words until thirty days after notice on some of which notice had been given but the time had not expired, when the plaintiff's right

accrued; and for the court to hold that they were due and effective as set-offs before the expiration of the time limit would be to do violence to the contract.

In a suit by plaintiff against all the defendants can one, or any number less than the whole, plead as a set-off a claim which he, or they, may have against the plaintiff?

Up to the adoption of the Code of Civil Procedure it was settled that no such plea could be allowed.

State Bank v. Armstrong, 15 N. C. 519; *Weed v. Richardson*, 19 N. C. 535; *Jones v. Gilreath*, 28 N. C. 338; *Walton v. McKesson*, 64 N. C. 164.

There must be mutuality in the debts both at law and in equity to entitle a defendant, or defendants, to the plea of set-off.

2 Waterman, Corp. § 371; Morse, Banks & Banking, § 334; Lindley, Partn. 292; 22 Am. & Eng. Encyclop. Law, 292.

A set-off under the circumstances is not allowable.

Uiley v. Foy, 70 N. C. 303; *Adams v. First Nat. Bank of Winston*, 23 L. R. A. 111, 113 N. C. 332; *Coffin v. McLean*, 80 N. Y. 560.

Burwell, J., delivered the opinion of the court:

The plaintiff is the receiver of a banking corporation, the insolvency of which is alleged. Immediately before his appointment as such receiver, the bank made to him a general assignment of all its property, for the benefit of its creditors. In the proceedings instituted to effect a winding up of its affairs, in which, as stated above, the plaintiff was appointed receiver, it was adjudged that that assignment was "in contravention of the laws of North Carolina in such cases made and provided." By that adjudication, as seems conceded, his title to the assets, as assignee, was destroyed, and thereafter he held them merely in his capacity as receiver. These proceedings were instituted, and this appointment was made, on June 19, 1893, in the superior court of New Hanover county. It appears from the record that on July 11, 1893, the plaintiff was again appointed receiver of the bank, in a proceeding instituted in the superior court of Wake county by the public treasurer, under the provision of chapter 155 of the Laws of 1891, which, in certain contingencies, directs him to take such action "for the purpose of winding up and settling the affairs" of a bank incorporated by the laws of this state. In our consideration of the questions presented by this appeal, we will assume that the latter proceedings are in aid of the proceedings instituted by the creditor in the court of New Hanover county and that the plaintiff has been continuously and uninterruptedly the receiver of the Bank of New Hanover from June 19, 1893,—the date of his first appointment. It is to be borne in mind, then, that he is not the assignee of an insolvent, empowered to collect and distribute the assets of his assignor according to the terms of the deed of assignment so far as its provisions are not inconsistent with the law.

NOTE.—For authorities on the subject of how far a receiver takes subject to set-off, see note to preceding case.

23 L. R. A.

He is an officer of the court, appointed to "settle and wind up" the affairs of the insolvent bank, and to that end is invested, *sub modo*, with the title to the bank's assets, and is authorized by statute (Code, § 668) to bring suits to collect debts due to it, either in his own name, or in the name of the corporation. Prior to the enactment of this statute, and the merging of the courts of law and the courts of equity into one tribunal, having jurisdiction of both legal and equitable rights, a receiver appointed by a court of equity, and holding the relation that plaintiff holds to the corporation, its assets, and its debtors and creditors, could not maintain in his own name a suit on a note due to the bank, and in his hands as receiver. *Battle v. Davis*, 66 N. C. 252. In *Gray v. Lewis*, 94 N. C. 392, it was decided that, as well because of the change in the system of our courts as because of the statute, the receiver might sue either in his own name, or that of the insolvent corporation. In whichever name he may elect to bring the action, it is essentially a suit by the corporation, prosecuted by order of the court, for the collection of the assets; and the rights of the defendant cannot be altered or destroyed by his choice to sue in his own name, rather than in that of the bank. In it may be adjudicated all the rights of the bank, its creditors, and the defendant debtor, both legal and equitable, pertaining to the matters set out in the pleadings; and such a judgment may be entered as will enforce the rights of the general creditors, and also protect any equities that the defendants, jointly or severally, may be entitled to by reason of their being depositors in the bank as well as debtors thereto. In the statutes of this state which relate to the winding up of the affairs of insolvent corporations there is no specific direction as to mutual debts and credits. It is said, however, that in the proceedings there shall be made such "orders, injunctions, and decrees as justice and equity shall require" (Code, § 669), and that the court shall direct the manner in which debts against the corporation shall be proved (Code, § 670). In the settlement of the estates of insolvents, it is necessary that there should be some general rule by which it may be determined what is the provable debt, in cases where the creditor is also a debtor to it, either as principal or surety. That rule must be such as equity and justice require, and, when made, must control the demands of the receiver in such cases as that which we now have under consideration; for if, from the claims of an insolvent creditor of the bank, he shall be allowed to demand a deduction, before proof, of whatever the claiming creditor owes the bank, no matter whether as principal or partner or surety or guarantor, and to allow a dividend only on the net amount after such deduction, equity and justice will require that the same principle shall be applied when, as here, the receiver seeks, not to avoid the payment of an excessive dividend, but to collect a debt due to the insolvent bank, and the debtor asks that the court's officer (the receiver) will require him to pay, not the gross sum that he owes, as principal or part-

ner or surety or guarantor, but the net amount after deducting from all the demands against him, of whatever nature, the sum due to him from the bank.

It may be well here to note precisely who are meant by "debtors" and "creditors" of the insolvent bank, as the terms are used in its discussion of the rules of equity that should control the settlement of its affairs. By "debtors to the bank" are meant all those who, at the appointment of the receiver, were liable to the bank for the payment of money (whether their liability had matured or not), and without any regard to the exact nature of the liability (whether as principal or surety). The word, as here used, does not include those who become indebted to the receiver, for the same reason that a person who has become indebted to an administrator of an insolvent estate is not considered a debtor to the intestate, and allowed to set up against that debt a debt due from the deceased to him. He owes the administrator, while the estate owes him. *State v. Oliver*, 104 N. C. 458; *Rountree v. Britt*, 94 N. C. 104; *Mauney v. Ingram*, 78 N. C. 96. Nor is it intended to include stockholders or officers of the corporation against whom the receiver may be directed to bring actions to recover sums due for subscription for stock, or other like claims. In all matters pertaining to set-off, such indebtedness or liability as that last named is considered as due strictly to the receiver, and not to the corporation. By "creditors of the bank" are meant those to whom the bank was indebted at the date of the appointment of the receiver, whether the debts were then due or not. The creditor may thereafter assign his claim but the assignee will hold it subject to the receiver's right to set off against it claims he holds against the creditor, as stated heretofore. If the assignee of the claim is himself a debtor to the bank, he will not be allowed to use the assigned claim as a set-off. *Brown v. Brittain*, 84 N. C. 552.

Having thus stated what we here mean by debtors and creditors of the bank, we declare that, in our opinion, equity and justice require that the receiver, when he comes to make a settlement with the one who is a creditor of the bank, shall deduct from his credit all those sums for which he is debtor; and, when he settles with a debtor to the bank, he shall allow him credit for all sums for which he is a creditor of the bank. Applying this rule to the case now before us, we find that the defendant Henry P. West is a creditor of the bank in two accounts: First, by a deposit subject to check; and, second, by a certificate of deposit, bearing interest at 4 per cent, dated May 13, 1892, "payable to the order of himself, after thirty days' notice, on return of this certificate properly indorsed." To the extent of these two deposits, he is a creditor. In a certain sense, he may be said to be a debtor to the bank for the whole amount of the note, on which he is one of the eight indorsers. If it is true that the principal debtor, the Industrial Manufacturing Company, is wholly insolvent, and that the receiver will not be able to collect anything on this note from it, then the true debt of the de-

fendant West to the bank is one-eighth part of the whole amount, and also his proper proportion of what his cosureties fall to pay, and cannot be made, by execution, to pay; and we hold that the receiver should be directed to adjust and settle the said true indebtedness of the defendant West by setting off the same against his aforesaid claims against the bank. It is to be assumed that the receiver, when an execution is issued in his favor, will direct the sheriff, in such cases as this one, to seize and sell the property of the principal debtor, and not direct steps to be taken against the sureties, unless necessary, and against the sureties only as is equitable and just.

In *Morse on Banks and Banking* (sec. 838), it is said: "Where the bank itself stops payment, and becomes insolvent, the customer may avail himself, in set-off against his indebtedness to the bank, of any indebtedness of the bank to himself, as, for example, the balance due him on his deposit account. So, also, even though the debt to him has not matured at the time of the insolvency. The maker or indorser of a note falling due after insolvency may set off his deposit, or a debt due him at the time of the assignment, but not a claim coming to him after the assignment." By the expression, "coming to him after the assignment," is meant, purchased or otherwise acquired after the assignment, the principle announced being that decided by this court in *Brown v. Brittain*, *supra*. In the settlement of the affairs of an insolvent national bank, the indorser of a note in the hands of the receiver was allowed to set off against his liability on this note his deposits in the bank. *Yardley v. Clothier*, 51 Fed. Rep. 506, 17 L. R. A. 462, overruling *Armstrong v. Scott*, 36 Fed. Rep. 63. If an indorser has this right of set-off, any one or more of several indorsers must certainly have the same right. The national banking act contains no express provision as to set-off in cases of insolvency of a bank. In *Re Middle Dist. Bank*, 9 Cow. 414, note, Chancellor Walworth said: "If the real debtor is unable to pay, and the receiver is compelled to resort to the indorser, who is eventually to be the loser, he has the same equitable claim to set off bills which he had at the time the bank stopped payment. But no such effect should be allowed to an indorser, where he is indemnified by the real debtor, or where the latter can be compelled to pay." The rule thus stated by the learned chancellor seems to us eminently just and equitable. It was applied by him to the settlement of the affairs of a bank of issue. The Bank of New Hanover was not a bank of issue, but of deposit and discount. But we know of no reason why it should not effect an equitable result as well where the indebtedness of the insolvent bank consists of accounts and certificates of deposit as where its liabilities were represented by bills.

If it be said that no action would lie on the deposit, which was subject to check, until after demand and refusal, it is to be replied that the same is true of an action on bills of a bank of issue. But we think that the effect of the insolvency of the bank, and its closing

of its doors and stoppage of business, and attempting to assign all its property to the plaintiff, was to make all its deposit accounts and all its certificates of deposit at once due, without any demand or notice. *Seymour v. Dunham*, 24 Hun, 93, was an action by the assignee of an insolvent bank against the maker of a note, who asked that he be allowed to set off a certificate of deposit payable to his order "on return of the certificate properly indorsed, with interest at the rate of five per cent, if left four months." We adopt as pertinent here what was said there: "The argument of the plaintiff is that such a deposit is not due until demand; that, as no demand has been made before the assignment, the deposit was not then due, while the note was due; and, therefore, that the deposit is not a set-off. There is no doubt of the general principle that an action cannot be maintained for money thus deposited until after demand, and the reason for that is that a right of action does not arise until there has been a breach of contract, and in cases of such a deposit, a breach of contract does not take place until a refusal of payment. But the plaintiffs, as I think, err in arguing that, because a demand is necessary before an action can be brought, therefore the indebtedness is not presently payable. The depository may lawfully pay the debt at any time. He could not do this if it were a debt payable in the future. The depositor may lawfully demand the debt at any time. He could not do this if it were a debt payable in the future. A debt payable in the future is one which neither the debtor has a right to pay, nor the creditor has a right to demand, instantly. That is not the case with such a deposit. There is no future day, till which the respective rights of the parties are postponed. The creditor may demand payment at any time, and therefore the deposit is a debt payable *in presenti*. Let us suppose that Pratt [the banker], instead of making an assignment, had sued Dunham [the debtor] on the past-due note. Can it be doubted that Dunham might have set off in such action the deposit, producing and surrendering the certificate? Could Pratt [the banker] have objected, in opposition to such a set-off, that Dunham had not made a demand for the deposited money before the day when Pratt commenced his action? The reply to such an objection would have been that a demand was only for the depository's protection, when called upon to pay, but that no demand was needed when the deposit was to be used only as a set-off or defense." The fact that in one case the certificate of deposit was payable "after thirty days' notice," and not immediately after demand, cannot make the language above quoted inapplicable here. But, besides all this, it must be considered that when a bank of deposit closes its doors, and abdicates its functions, as the Bank of New Hanover did, all its deposits, whether evidenced by book accounts, or certificates such as the defendant West holds, became, *eo instanti*, due. Why demand that which it has thus emphatically declared it could not and would not pay? Why notify the insolvent bank that after thirty days a demand would be made? On

whom should the demand be made? To whom should the notice be given? The law does not require the doing of "vain things." The failure to do them is not allowed to prevent the enforcement of just rights. We do not think that the principle announced in *Adams v. First Nat. Bank of Winston*, 118 N. C. 382, 23 L. R. A. 111, cited by plaintiff's counsel, has application here. We are not considering the lien of a bank upon the deposit of its customer, but the rights of a depositor in an insolvent bank, that has stopped business, to treat his deposit as due, and to demand that there shall be an accounting, and that the difference between all the debits and all the credits shall be considered by the receiver—the officer of a court of equity—as the true debt due from him to the bank.

It is not necessary here to discuss the legal rules which are adopted by the courts when the defendants in an action seek to enforce a claim which they, or some of them, have against the plaintiffs, or some of them, further than to say that if the Bank of New Hanover, not being insolvent and in the hands of a receiver, had itself brought this action, we can see no reason why each one of the defendant depositors should not be allowed to set up against the claim of the bank what the bank owed him either on account or by certificate. The objection of the bank to such an allowance of credit would seem most unreasonable, and to indicate a purpose not to conduct its business as solvent banks do. Such an objection would not be raised by a solvent banking institution. No objection would be likely to come from the principal debtor, or the other sureties. If it did come from either, the reply would be, "Pay all the debt, then, yourselves, if you do not wish to account with your codefendant after he has paid it by surrendering his own individual bank deposit." There would be no such multiplicity of issues raised as would make it inconvenient or impracticable to try

all of them in one action. The tendency of the code practice is towards the enlargement of the number of rights that may be adjusted in one action. *Swan v. McDowell*, 71 N. C. 356. The court, being a court of equity as well as of law, adjusts its judgment or decrees to enforce and protect all the rights of all the parties, and each right of each party, as far as they can be declared upon the pleadings, issues, and verdict. *Clark v. Williams*, 70 N. C. 679; *McNeill v. Hodges*, 105 N. C. 52.

What is said above applies also to the deposit account and the certificates of deposit set up by the defendant Bellamy. His claim for services was due from the bank to him before its insolvency, and must be counted as a part of the set off available to him in settlement of the claim of the bank against him.

We hold, therefore, as we have heretofore stated, that, while the judgment against all the defendants for the amount of the note and costs was proper, it should have been so framed as to contain a direction to the receiver to allow the defendants West and Bellamy to avail themselves of their respective claims against the bank set out in the answer, in settlement of what each of them is required to pay to satisfy this judgment. If the principal debtor is wholly insolvent, and the receiver can get nothing by his execution against it, and all the cosureties are solvent, then, as has been said, each of these defendants will be allowed to pay one-eighth part of the judgment in that way. If any one or more of the sureties are insolvent, the proportion of the judgment to be adjusted in this way by these two depositors, West and Bellamy, will be increased. The receiver should be directed to proceed in the collection of his judgment in accordance with the principle herein announced, and to allow the set-off of the defendants West and Bellamy to the extent indicated above.

Modified and affirmed.

ALABAMA SUPREME COURT.

W. J. VANN *et al.*, Appts.,

v.

Josiah MARBURY.

(.....Ala.....)

1. Negotiable paper held as collateral security for a pre-existing debt is open in the hands of the holder to all defenses which

could have been made against it in the hands of the original owner, whether there was notice of them or not.

2. Unless payable to bearer or indorsed negotiable papers although assigned before maturity, will be subject in the hands of the assignee to all equities which accrue before notice is given of the assignment.

3. In the absence of notice of the as-

Note.—Set-off against assignee of commercial paper of claim against assignor.

There is a marked lack of uniformity in the rules which have been promulgated upon this question. Among the early cases are found decisions which apply to promissory notes the rule applicable to choses in action generally and because of the inconvenience of this proceeding various devices were resorted to to place at least certain classes of notes beyond the liability to set-off. This was accomplished in many cases by statute, but in some instances it seems to have been done by drawing distinctions between different forms of paper.

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Paper indorsed before maturity.

Of course according to the principles now recognized as governing commercial paper and its transfer the general rule must be that notes indorsed before maturity are not subject in the hands of the indorsee to set-offs held against the payee. *Drexler v. Smith*, 30 Fed. Rep. 764; *Prior v. Jacobs*, 1 Johns. Cas. 129; *Hendricks v. Judah*, 1 Johns. 819; *Smith v. Van Loan*, 16 Wend. 659; *Williams v. Brown*, 2 Keyes, 438; *Coster v. Griswold*, 4 Edw. Ch. 384, 6 L. ed. 907; *Savings Bank of New Haven v. Bates*, 8 Conn. 505; *Barbaroux v. Barker*, 4 Met. (Ky.) 47; *Stanbery v. Smythe*, 13 Ohio St. 495.

signature, payment to the payee of a note, assigned without indorsement, will be a complete protection against the assignee although the note was not produced or delivered up at the time of the payment.

4. The fact that a letter containing notice of the assignment of a note and placed in the mail properly stamped and directed was never returned to the sender, whose address appeared upon the envelope is not sufficient to sustain the burden of showing the receipt of notice when met by the positive denial of the sender, whose testimony is in no way discredited.

5. The purchaser of land mortgaged to secure notes the character of which is not described in the mortgage, who pays his money upon payment to, and satisfaction of the mortgage by, the one whom the record shows to be

owner of the mortgage, without notice of the rights of any assignee and upon the assurance that the notes are still owned by the mortgagee, takes free from any claim of the assignee, although the notes are not produced or surrendered.

(December 4, 1896.)

APPEAL by defendants from a decree of the Chancery Court for Jefferson County in favor of complainant in a proceeding brought to set aside the cancellation of a mortgage, and to enforce the mortgage to the extent of one of the notes which it had been given to secure, and which had been assigned to complainant prior to the cancellation. *Reversed.*

The facts sufficiently appear in the opinion.

Morris, Lane & White, for appellants:

One who takes negotiable paper as collateral

This is the rule by statute in Alabama. *Manning v. Maroney*, 37 Ala. 563.

If, at the time of its failure, a bank has transferred notes given to it by one of its depositors to another bank as collateral for its own debts, and when the notes are paid such bank applies the proceeds to such debt, the depositor cannot have the amount of his deposit set off against such notes, nor can he have the amount of such collateral returned by such bank to the receiver applied for his benefit as against the other creditors of the bank. *Balbach v. Frelinghuysen*, 15 Fed. Rep. 685.

But that rule has not always been clearly recognized nor has it been universally followed.

In *Hallowell v. Howard*, 13 Mass. 235, an attempt was made to set off against a note in the hands of one to whom the bank had assigned it depreciated notes of the bank, and the court held that it could not be done, even if the note was still in the hands of the bank, stating that the only way to accomplish such result would be for the holders of the notes to obtain judgment on them and set off such judgments against the judgment obtained by the bank.

Under the Vermont statute, which allows set-offs only between the actual parties to the suit, the maker of a note sued by a purchaser cannot set off another note made by the payee, although the plaintiff holds the former note merely as trustee for the payee, who had notice of the claim to set-off. *Phelps v. Bulkeley*, 20 Vt. 17.

In addition to the above guarded and indirect methods of denying the set-off there are many cases in which the set-off is permitted.

Under the Arkansas statute, the assignee of a note does not take subject to the right to set off a note of the assignor obtained by the maker of the former before the assignment, if neither was due at the time of the assignment. *Small v. Strong*, 3 Ark. 138.

But a demand against the maker existing at the time of the transfer may be set off. *Oldham v. Wallace*, 4 Ark. 559; *Smith v. Capers*, 13 Ark. 11; *Robinson v. Swigart*, Id. 71.

A set-off was allowed against a note which seems to have been assigned before due, in *Stewart v. Anderson*, 1 Cranch, C. C. 586.

Under the Vermont statute, a book account against the payee of a note may be set off against the note, in the hands of an indorsee. *Martin v. Trobridge*, 1 Vt. 477.

But the statute permitting the set-off was repealed. *Britton v. Bishop*, 11 Vt. 70.

Under the Indiana statute a note is subject to set-off in the hands of an assignee. *Sample v. Lamb*, 3 Ind. 180.

Set-off to a sealed note was allowed in *Hart v. Woods*, 7 Blackf. 563.
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In *Wells v. Teall*, 5 Blackf. 303, the right to set-off against a note is recognized, although there is nothing to show whether it was assigned before or after maturity.

An indorsee of a note takes subject to set-off. *Harwell v. Steel*, 17 Ala. 373.

A Virginia statute provided that the assignee of a note should allow all just discounts, not only against himself but also against the assignor before notice given to the debtor, and under that statute it was held that if the claim against the maker matured before his note, the fact that it had not matured at the time of the assignment or notice thereof would not prevent a set-off. *Stewart v. Anderson*, 10 U. S. 6 Cranch, 203, 8 L. ed. 198.

Even in Pennsylvania it was formerly held that an indorsee of a note takes it subject to equities. *McCullough v. Houston*, 1 U. S. 1 Dall. 441, 1 L. ed. 214.

And that case was not overruled as late as 1824. *Ridgway v. Farmers Bank of Bucks County*, 12 Serg. & R. 265, 14 Am. Dec. 681, although it is said in *Louden v. Tiffany*, 5 Watts & S. 399, to have been overruled in 9 Serg. & R. 198, and 12 Serg. & R. 265.

In *Lewis v. Reeder*, 9 Serg. & R. 193, however, it is said that the authority of that case is not to be questioned.

In at least one case the question of notice of the set-off at the time of the indorsement, rather than that of the immaturity of the note, seems to have been the controlling factor.

If the indorsee of a note, who has previously taken it as collateral for advances to the payee, has notice of the true state of the accounts between maker and payee when he procures the indorsement, he takes subject to the right of set-off as far as subsequent advances are concerned, although the note was not yet due. *Goodall v. Ray*, 4 Dowl. P. C. 76, 1 Harr. & W. 333.

But that case is stated by *Parke, B.*, in *Oulds v. Harrison*, 10 Exch. 572, 24 L. J. Exch. 66, 3 C. L. Rep. 353, to have been misreported, and he also doubts its authority in *Whitehead v. Walker*, 10 Mees. & W. 608, 11 L. J. Exch. 163, 13 L. J. Exch. 28, 7 Jur. 330.

And in *Barker v. Valentine*, 10 Gray, 341, it is stated that although an indorsee of a note before maturity takes with notice that it was given to an insurance company for premiums, it is not subject in his hands to set-off of claims by the maker against the company.

Transfer after maturity.

A few cases hold that a note is not subject to set-off although it is transferred after maturity.

There can be no set-off against a note, although it is transferred after due. *Chandler v. Drew*, 6 N.

security for a pre-existing debt is not a purchaser for value in the usual course of trade, but the paper is open in his hands to all defenses which might have been made against it in the hands of the assignor or original holder.

Miller v. Boykin, 70 Ala. 469; *Boykin v. Bank of Mobile*, 72 Ala. 262, 47 Am. Rep. 408; *Fenouille v. Hamilton*, 35 Ala. 319; *McKenzie v. Branch Bank at Montgomery*, 28 Ala. 606, 65 Am. Dec. 369.

The holder of a promissory note made payable to order, which has not been indorsed, is not a holder for value and it is taken by the holder subject to all the equities between the original parties.

1 Dan. Neg. Inst. 8d ed. § 761; *Planters & M. Ins. Co. v. Tunstall*, 72 Ala. 142.

Statements made by vendor, after he has deeded land, to vendee, are inadmissible.

H. 469, 26 Am. Dec. 704; *Annan v. Houok*, 4 Gill, 225, 45 Am. Dec. 133.

A promissory note indorsed when overdue for value and in good faith is not subject to set-off of debts due to the maker from the payee. *Leavitt v. Peabody*, 63 N. H. 185.

The indorsee of an overdue note does not take subject to the statutory set-off. *Cumberland Bank v. Hann*, 18 N. J. L. 223.

It was held that under the North Carolina Code, a note assigned after due is not subject to set-off, unless the claim had attached itself to the note before the assignment. *Neal v. Lea*, 64 N. C. 673.

But that case was overruled in *Harris v. Burwell*, 65 N. C. 534.

In *Johnson v. Bridge*, 6 Cow. 603, in which a set-off was sought against the indorsee of a note after maturity, the court states that under the statute set-off is allowable only in those cases where, if it exceeds the plaintiff's demand, the defendant may compel the plaintiff to pay the excess, which is the case of the modern counterclaim, and the right to set-off in that case is denied upon the authority of *Wheeler v. Raymond*, 5 Cow. 231, 9 Cow. 205, in which the action was brought by the assignor for benefit of his assignee and the set-off of a claim against the assignee was not permitted. And this case was affirmed by a divided court in 5 Wend. 342.

The question again came before the court in *Driggs v. Rockwell*, 11 Wend. 504, and the chancellor was inclined to follow the decision of *Johnson v. Bridge* on the ground of *stare decisis*, but Senator Beardsley went to the full extent of holding that the assignee of an overdue bill of exchange takes it subject to set-offs then existing against the assignor. The majority of the court concurred in a reversal, but it is impossible to tell whether the concurrence was on the grounds stated by Senator Beardsley, or on those stated by the chancellor, which was that the claim sought to be set off was against the real party in interest.

But the overwhelming weight of authority upholds the right of set-off and the only diversity of opinion is as to what claims may be used in set-off. One line of cases, following the lead of an early English case, hold that the indorsee of an overdue note is not liable to set-off of counterclaims arising out of collateral matters. *Burrough v. Moss*, 10 Barn. & C. 558, 5 Mood. & R. 236; *Stein v. Yglesias*, 1 Crompt. M. & R. 665; *Quils v. Harrison*, 28 Eng. L. & Eq. 524, 10 Exch. 372; *Re Overend, Gurney & Co. L. R. 6 Ex. 844*; *Whitehead v. Walker*, 10 Mees. & W. 698, 11 L. J. Exch. 168, 12 L. J. Exch. 28, 7 Jur. 390; *Robertson v. Breedlove*, 7 Port. (Ala.) 541; *Kilcrease v. White*, 4 Fla. 45; *Tinsley v. Beal*, 2 Ga. 134; *Wilkinson v. Jeffers*, 30 Ga. 153; *Elliott v. Deason*, 64 Ga. 63; 33 L. R. A.

Agnese v. McGill, 96 Ala. 496.

Mr. W. R. Houghton also for appellants.
Messrs. Ward & John for appellee.

Stone, Ch. J., delivered the opinion of the court:

Many of the assignments of error are based on the objections of appellants to portions of the testimony offered by appellee. Without ruling specifically on the objections, the chancery court rendered a decree on the merits in favor of appellee. We shall consider only the substantial controversy as shown by the record, and in doing so will look alone to the legal testimony to determine whether or not it authorizes the decree from which the appeal is taken. The controversy as it comes before us in this record is mainly one of fact, and arises out of the following

Shipman v. Robbins, 10 Iowa, 208; *Ryan v. Chew*, 18 Iowa, 589; *Way v. Lamb*, 15 Iowa, 79; *Stannus v. Stannus*, 30 Iowa, 443; *Richards v. Daily*, 34 Iowa, 427; *Trafford v. Hall*, 7 R. I. 104, 82 Am. Dec. 589; *Walbridge v. Kibbee*, 20 Vt. 542; *Armstrong v. Noble*, 55 Vt. 423; *Hughes v. Large*, 2 Pa. 103; *Long v. Rhawn*, 75 Pa. 128; *Robinson v. Lyman*, 10 Conn. 30, 25 Am. Dec. 52; *Stedman v. Jilison*, 10 Conn. 55; *Hankins v. Shoup*, 2 Ind. 342; *Gullett v. Hoy*, 15 Mo. 399; *Arnot v. Woodburn*, 35 Mo. 99; *Haeussler v. Greene*, 8 Mo. App. 451; *Grier v. Hinman*, 9 Mo. App. 213; *Hyde v. Hazel*, 43 Mo. App. 638.

The rule is sometimes stated as that the set-off is available if it arises out of the note transaction. *Bigelow v. Lawrence*, 18 Conn. 207.

The other line of cases go to the full extent of permitting a set-off of any claim held against the assignor at the time of the assignment. *Foot v. Ketohum*, 15 Vt. 258, 40 Am. Dec. 673; *Cain v. Spann*, 1 McMull. L. 258; *Baker v. Kinsey*, 41 Ohio St. 408; *Haywood v. McNair*, 14 N. C. 231, 19 N. C. 233; *Harrington v. Wilcox*, 53 N. C. 349; *Bank of Niagara v. McCracken*, 18 Johns. 493; *Ford v. Stuart*, 19 Johns. 342; *O'Callaghan v. Sawyer*, 5 Johns. 118; *Armstrong v. Chadwick*, 127 Mass. 156; *McKenna v. Kirkwood*, 50 Mich. 544; *Winston v. Metcalf*, 7 Ala. 337; *Newberry v. Trowbridge*, 13 Mich. 263; *Hurdle v. Hanner*, 50 N. C. 360; *Bond v. Fitzpatrick*, 4 Gray, 89; *Barney v. Norton*, 11 Me. 350; *Norton v. Porter*, 12 Kan. 44; *Bank of Mobile v. Poelinitz*, 61 Ala. 147.

A set-off is good against a note transferred after maturity. *Robinson v. Perry*, 73 Me. 163.

A note indorsed in pledge after maturity is subject to a set-off of the debt of the indorser to the maker at the time of the transfer. *Jennens v. Bean*, 10 N. H. 206, 34 Am. Dec. 152.

The assignee of a sealed note after it is due takes it subject to all set-offs, whether they arise out of the transaction or not. *Carroll v. Malone*, 23 Ala. 521.

A transfer of notes long past due will not deprive the maker of any defense he had against the payee. *Crawford v. Beal, Dudley* (Ga.) 204.

Under the Missouri statutes an assignment of a note after maturity is subject to set-offs. *Munday v. Clements*, 58 Mo. 577.

But that case was overruled in *Quiler v. Cook*, 77 Mo. 333.

Under the Illinois statute a set-off is available to maker of negotiable paper assigned after due, whether it arises out of the same transaction or not. *Bennett v. Third Nat. Bank of Chicago*, 8 Brg. L. J. 239; *Favorite v. Lord*, 35 Ill. 142.

Under the Minnesota statute commercial paper assigned after maturity is subject to set-offs. *La Due v. First Nat. Bank of Kasson*, 81 Minn. 83.

Under the provisions of the Nebraska code a note

circumstances: In December, 1886, Vann sold and conveyed a tract of land near Birmingham, Ala., to Harriet Moore, in consideration of the sum of \$4,000, of which \$1,833.33 was paid cash, and for the balance Mrs. Moore and her husband executed and delivered their two joint notes for \$1,833.33 each, both dated December 27, 1886, payable, respectively, at twelve and twenty-four months from date, and secured by a mortgage on the land. The mortgage recites an indebtedness of \$2,666, one half due December 27, 1887, and the other due December 27, 1888, and was duly recorded. On the 1st day of June, 1887, Vann transferred the first of said notes to Marbury as collateral security for an antecedent debt owing by the former to the latter. It is claimed by appellee that notice of this transfer was given by his (Marbury's) attorney

to Mrs. Moore at the time of the transfer, or shortly thereafter, by a letter addressed to her at Birmingham or Avondale (the witness being uncertain which), but stating that the envelope had his name printed thereon, and that the letter was never returned to him. Afterwards, to wit, October 24, 1887, Mrs. Moore, believing she would not be able to meet the notes, and before either of them had matured, sold the property to the Woodlawn Cemetery Company for \$4,158. Of this sum \$358 was paid to her in cash and \$3,800 in stock of said company. One thousand dollars of the stock she retained, and the remaining \$2,800 of stock was, contemporaneously with its payment to her, transferred by her to Vann. Vann, Mrs. Moore, Erswell, and Nash were present at the conclusion of the trade; the two latter being respectively president

assigned after due is subject to all set-offs then existing. *Davis v. Neligh*, 7 Neb. 84; *Edney v. Willis*, 23 Neb. 58.

Under the Mississippi law, an indorsee takes subject to all set-offs acquired before notice. *Brabston v. Gibson*, 50 U. S. 9 How. 277, 13 L. ed. 137.

Under the Tennessee Code, a note indorsed after due is subject to all set-offs. *Gatewood v. Denton*, 3 Head, 380.

In an action on a negotiable certificate of deposit transferred after due, the maker may set off any cross-demands which existed in his favor against the original payee at the time of the transfer. *Rapid City First Nat. Bank v. Security Nat. Bank*, 15 L. R. A. 388, 84 Neb. 71.

In *Peabody v. Peters*, 5 Pick. 1, although the court recognizes the doctrine that the set-off against an assignee cannot be allowed, it shows a disposition to make the defense available in some form.

In *Stookbridge v. Damon*, 5 Pick. 223, evidence of the set-off was allowed under the general issue.

In *Sargent v. Southgate*, 5 Pick. 312, 16 Am. Dec. 409, *Holland v. Makepeace* is distinguished, and it is held that an indorsee after maturity of a promissory note practically stands in the place of the payee, and that a claim against the payee existing at the time of the assignment may be used as a set-off.

That case was followed in *Braynard v. Fisher*, 6 Pick. 355.

The maker of a note cannot plead set-off against the indorsee after maturity of claim against indorser, but may, under the general issue, give evidence of any defense which grew out of the note transaction, or agreement in relation to the note. *Haley v. Congdon*, 56 Vt. 65, 19 Cent. L. J. 137.

Paper negotiable in bank or payable without defalcation.

Some of the courts which were not at first disposed to recognize the right to assign promissory notes free from liability to set-off found it necessary to make some exceptions and it was held that if the paper was made negotiable in bank or expressly stated that it was payable without defalcation, it might be assigned free from set-offs.

If a note is made negotiable at a bank, and the bank becomes the purchaser, no set-offs existing against the payee will be allowed against the bank. *Emanuel v. Atwood*, 6 Port. (Ala.) 384.

And the same rule applies in favor of any assignee. *O'Hara v. Bank at Hawkinsville*, 2 Ala. 397; *Knapp v. McBride*, 7 Ala. 19.

At least if it was acquired before maturity, and that, too, although it was not negotiated at the bank where it was made payable. *McDonald v. Husted*, 3 Ala. 297.

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The rule is the same although the note was made in another state. *Beal v. Wainwright*, 6 Ala. 156.

A note not payable in bank is subject to set-off. *Hoffman v. Zollinger*, 39 Ind. 461; *Herod v. Snyder*, 43 Ind. 490.

And even under the Virginia law which generally permits the set-off, if a note is made negotiable in bank and is actually discounted by such bank, no set-off of transactions between the parties to it can be allowed. *Mandeville v. Union Bank of Georgetown*, 13 U. S. 9 Cranch, 9, 3 L. ed. 639.

The statute of set-offs is not applicable to notes payable "without defalcation." *Collins v. Waddle*, 4 Mo. 453; *Maupin v. Smith*, 7 Mo. 402.

A note payable at a bank, without defalcation or discount, transferred either before or after maturity, is not subject in the hands of the indorsee to any set-off which the maker may have had against the discounting bank, the statute of New Jersey expressly providing that no discount shall be allowed when the note expresses that the money therein mentioned shall be paid without defalcation or discount. *Tillou v. Britton*, 9 N. J. L. 152.

In case the note does not contain the words "without defalcation or discount," it is subject in the hands of indorsees to set-offs which accrue prior to notice of its transfer, whether the assignment was before or after maturity. *Youngs v. Little*, 15 N. J. L. 1.

A note payable without defalcation or discount is not subject to set-off in the hands of an assignee. *Coryell v. Croxall*, 5 N. J. L. 764.

But inserting the words "without defalcation" in a sealed note will not preclude a set-off. *Louden v. Tiffany*, 5 Watts & S. 360.

And it has been held that although a note is payable without defalcation if the assignee takes it with notice of a right of defalcation arising since the making of the note, and of strong equities, and the insolvency of the payee, the note is subject in his hands to defalcation. *Lighty v. Brenner*, 14 Serg. & R. 127.

What necessary to defeat right of set-off.

The courts which refuse to recognize a right of set-off against an assignee are not agreed upon the question whether the assignment itself is sufficient to defeat the right or there must be in addition notice of the assignment or some equitable ground for refusing the set-off. Perhaps the most numerous class of cases hold in some form that matters of set-off against a payee acquired after assignment of a note assigned after maturity are not available to the maker. *Murtaugh v. Colligan*, 23 Ill. App. 438.

Equities arising subsequently to transfer of note will not attach to it in the hands of the assignee. *Campbell v. Ruch*, 9 Iowa, 245; *Woods v. Viosea*,

and secretary of said Woodlawn Cemetery Company. When the money and stock were paid, Vann agreed to go at once to the court-house, and cancel the mortgage on the records. He also stated that the mortgage and notes were at his office, and requested Mrs. Moore to go with him from Erswell's office to his office, where he would deliver the papers to her. Mrs. Moore and Nash both went with Vann to his office, where he got the mortgage and one of the notes (the last note), and gave them up to Mrs. Moore, saying that the other note (the one in controversy) was mislaid, and that he would get it for her in a day or two. He gave Mrs. Moore a receipt against the last-mentioned note, in which receipt it is recited that the note was then in the hands of W. C. Ward; but it does not appear that this receipt was

shown to Nash, or that he knew of this recital therein. Vann afterwards made various excuses for not delivering up the note. Mrs. Moore denies ever having received notice of the transfer of the note, and the Woodlawn Cemetery Company also denies notice that appellee held the note, or claimed any interest in it, and also of all facts that might put it on inquiry. Vann did not in fact cancel the mortgage on the records for some months after the payment. He, on one occasion, told Mrs. Moore that he had done so, but she, finding the statement to be false, required him to go to the records with her, and make the proper entry of satisfaction. He is not examined by either party as a witness.

The question argued by counsel as to whether or not the note transferred by Vann to Marbury is negotiable is not a material

25 La. Ann. 716; *Whittaker v. Kuhn*, 52 Iowa, 815; *McAlpin v. Wingard*, 2 Rich. L. 547; *Bullock v. Dunbar*, 17 Tex. 248; *Thatcher v. Mills*, 14 Tex. 18, 65 Am. Dec. 95; *Ritchie v. Moore*, 5 Munf. 333, 7 Am. Dec. 638.

But in *Lawton v. Blitch*, 33 Ga. 663, the court permitted the account current between maker and payee for the year in which the note became due to be introduced in set-off against an assignee after maturity without attempting to limit the set-off to what accrued prior to the assignment.

And the above rule is enforced although the claims were acquired without notice of the transfer. *Davis v. Miller*, 14 Gratt. 9.

Thus an indorsee of an overdue note takes it subject to all set-offs existing at the time of the transfer, but neither maker nor prior indorser can avail himself of a set-off acquired after such transfer, whether he had notice of it or not. *Barter v. Little*, 6 Met. 7, 39 Am. Dec. 707.

The bearer of a note payable to a certain person, or bearer, acquired before it has been dishonored, takes it free from any set-off which the promisor may afterwards acquire against the payee. *Pettes v. Prout*, 3 Gray, 502, 53 Am. Dec. 773.

In *Lowell v. Lane*, 33 Barb. 222, a promissory note was assigned overdue, and a short time afterward the maker recovered a judgment on a note which he held against the assignor. In a suit by the assignee it was held that the claim could not be used as a set-off, since it was not a subsisting demand at the time the action on the assigned note was commenced, and the judgment could not be set off since the assignment occurred prior to its entry.

In other jurisdictions notice of the assignment seems to be the feature given most prominence in defeating the set-off.

Under the Alabama statute all notes, except such as are payable at a bank, are subject to set-offs which exist prior to notice of assignment. *Russell v. Bedding*, 50 Ala. 448.

In *Stocking v. Toulmin*, 3 Stew. & P. (Ala.) 95, in which an attempt was made to set off claims against an intermediate assignor of a note, the court said: "No doubt exists under our statute as to the right of the defendant to set off any proper demand which he may hold against the payee at any time previous to notice of the assignment by him. But the set-off against the intermediate holder was denied."

The maker can purchase a set-off at any time before notice of the assignment, even although he knows the payee is dead. *King v. Conn*, 25 Ind. 425.

Under the Iowa statute, an assignee of an overdue note takes subject to any set-off procured before notice of assignment. *Downing v. Gibson*, 53 Iowa, 517.

By statute in Indiana, a set-off against the payee acquired before notice of the assignment is available against the assignee of a note. *Sefton v. Hargett*, 118 Ind. 502.

Under the Mississippi statute a promissory note is subject to all set-offs which existed prior to notice of the assignment. *Northern Bank v. Kyle*, 7 How. (Miss.) 360.

In *Abshire v. Corey*, 118 Ind. 484, it is held that defenses existing before notice of assignment are available as against a note not negotiable by the law-merchant, and that a note not payable in bank is not governed by the law-merchant, and they therefore allowed the set-off in that case, although the note was assigned before maturity. But there is nothing in the case to show that the assignment was by a regular indorsement.

So on the other hand there can be no set-off against the assignee of a note of a claim purchased after notice of the assignment. *Lewis v. Faber*, 65 Ala. 460; *Small v. Browder*, 11 B. Mon. 212; *Goodrich v. Stanley*, 23 Conn. 79; *Wood v. Brush*, 72 Cal. 224.

In *Brashear v. West*, 32 U. S. 7 Pet. 608, 8 L. ed. 801, notes were assigned soon after their date as collateral security for a debt of the payee; subsequently the payee made a general assignment for creditors and judgments were obtained in the name of the payee on the notes for the benefit of the assignee. After the judgments were obtained a bill was filed to have set off against them amounts which the maker had been compelled to pay as special bail for the payee, and the court held that since the maker became special bail after notice of the assignment, he was not entitled to a set-off.

In some cases the fact of bankruptcy seems to be given prominence.

An overdue note taken after the issuance of a commission of bankruptcy against the maker is subject to all set-offs that the maker's assignees may hold against it. *Humphries v. Blight*, 4 U. S. 4 Dall. 370, 1 L. ed. 870.

Negotiable paper assigned after a commission in bankruptcy has issued against the maker is subject to set-offs in the hands of the assignee. *Humphreys v. Blight*, 1 Wash. C. C. 44.

And under the Vermont laws it seems to be necessary that the maker must notify the payee of notes purchased against him before the assignment to render them available as set-offs. *Parker v. Kendall* 3 Vt. 540.

And this rule was recognized in a case arising in New Hampshire. *Bliss v. Houghton*, 13 N. H. 125.

one, for several reasons. In the first place, it was transferred to Marbury as collateral security for an antecedent debt Vann owed him. The doctrine in this state is that the holder of negotiable paper as collateral security for a pre-existing debt is not a bona fide holder for value, nor entitled to protection against equities and defenses existing between prior parties, of which he had no notice; but that such paper is open in the hands of such holder to all the defenses which could have been made against it while in the hands of the original owner. *First Nat. Bank of Decatur v. Johnson*, 97 Ala. 655. In the next place, it nowhere appears from the record that the note was indorsed by Vann to Marbury, so as to carry the legal title. Even negotiable paper assigned before maturity, unless payable to bearer or indorsed, will be

subject in the hands of the assignee, until the debtor is notified of the assignment, to the same equities as would have affected the party from whom it was received. The rule, in such cases, applicable to both non-negotiable and negotiable paper, has been well stated as follows: "When the written evidence of indebtedness is non-negotiable or overdue, indorsement will not obviate the necessity of notice; but, when negotiable paper requiring indorsement is assigned by delivery, notice has been held necessary to perfect the assignment." Wade, Notice, §442. It is true the testimony tends to show that the transfer of the note as collateral was in consideration of indulgence granted by Marbury to Vann on the debt for the security of which the note was so transferred; but the testimony does not show such a clear, definite, and cer-

Paper not negotiable.

There is a set-off against the assignee of a non-negotiable note of a claim against the payee acquired before notice of the assignment. *Moore v. Jervis*, 2 Colly. Ch. Cas. 60.

Notes without words of negotiability, although held by a bona fide purchaser, are subject to the set-offs existing between the assignor and the assignee at the time of the assignment. *Hamilton v. Grangers L. & H. Ins. Co.* 65 Ga. 750.

If the note is not payable to order, the assignor takes it subject to equities existing at the time of the notice of transfer. *Sanborn v. Little*, 8 N. H. 539.

Paper irregularly transferred.

VANN v. MARBURY holds that if the paper has been irregularly assigned it is not free from equities. The weight of authority seems to be with that case.

In *Hedges v. Sealy*, 9 Barb. 214, in which the defense was not set-off, it is said that a note payable to order, which is assigned without indorsement, is subject in the hands of the assignee to every equitable defense which the maker would have against the payee.

Negotiable paper assigned without indorsement is subject to all equities in the hands of the assignee, whether they arise out of the note transaction or not. *Simpson v. Hall*, 47 Conn. 417.

An irregular assignment of a note will not cut off set-offs. *Peck v. Bligh*, 37 Ill. 317.

But it has been held that transfer by assignment of a negotiable note for value and without notice before maturity bars offsets equally with indorsement. *Hall v. Toby*, 110 Pa. 818.

And that the bona fide holder of commercial paper transferred by delivery only is protected from all set-offs which arise subsequently to such delivery. *Heard v. Dedolph*, 29 Wis. 136.

In *Proctor v. Cole*, 104 Ind. 373, it was attempted to uphold the set-off against the assignee of notes on the ground that the assignment was without indorsement until after notice of the procurement of the set-off, but it appeared that the set-off claimed by the maker was not procured for value, and consequently that the equity of the assignor was superior, and therefore the set-off was not allowed.

That the indorsement of the note was not made at the time of its transfer will not let in subsequently acquired set-offs, if the maker was present at the time of the transfer of the note. *Flint v. Flint*, (Allen, 24, 33 Am. Dec. 615.

An indorsement after maturity upon a note transferred for value before maturity will relate back to the time of the transfer, so as to give the

transferee all the rights of an indorsee before maturity. *Ranger v. Cary*, 1 Met. 399.

Fraudulent transfers or transfers without value.

In *Bone v. Tharp*, 68 Iowa, 223, the court states that the old rule that the only equities between the original parties to a note which can be pleaded against an assignee must inhere in or grow out of the note itself, has been materially changed by statute, and that the note is subject to equities if not taken in good faith and for a valuable consideration.

A fraudulently transferred note is subject to set-off. *Keightley v. Walls*, 27 Ind. 384; *Hillhouse v. Adams*, 57 Conn. 182.

If a note is fraudulently transferred for the purpose of defeating the set-off, the set-off will be allowed against the assignee. *Savage v. Davis*, 7 Wend. 223; *Martindale v. Hudson*, 25 Mo. 425; *Baker v. Brown*, 10 Mo. 386.

A claim procured for a nominal consideration is not a good set-off against an equitable assignee of a promissory note. *Proctor v. Cole*, 115 Ind. 15.

The transfer must be bona fide and for a valuable consideration to prevent the set-off. *McDuffie v. Dame*, 11 N. H. 244; *Odiorne v. Woodman*, 39 N. H. 544.

Unless the indorsement of an overdue note is for value it is subject to set-off. *Cross v. Brown*, 51 N. H. 493.

If a note not due is assigned for a past consideration it is subject to equities. *Furness v. Gilchrist*, 1 Sandf. 53.

Contingent liability and claims not owned.

A claim merely contracted for but not delivered at the time of the assignment is not a set-off against the assignee of a note. *Weader v. First Nat. Bank of Crawfordsville*, 126 Ind. 113.

A note assigned after due by a solvent assignor is not subject to set-off of the amount the maker was compelled to pay as surety for the payee, which was only a contingent liability at the time of the assignment. *Follett v. Buyer*, 4 Ohio St. 586.

But it has been held that equity may relieve a surety on a bond who has given a note to his principal which has been assigned so as to enable him to set off his contingent liability on the bond, which has become fixed since the assignment of the note and recovery of judgment thereon. *Wood v. Steele*, 65 Ala. 436.

Equities which will justify set-off.

In some of the cases an attempt has been made to seize upon equities to justify a set-off which could not be allowed under the ordinary rules of law.

The insolvency of the assignor of a note at the

tain agreement, either as to the terms or time of the forbearance, as to constitute an independent consideration for the transfer which would give the transferee the rights of a bona fide holder for value without notice. Whether or not, therefore, the note in controversy was or was not negotiable paper, the whole question is one of notice.

Did Mrs. Moore, before or at the time of making payment of the note to Vann, have notice of the transfer of the note to Marbury? And did the Woodlawn Cemetery Company, at the time or before making payment of the purchase money to Mrs. Moore and to Vann, have notice of such transfer, or of any fact sufficient to put it on inquiry? In the absence of notice to Mrs. Moore of the transfer of the note to Marbury, the payment made by her to Vann would be a complete protection to her against this suit, notwithstanding the note was not produced and delivered up at the

time of such payment. In *Hart v. Freeman*, 43 Ala. 568, we said: "The maker of a promissory note, not negotiable, may pay the same to the payee after its maturity, even though the note be not produced and delivered up at the time of payment, provided the maker has had no notice of the indorsement or transfer of the note to a third person; and such payment would be a valid and competent defense against the note, should it afterward appear, and suit be brought thereon against the maker by another holder." It was further held in that case that the burden of proof rests upon the plaintiff in the action, the defendant having proved the payment, to show that the defendant had notice of the transfer or indorsement before the payment was made. We cannot perceive that the fact that payment of the note in controversy was made before maturity takes the case without the influence of the decision in *Hart v. Free-*

time of the assignment is an equitable ground for setting off against it notes against him held by the maker at the time of the assignment. *Colyer v. Craig*, 11 B. Mon. 73.

So in *Wray v. Furniss*, 27 Ala. 471, it seems to be intimated that if the payee is insolvent at the time of notice of the transfer of the note, such insolvency raises a sufficient equity to permit the set-off although the set-off did not arise out of the note transaction.

Assignment will not defeat perfected right.

The right of set-off perfected to note before assignment continues as against the indorsee. *Snow v. Conant*, 8 Vt. 301.

If the note becomes charged with an equity of set-off in the hands of the assignee, any subsequent assignment will not defeat the right. *Martin v. Richardson*, 68 N. C. 255.

Claims not in the same right.

A note payable to two jointly is not subject, in the hands of an assignee, to a claim against one of the payees. *Walker v. Hall*, 66 Miss. 390.

In *Peyton v. Planters Compress Co.*, 68 Miss. 410, in which it was sought to set off against an assigned note a judgment recovered on a claim against the assignor and a third person, which arose prior to the notice of the assignment, the set-off was resisted on the ground of want of mutuality in the demands; but the court allowed the set-off without discussing the question of how far a promissory note is subject to set-off in the hands of an assignee, although it is stated that the promissory note was assigned, and it does not appear whether it was indorsed or not.

Effect of agreements.

An indorsee of a note takes subject to an agreement between the original parties as to set-off. *Gary v. James*, 7 Ala. 640.

One taking a note past due may be compelled to set off upon it a joint debt of the payee and another, if the parties had agreed to such set-off prior to the transfer. *McDonald v. Mackenzie (Or.)* May 24, 1887.

But an agreement between maker and payee to set off a claim against the note is not sufficient to attach the right of set-off to it in the hands of an assignee before maturity. *Cripps v. Davis*, 12 Mees. & W. 159.

Effect of new note.

If an indorsed note is taken up and a new one in renewal given to the indorsee, set-offs against

the payee do not attach to the new note. *Dodge v. Ockerhausen*, 61 N. Y. S. R. 136.

Damages for breach by the payees of a note of an agreement to apply the proceeds of a consignment of wheat to its payment cannot be set off by the makers against a new note on different consideration in the hands of an assignee, although it was assigned after maturity. *Titus v. Himrod*, 39 Barb. 561.

Effect of assignment without recourse.

That the assignment of a note is without recourse is not sufficient to make it subject to set-off in the hands of the assignee. *Bisbing v. Graham*, 14 Pa. 14.

Counter set-off.

The set-off is not available against the assignee of a note if demands still exist in the hands of the assignor sufficient to exhaust the set-off. *Collins v. Allen*, 12 Wend. 266, 27 Am. Dec. 130.

The maker of an overdue note cannot set off claims against the assignor, if the remaining claim of the assignor is sufficient to cancel the set-off claimed. *Wharton v. Hopkins*, 38 N. C. 505.

Attempt to compel set-off by statute.

An attempt to make a note given to a bank payable in the bills of the bank, even in the hands of its assignee, is invalid, so far as it relates to past contracts, as impairing the obligation of contracts. *Dundas v. Bowler*, 8 McLean, 397.

Special contracts.

If, for a valuable consideration, one person undertakes to pay the debts of another, including existing promissory notes, the promise inures to the benefit of existing creditors; and if an assignee of such a creditor, who holds an unmatured promissory note, seeks to avail himself of the undertaking, he must allow set-offs which the obligor had against his assignor. *Barlow v. Myers*, 64 N. Y. 41, 21 Am. Rep. 562.

In a case where a firm, sued for infringement of patent, dissolved by mutual consent, and one of the partners purchased the other's interest, giving his notes therefor, under the agreement that the retiring partner should bear his share of the expenses and recovery in the suit, and after the notes matured and an action was brought on them they were assigned to a bank, the court permitted the continuing partner to set off the amounts which he had paid to settle the infringement suit and his costs incurred therein, against the notes in the hands of the bank. *Littlefield v. Albany County Bank*, 97 N. Y. 581. H. P. F.

man, supra The testimony in the record shows that both Mrs. Moore, the maker of the note, and the Woodlawn Cemetery Company, deny all notice of the transfer of the note by Vann to Marbury. On the other hand, W. C. Ward, attorney for Marbury, testifies that he notified Mrs. Moore of the transfer of the note to Marbury at the time, or shortly after, it was made, by addressing her and her husband a letter through the postoffice at Birmingham or Avondale (the latter according to the best of his recollection), and that the letter was never returned to him, although the envelope in which it was inclosed had his name and address thereon. If we may take judicial cognizance of the postal regulation or custom to return undelivered letters to sender, when there is a printed or written request to that effect, and the address of the sender on the envelope, we cannot consider this testimony as satisfactory or conclusive on the question of notice of the transfer of the note, in the face of Mrs. Moore's positive denial of notice, and the further fact that the burden of proof rests upon the complainant to establish notice. In the first place, the witness does not state that the postage was prepaid on his letter. In the second place, it appears from Mrs. Moore's testimony that she, at the time the letter was sent, received her letters from the Birmingham postoffice, instead of at Avondale, where she resided. In the third place, if it had been stated by Mr. Ward that his letter was sent postage prepaid, and to the proper office, it would simply have made out a *prima facie* case of notice, which is overcome by the positive and unequivocal denial of Mrs. Moore that she ever had notice of such transfer. We discover nothing in the testimony which disentitles her to full credit as a witness, and in accepting her denial of having received notice we do not in any wise discredit the testimony of Mr. Ward. The testimony of the two can be reconciled upon the theory that Mr. Ward's letter went to the postoffice at Avondale, where Mrs. Moore was not accustomed to receive her letters; or that the letter was not prepaid, or was lost in the Birmingham postoffice, or delivered to some person who failed to hand it to her. Appellee further insists, however, that both Mrs. Moore and the Woodlawn Cemetery Company were either notified of the transfer of the note or acquired knowledge of facts sufficient to put them on inquiry at the time the payment by Mrs. Moore was made, and the purchase by the Woodlawn Cemetery was concluded; that the receipt itself, given by Vann to Mrs. Moore on that occasion, recited that the note in controversy was then in the hands of W. C. Ward. A careful review of the testimony fails to satisfy us that this contention is supported by the proof. On the contrary, Mrs. Moore swears: "Vann did not say my note was out when he made the trade, but said so when he delivered my paper. When I delivered the deed to Erswell, Vann did not tell me that the note was out. The note was handed me in Vann's office. I never heard him say anything in presence of Erswell about the note being out, and nothing in that of Nash, except in his office." Nash, in his testimony,

shows that the money and stock were paid to Mrs. Moore, and the deed delivered by her to Erswell in his office, before Mrs. Moore, Nash, and Vann went to the latter's office; and we think it appears this was all done on the faith of Vann's statement that the notes and mortgage were in his office. Nash says: "Mr. Erswell, Mr. Vann, Mrs. Moore, and myself were the parties present at Mr. Erswell's office when the payment was made. The notes and mortgage were at Mr. Vann's office, so he said at the time. I went up to Mr. Vann's office with Mrs. Moore, when she received one note and the mortgage, I think. She also received a receipt for the other note, which he said was then misplaced, but he would surrender it in a day or so. Later on he made various statements as to the note," etc. And again, on cross-examination, he says: "I was present when Mrs. Moore executed the deed to the W. C. Co. Mrs. Moore was paid \$358 cash, and \$3,800 in stock, and she paid Vann \$3,800 stock. The W. C. Co. paid him nothing. After the stock had been transferred to Vann by Mrs. Moore she demanded the notes from Vann, and she went up to Vann's office to get them; but she only received one, and a receipt for the other. He said that note was then misplaced, and promised to deliver it to her in a day or so. Am quite sure he did not say it was in Ward's hands or any other person's hands at that time." Erswell is also examined, and corroborates Nash as to the conclusion of the trade at Erswell's office, and the statement then made by Vann that the notes were at his office, and the fact that Vann, Mrs. Moore, and Nash left Erswell's office to go to Vann's office. We cannot discover from the testimony that Nash read the receipt given by Vann to Mrs. Moore for the note in controversy, or that Nash there learned any fact which would have put him on inquiry, unless it was the one fact that the note here in suit was not actually produced and surrendered.

So far as the Woodlawn Cemetery Company is concerned, it not appearing that the receipt showing that the note was then in Ward's hands was shown to Nash, we think the statements made by Vann, in the hearing of Nash, both at that time and at Erswell's office, that the note was mislaid, and would be surrendered in a day or two, disarmed all suspicion on Nash's part that the note had been transferred. Indeed if inquiry had been excited, of whom would he have made it? He could not have gone out into the community generally to make such inquiry. He could have gone to no one except to the mortgagor and mortgagee and it is apparent from this record that inquiry of either of them would have been unavailing, in the light of the testimony in this record. And, so far as Mrs. Moore is concerned, it may be said that the statements of Vann to her, before and accompanying the delivery of the receipt for the note, might justly be said to have disarmed any suspicion which, without such statements, the recital in the receipt that the note was in Ward's hands ought to have excited in her mind. *Brown v. Blydenburgh*, 7 N. Y. 142-146, 57 Am. Dec. 506. It is to be observed this receipt does not recite that the note had been

transferred to Ward, but that it was in his hands. If this recital stood alone, it may be it was sufficient to put Mrs. Moore on inquiry, and that she would be chargeable with notice of all facts inquiry from Ward would have elicited; but, in connection with Vann's statements at the time of the payment, and also accompanying the delivery of the receipt, the most natural inference Mrs. Moore could have drawn from such recital in the receipt would have been that the note was in Ward's hands, not as transferee, but as agent for Vann; and that it had been mislaid. We see no escape from the conclusion that Vann's declarations and conduct were intended, and naturally had the effect to quiet suspicion, and prevent inquiry by Mrs. Moore and the officers of the Woodlawn Cemetery Company, and sufficiently excused their failure to demand the production and surrender of the note. *Brown v. Blydenburgh, supra*; 1 Jones, Mortg. § 791; *Van Keuren v. Corkins*, 6 Thomp. & C. 355.

The question with which we have mainly to deal in this case is not whether the mortgage can be enforced as to this note against Mr. and Mrs. Moore, or whether they are liable personally to Marbury on the note, but whether the note is enforceable in this suit as a lien on the land as against the Woodlawn Cemetery Company, the purchaser of the land. Its attorney examined the title, and found no incumbrance except the mortgage from Mrs. Moore and her husband to Vann, securing the two notes. So far as the record showed, therefore, Vann was the proper party to whom payment of the mortgage debt should be made, and who had the right to cancel the mortgage. In *Ogle v. Turpin*, 103 Ill. 148, it is said: "There is no presumption of law that the payee of notes secured by mortgage has transferred the notes before purchasing the equity of redemption from the mortgagor, and a person taking a mortgage from the payee will not be held chargeable with notice that the notes secured in the first mortgage, although not due, have been assigned, but he may rely upon the record as showing title in his mortgagor." This we think to be the correct rule, except where the mortgage shows upon its face the negotiable character of the notes it secures, in which event it might be incumbent on a subsequent purchaser to inquire as to whether the notes have been assigned. *Keohane v. Smith*, 97 Ill. 156; 1 Jones, Mortg. § 814. The mortgage before us does not describe the notes, or otherwise indicate their character. In the absence of proof of notice to the Woodlawn Cemetery Company of the transfer of the note to Marbury, or of facts sufficient to put it on inquiry, the principles which govern the respective rights of Marbury and said company in this controversy may be briefly stated as follows: By the transfer of the note from Vann to Marbury under the circumstances above shown, the latter acquired an interest in the mortgage security which he was entitled to assert as against both the

mortgagor and the mortgagee so long as the security subsisted. This being so, the cancellation of the mortgage on the records by Vann, it cannot be doubted, was a fraud upon the rights of Marbury, and the latter's rights remained unaffected as against all parties participating in, or cognizant of, the fraud. But, as between Marbury and the Woodlawn Cemetery Company, the question here presented is whether Marbury's rights are such that they can be asserted against a bona fide purchaser from the mortgagor, who, without notice of the claim of Marbury, has parted with its money relying upon the payment and cancellation of the only claim upon the land disclosed by the record, and which payment was made to, and cancellation made by, the party whom the record showed to be the proper party for such purposes. As we have said, the transfer of the note vested in Marbury no legal title to the land, but simply an equity. The legal title to the conditional estate in the land remained in Vann as fully after the transfer as before. This legal title, it may be, he held in trust for Marbury to the extent of the note held by the latter; but it was a trust not appearing from the mortgage itself, or by any record, but a latent trust, which could not affect the rights of bona fide purchasers, who, in ignorance of its existence, relied on the acts and declarations of the mortgagee within the scope of his apparent powers as legal owner of the mortgage; and any such acts of the mortgagee as would work an estoppel as against him would be equally effective against the holder of a latent equity arising from contract with the mortgagee. *Swarts v. Leist*, 18 Ohio St. 419.

Without discussing the question further, our conclusion is that Marbury, being a holder of the note as collateral security for an antecedent debt, and the mortgage failing to show that the note was negotiable, and the payment of the entire mortgage debt having been made by Mrs. Moore, and the purchase made by the Woodlawn Cemetery Company, in good faith, without notice by either of the transfer of the note, and in reliance upon the fact that the payment was made, to, and the surrender of the mortgage by, the party whom the record showed was the proper party, and who then represented himself as the owner of the note, and that it was temporarily mislaid, such payment and purchase defeat the right of the transferee, Marbury, to subject the land to the payment of the note, notwithstanding the failure of Mrs. Moore and the officers of the Woodlawn Cemetery Company to require the production and surrender of the note at the time of such payment and purchase. The decree of the chancery court is not in accordance with our conclusion. It is therefore reversed, and a decree will be here rendered denying relief to the complainant in the court below, and dismissing the bill of complaint.

Reversed and rendered.

UNITED STATES CIRCUIT COURT, DISTRICT OF WASHINGTON.

J. H. ADAMS, Receiver of the Citizens'
National Bank of Spokane Falls,
v.

SPOKANE DRUG CO.

(57 Fed. Rep. 898.)

A receiver of a national bank takes immature notes belonging to the bank subject to the right of the maker to set off against them his deposit account in the bank.

(October 7, 1898.)

ON DEMURRER to an answer pleading set-off in an action upon a promissory note. *Overruled.*

The facts sufficiently appear in the opinion.

Mr. J. H. Adams, in propria persona, in support of the demurrer.

Mr. C. Wellington for defendant, *contra*.

Hanford, District Judge, delivered the following opinion:

This is an action by a receiver of a national bank upon a promissory note for \$5,000, given to and owned by said bank. The answer alleges that the amount of the loan for which said note was given was not actually paid, but was credited by said bank to the defendant as a deposit subject to check; that thereafter the defendant purchased of said bank three bills of exchange on the Chase National Bank of New York, for sums aggregating \$3,500, and paid for the same, by checks against said deposit; that the bills of exchange were presented in due course of business, but acceptance thereof was refused, for the reason that the drawer had failed; that, at the time of the suspension of said bank, part of said deposit still remained to the credit of the defendant; that, before the action was commenced, the defendant tendered to the receiver said bills of exchange, and a sum of money equal to the full amount of the principal and interest due on said note, after deducting therefrom the balance of said deposit and the amount of said bills of exchange, with protest fees, and the tender has been made good by bringing said bills of exchange and money into court. The suspension of the bank and appointment of the receiver occurred before the maturity of the note. The case has been argued and submitted upon a demurrer to said answer.

In the case of *Scott v. Armstrong*, 146 U. S. 499, 38 L. ed. 1059, the Supreme Court held that the receiver of a national bank took the assets as a mere trustee, and not as a purchaser for value; that, in the absence of a statute to the contrary, demands and choses in action which belonged to the bank were in his hands, subject to all claims and defenses that might have been interposed as

against the bank before the liens of the United States and the general creditors attached; and that there is nothing in the statutes relating to national banks to deprive a customer of an insolvent national bank of the right to set off a debt, or obligation of the bank to him, existing at the time of its failure, against a promissory note which did not become due until after the failure, according to the ordinary rule in equity applicable to cases wherein the reciprocal liabilities of insolvents and others have to be adjusted, and the judgment of the United States circuit court for the southern district of Ohio was reversed for error in sustaining a demurrer to a defense similar to the one pleaded in this case. I should have no difficulty in reaching a satisfactory conclusion, harmonious with the reasoning of that decision, were it not for the fact that in the same opinion the learned chief justice argues that the statute of Ohio, allowing a set-off to be interposed as a defense in an action at law, is not applicable as a rule of practice in the federal courts; and he makes the following emphatic announcement: "We are of the opinion that the circuit court had no power to grant the set-off in question in the suit at law." The reason given is that "legal and equitable claims cannot be blended together in one suit in the circuit courts of the United States, nor are equitable defenses permitted." In England the right to set off a debt due to a defendant from the plaintiff in an action at law is given by Stat. 2 Geo. II. chap. 22, § 13, and made perpetual by 8 Geo. II. chap. 24, § 4. Most of the states of the Union, if not all, have long ago enacted similar laws. We have such a statute in the state of Washington. The practice has prevailed in the courts of this country, state and federal, for so long, and has been so often sanctioned by the Supreme Court of the United States, that the right of a defendant having such a defense to avail himself of it would seem to be firmly established. 2 Parsons, Cont. 734; *Partridge v. Phœnix Mut. L. Ins. Co.* 82 U. S. 15 Wall. 578, 21 L. ed. 229; *Dushane v. Benedict*, 120 U. S. 630, 30 L. ed. 810. In the case last cited, *Mr. Justice Gray* shows that the Pennsylvania law of set-off has been in force nearly two centuries. In *Scott v. Armstrong*, the Supreme Court reversed the judgment of the circuit court for not allowing the set-off pleaded by the defendants in that case, and approved the decision of the circuit court for the eastern district of Pennsylvania in the case of *Yardley v. Clothier*, 49 Fed. Rep. 387, which was an action like the one at bar, and in which a similar defense was sustained. Considering what was done, notwithstanding what was said by the supreme court, I feel warranted in following *Yardley v. Clothier*.

The demurrer is therefore overruled, and, the plaintiff having elected to stand upon his demurrer, a judgment in favor of the defendant for costs will be entered.

NOTE.—As to right to set off against commercial paper in the hands of an assignee, claims against the assignor, see note, to *VAN V. MARBURY*, ante, 323, 33 L. R. A.

IOWA SUPREME COURT.

E. W. BENSON

v.

Jonas HAYWOOD *et al.*, *Appts.*

(.....Iowa.....)

1. The statements in a written assignment of a judgment cannot in the absence of fraud or mistake be contradicted by parol in a proceeding by the judgment debtor to set off against it a cross-judgment held by him against the assignor.

NOTE.—Set-off against judgment in the hands of assignee.

The set-off of judgments, even before it was provided for by statute, was frequently compelled by the courts in their equitable jurisdiction over suits. And while it was not a matter of strict right the rule was to allow it unless there were sufficient reasons to prevent it. It was generally considered that the right attached as soon as a judgment was entered in favor of each party, and that a subsequent assignee of one of the judgments would be bound by the equity of the set-off.

Although in *Gildersleeve v. Burrows*, 24 Ohio St. 204, it is questioned whether or not the insolvency of the assignor or other equitable ground must not exist in order to make available a set-off against an assigned judgment.

Yet the courts have not as a rule acted on that suggestion.

The assignee of a judgment takes subject to an existing right of set-off of a cross-judgment. *Brislin v. Newhall*, 5 Minn. 273.

At least if the assignee has notice of the existence of the cross-judgment. *Irvine v. Myers*, 6 Minn. 522.

A demand for a set-off prior to the assignment of one of the judgments is not necessary to charge it with the set-off in the hands of an assignee, if the equities had become perfect prior to the assignment. *Dimock v. Wilbur*, 1 N. Y. Supp. 205.

After a right of set off of judgments has attached it cannot be defeated by the assignment of one of them. *McBride v. Fallon*, 65 Cal. 301.

If the right to set-off of judgments has become perfect under the statute, it cannot be defeated by the assignment of one of them. *Ballinger v. Tarbell*, 16 Iowa, 401, 85 Am. Dec. 527.

After the right to set off cross judgments has become fixed, it cannot be defeated by assigning one of the judgments to the attorney. *Dingee v. Shears*, 29 Hun, 210.

The equity of the assignee of a judgment is subordinate to an existing equity of the judgment debtor to set off judgments which he had obtained against the assignor. *Jeffries v. Evans*, 6 B. Mon. 119, 43 Am. Dec. 159.

In *Graves v. Woodbury*, 4 Hill, 559, 40 Am. Dec. 296, the court says that the assignee of a judgment takes it subject to the right to have another judgment existing at the time set off against it, even although he has no notice of such judgment; but it is decided in that case that no judgment existed at the time of the assignment capable of being set off.

The assignee of a judgment takes it subject to the right to set off a cross-judgment existing at the time of the assignment. *Brown v. Hendrickson*, 30 N. J. L. 239; *Chamberlain v. Day*, 3 Cow. 353; *Hobbs v. Duff*, 23 Cal. 599; *Filbert v. Hawk*, 8 Watts, 443.

In the last case above cited the court explains *Ramsay's App.*, 2 Watts, 223, 27 Am. Dec. 301, 15 23 L. R. A.

2. An assignment of a verdict to secure the attorney's compensation does not relieve the judgment to be entered thereon from liability to offset of a judgment then existing in favor of the judgment debtor against the assignor.

(October 5, 1892.)

APPPEAL by defendants from a judgment of the District Court of Buena Vista County in favor of plaintiff in a proceeding brought to compel the set-off of certain judgments. *Affirmed.*

which the set-off was apparently denied, as being one in which the one judgment was assigned before the other was recovered. *Filbert v. Hawk, supra.*

An assignment of a judgment for costs to the attorney will not prevent the set-off of a judgment in a former action in favor of the opposing party. *Yorton v. Milwaukee, L. S. & W. R. Co.* 62 Wis. 367.

At law a judgment assigned to attorneys to secure costs without any prior agreement to that effect remains subject to set-off on the part of the judgment debtor. *Davidson v. Alfaro*, 80 N. Y. 600.

The assignee, in satisfaction of a preceident debt, of a bill of costs due a solicitor, takes the same subject to the right of the debtor to set off against it a claim then existing on a judgment against the solicitor. *Utica Ins. Co. v. Power*, 8 Paige, 365, 3 L. ed. 190.

Where, prior to the assignment of a judgment, the right exists to have another judgment set off against it, the assignee takes subject to such right,—especially if he has notice of it; and it is immaterial that the assignment was to secure an antecedently earned attorney's fee. *Skinker v. Smith*, 48 Mo. App. 91.

If an assignee's lien on a judgment is satisfied, the right to set off an existing judgment against the original judgment creditor will arise and is not defeated by a subsequent assignment of the judgment to secure other indebtedness. *Stillwell v. Carpenter*, 2 Abb. N. C. 259.

If demands are mutual, a set-off of the judgments acquired on them cannot be defeated by assignment. But the right of an attorney who has made advances may be protected. *Hooper v. Brundage*, 22 Me. 460.

But it was held that prior to the Connecticut statute of set-off, one of two existing cross-judgments might be assigned so as to defeat the right of set-off. *Rumrill v. Huntington*, 5 Day, 163.

This case was followed in *Benjamin v. Benjamin*, 17 Conn. 110, and the same was true with claims which had not passed into judgment. *Ripley v. Bull*, 19 Conn. 53.

This note will not go into the question of the statutory right to set off executions in the hands of the sheriff, as was the case in *Gallaher v. Pendleton*, 55 Iowa, 142.

Assignment of verdict.

It has been held that the right to set off judgments cannot be defeated by the assignment of the claim on which the later one is rendered. *Johnson v. Taylor*, 1 Disney (Ohio) 168.

In *Orr v. Spooner*, 19 U. C. Q. B. 601, as assignment of a verdict was held to be no obstacle to set off the judgment to be entered on it against another judgment already existing. There was some evidence of an assignment to defeat the set-off, but the decision was not based on this ground but upon the apparent haste of the assignment during a time

Statement by Given, J.:

Plaintiff owns a judgment rendered in his favor against defendant Haywood for \$200, drawing 10 per cent interest, and \$16.25 costs. Judgment was rendered against plaintiff in favor of Haywood for \$187.60, and for \$70.95 costs, in another action. Defendant James, as sheriff, holds executions on both judgments, but refuses to offset the lesser against the larger, for the reason that the judgment against plaintiff was assigned to defendants Chapman and Irwin. Plaintiff asks that the judgment against him be credited on the judgment in his favor, and that defendants be enjoined from collecting said

judgment against him. Decree was entered offsetting said judgments, except as to costs. Defendants appeal.

Messrs. C. A. Irwin and T. H. Chapman, for appellants:

Code 8097 provides that mutual judgments the executions on which are in the hands of the same officer, may be set off one against the other. Under this section the plaintiff is entitled to relief only upon a showing that the judgments were mutual at the time that suit was brought.

Bell v. Perry, 43 Iowa, 370.

Gallagher v. Pendleton, 55 Iowa, 143, was on

that defendant had the right reserved to him to move for a new trial.

But it seems to be elsewhere considered that while the claim is merely in verdict the equity of the cross-judgment does not attach to it so as to defeat an assignment.

The assignment of a verdict together with a judgment to be entered thereon to the attorneys for their services and disbursements in the action gives them an equity superior to that of the defendant to set off a judgment existing in his favor against the assignor at the time the judgment is entered on the verdict. *Mackey v. Mackey*, 43 Barb. 53.

The assignment of a verdict to the attorney to secure his charge for service, frees the judgment when entered of any right to set off an opposing judgment then existing. *Ferguson v. Bassett*, 4 How. Pr. 172.

Assignment of a claim for damages before entry of the judgment will prevent the set-off of an existing adverse judgment for costs in other actions. *Hackett v. Connatt*, 2 Edw. Ch. 73, 6 L. ed. 513.

But the assignment of a verdict, while an opposing judgment is in the hands of assignees for creditors, will not prevent the debtor from taking a re-assignment of it, and setting it off on the judgment under the verdict when it is entered. *Jacoby v. Guier*, 6 Serg. & R. 443.

How far subject to set-off of demand not in judgment.

The language of some of the cases makes the same rule applicable in case of a judgment that is applicable to an ordinary chose in action.

An assignee of a judgment takes subject to the equities existing between the original parties. *Cutts v. Guild*, 57 N. Y. 229; *Rowe v. Langley*, 49 N. H. 393.

The assignee of a judgment takes it subject to all equities of set-off then attached to it. *Wells, Fargo & Co. v. Clarkson*, 5 Mont. 336, 2 Mont. 230; *Burtis v. Cook*, 16 Iowa, 194.

Under the Georgia statute a judgment is subject to set-off in the hands of an assignee. *Langston v. Roby*, 63 Ga. 403.

Under the Michigan statute any claim held by the judgment debtor, before notice of the assignment of the judgment, may be set off in a suit upon the judgment by the assignee. *Finn v. Corbitt*, 33 Mich. 313.

Indebtedness on promissory notes from a judgment creditor to the judgment debtor existing when the judgment is assigned to a third person may be set off against the judgment in the hands of the assignee. *Way v. Colyer* (Minn.) June 23, 1898.

Under the Maine statutes to enable an assignee of a judgment to resist a set-off of a claim against the assignor, he must make it appear that the assignment was made before defendant became entitled to the sum claimed by him from the assignor. *New Haven Copper Co. v. Brown*, 46 Me. 413.

A claim for damages for wrongfully taking back

property which had been sold, and for which a note was given, cannot be assigned so as to place the verdict and judgment beyond the liability to set-off against the note. *Bonte v. Hall*, 2 Ctn. Sup. Ct. Rep. 32.

An individual claim by one member of a partnership against another, which was due at the time of the latter's obtaining a judgment against the former in a proceeding to settle the partnership accounts, may be set off against a judgment in the hands of an assignee. *Weston v. Turner*, 23 N. Y. Supp. 141.

But it is elsewhere positively stated that equity will not set off against an assigned judgment a simple claim against the judgment creditor existing at the time of the assignment. *Catron v. Cross*, 3 Heak. 683.

So the assignee of a judgment recovered by a bank, which afterwards becomes insolvent, was held not subject to the set-off of money deposited by the debtor in the bank and lost by its insolvency, in *Spilman v. Payne*, 64 Va. 435.

By implication at least the latter cases are supported by those which hold that an assignee of a judgment is not subject to set-off of a cross-judgment subsequently entered. *Hughes v. Trahern*, 64 Ill. 48; *Ullmann v. Kline*, 37 Ill. 263; *Wyllie v. Barwise*, 43 Minn. 171; *Ledyard v. Phillips*, 55 Mich. 204; *Roberts v. Carter*, 33 N. Y. 107; *Peckham v. Barcalow*, Hill & D. Supp. 112.

A judgment may be assigned free from liability of set-off of a cross-judgment subsequently recovered. *Middlesex County Chosen Freeholders v. State Bank at New Brunswick*, 33 N. J. Eq. 33.

A judgment will not be permitted to be set off against an assigned judgment, if the record does not show that it was procured until long after the assignment, although the equitable interest had existed in it long prior thereto. *Horton v. Miller*, 44 Pa. 263.

A judgment assigned to the attorney to satisfy his charges is not subject to set-off of a cross-judgment subsequently entered. *Roberts v. Carter*, 17 How. Pr. 347.

A claim which could not have been set off in an action *ex delicto* cannot be set off against the judgment, if the claim was assigned before judgment in good faith and for a valuable consideration. *Marine Sawmill Co's App.* (Pa.) Jan. 4, 1893.

An assigned verdict and the judgment to be entered thereon is not subject to set-off of cross-judgment thereafter entered. *Nash v. Hamilton*, 3 Abb. Pr. 37.

Judgments for costs on the dismissal of chancery suits brought for breach of covenant cannot be set off against a judgment in a pending action at law for damages for the same cause of action, which is subsequently entered, if prior to the entry the claim has been assigned for value to a third person. *Hackett v. Connatt*, 2 Edw. Ch. 73, 6 L. ed. 513.

An assignment of the judgment to the attorney

all fours with this. Like this the plaintiff had a judgment against a person who afterwards obtained a judgment against him. The defendant Pendleton procured an assignment of the second judgment. This court said that such assignment destroyed the mutuality that had existed and that the judgments could not be set off one against the other.

Such an assignment would prevent an offset, even though it were verbal.

Gray v. McCallister, 50 Iowa, 503. See also *Gallaher v. Pendleton*, and *Bell v. Perry*, *supra*.

Under the written assignment the appellants cannot show that the actual agreement was different from the terms of the writing.

Foster v. Trenary, 65 Iowa, 622; *Moore v. Lowrey*, 25 Iowa, 386, 95 Am. Dec. 790; *Conyngham v. Smith*, 16 Iowa, 474.

Mr. H. F. Galpin, for appellee:

In case of the assignment of a thing in action, the action by the assignee shall be without prejudice to any counterclaim, defense, or cause of action whether matured or not, if matured when plead, existing in favor of the defendant and against the assignor before notice of the assignment.

Code, § 2546 (McClain's Anno. Stat. 3751).

The assignee (of a judgment) of course, takes it subject to any defenses which the judgment debtor may have against it.

Edmonds v. Montgomery, 1 Iowa, 143;

Notice.

The question of notice is made material in some of the cases.

An assignment of judgment is subject to equities accruing before notice. *Lockwood v. Bates*, 1 Del. Ch. 435, 12 Am. Dec. 121.

An assignee of a judgment must allow all set-offs purchased against it before notice of the assignment. *Townsend v. Quinan*, 47 Tex. 1.

An action on a judgment is within the Massachusetts act that when the demand on which an action is brought has been assigned and defendant had notice of the assignment, he shall not set off a demand that he acquired against the original creditor after such notice. *Smith v. Brown*, 151 Mass. 388.

The assignee of a judgment, with notice of the existence of a larger judgment against the assignor in the hands of the debtor in the assigned judgment, takes subject to the right of the latter to insist on a set-off. *Greene v. Hatch*, 12 Mass. 195.

A judgment upon a claim purchased without notice of an adverse claim is not subject, in the hands of the assignee, to a set-off of a judgment upon the other claim. *Ames v. Bates*, 119 Mass. 307.

Claims purchased after notice of assignment of judgment are not available. *Pass v. McRea*, 35 Miss. 143.

The right to set off an existing judgment is not defeated by notice of the attorneys that an interest in a newly entered judgment has been assigned to them. *Wright v. Treadwell*, 14 Tex. 235.

Set-off of claims against one who never had title not available.

A judgment debtor cannot set off against the judgment his claim against one who had negotiated for a purchase of the judgment but induced a third person to purchase it before any claim of his own had attached to it. *Avery v. Russell*, 125 Mass. 571.

Assignees protected.

Under their equitable control over the question of the set-off of judgments courts are inclined to protect superior equities of assignees as well as those of the one asking the set-off.

In *Beard v. Puett*, 105 Ind. 68, it is said that a court can order one judgment to be set off against another only when equity and good conscience require that such set-off should be made.

The right to use against an assignee debts due by the assignor and purchased before notice of the assignment is a statutory right, and the statute does not provide that it shall be enforced after judgment. And equity will not permit the set off of judgments to the prejudice of bona fide assignees. *Pheiffer v. Harris*, 11 Bush, 400.

The right to set off judgments is to be exercised by a court of law *ex gratia* and is wholly within its discretion and will not be enforced when equity

for services is not subject to the claim of the judgment debtor to set off against the judgment a judgment against the plaintiff which he had procured after the entry of the judgment against himself, and before notice of the assignment. *Terney v. Wilson*, 45 N. J. L. 237.

An assignee of a judgment does not take subject to the right to set off a cross-demand on which a judgment is subsequently entered, unless there are equities which will compel the chancellor to allow the set-off, as the insolvency of the judgment debtor or his absence from the state. *Davis v. Milburn*, 3 Iowa, 163.

Where a defendant executed an undated assignment of the costs in his favor to his co-defendant, and in the trial the action was dismissed as to him with costs, and the co-defendant immediately filled up the assignment and, after a verdict had been entered against himself and assigned to a third person, perfected his judgment, after which the assignee perfected his, the co-defendant cannot insist on a set-off, because at the time his judgment was perfected the opposing claim had passed into the hands of a third person. *Wood v. Merritt*, 45 How. Pr. 471.

So under the Kansas statute, the assignee of a claim takes subject to have a cross-claim set off against it, but if the set-off is not claimed and the action proceeds to judgment, which is assigned, it defeats the right of set-off. *Leavenson v. La Fontaine*, 3 Kan. 523.

But it has been held that an assignee of a judgment, with notice of the cross-demands, will take subject to the right of set-off, although the cross-judgment is not then recovered. *Lammers v. Goodeman*, 69 Ind. 76.

Where cross-judgments are in same action.

An assignment cannot defeat the right to set off judgments entered in favor of each party in the same action. *Porter v. Liscom*, 22 Cal. 433, 33 Am. Dec. 76.

Where judgments had been entered in favor of both parties to an action, after which one assigned his judgment to the attorney for his services, the attorney was held to be entitled only to the surplus after setting off the other judgment. *Tiffany v. Stewart*, 60 Iowa, 307.

An assignee of a judgment takes it subject to the debtor's right to set off against it the costs in his favor, under the statute providing that if defendant offers judgment and plaintiff refuses it and fails to obtain a more favorable judgment, defendant is entitled to costs. *Hibbard v. Randolph*, 73 Hun, 623.

But it has been held that the costs of a motion cannot be set off against the costs of a prior motion in the same case, which had been assigned before the second motion was made. *Wellman v. Frost*, 35 Hun, 299.

33 L. R. A.

Hurst v. Sheets, 14 Iowa, 322; *Davis v. Milburn*, 8 Iowa, 170; *Merrill v. Souther*, 6 Dana, 305; *Robbins v. Holley*, 1 T. B. Mon. 191; *Burtis v. Cook*, 16 Iowa, 194.

Knowledge of Chapman and Irwin was charged, and it was incumbent on them to prove they had no notice of the fact or were not chargeable with notice.

Sillyman v. King, 86 Iowa, 207; *Kibby v. Harsh*, 61 Iowa, 196.

The promptitude with which the other party attempted to transfer the verdict is calculated to excite suspicion that it was done in anticipation of such a motion (to set-off) and for the purpose of defeating it.

Duncan v. Bloomstock, 2 McCord, L. 318, 18 Am. Dec. 728.

will not be promoted, or when the rights of others will be seriously infringed. *Rowe v. Langley*, 49 N. H. 306.

Equity will protect a bona fide assignee of a judgment. *Davidson v. Geoghagan*, 3 Bibb, 233.

The court will not permit a set-off of judgments when it appears that parties other than the nominal creditor are interested by assignment of the demand on which one of the judgments is rendered. *Makepeace v. Coates*, 8 Mass. 451.

But although one judgment at law cannot be set off against another which has been assigned prior to the entry of the later one, yet if the equity of the set-off is stronger than that of the assignment, if the assignee is compelled to come into equity for relief, he may be compelled to allow the set-off. *Gay v. Gay*, 10 Paige, 399, 4 L. ed. 1015; *Barber v. Spencer*, 11 Paige, 517, 5 L. ed. 218.

One desiring a set-off of judgments should not delay until the interests of third persons have become involved. *Williams v. Evans*, 2 McCord, L. 203; *Payne v. Webb*, 29 W. Va. 627; *Nuzum v. Morris*, 25 W. Va. 559.

The equitable right of setting off judgments will not be permitted to affect an equitable assignee for value. *Ramsey's App.* 2 Watts, 223, 27 Am. Dec. 301.

In that case it is said that the equitable right of setting off judgments is permitted only where it will infringe on no other right of equal grade, consequently it is not to affect an equitable assignee for value. *Ibid.*

Fraudulent assignment or for the purpose of defeating set-off.

A fraudulent assignment of one of the judgments cannot prevent a set-off. *Russell v. Conway*, 11 Cal. 93.

A fraudulent assignee of judgment takes subject to set-off. *Hurst v. Sheets*, 14 Iowa, 322.

An assignment of a judgment to one who has illegally furnished money to carry on the action is subject to the right of the judgment debtor to set off a judgment against the assignor. *Puett v. Beard*, 86 Ind. 172, 44 Am. Rep. 230.

To prevent injustice, one judgment may be set off against another, although the latter has been assigned to a third person. *Hovey v. Morrill*, 61 N. H. 9, 60 Am. Rep. 315.

A set-off of judgments will be allowed if the assignment was made for the purpose of defeating it. *Morris v. Hollis*, 2 Harr. (Del.) 4; *Duncan v. Bloomstock*, 2 McCord, L. 318, 18 Am. Dec. 728.

A wife to whom is assigned a judgment recovered by her husband in tort in accordance with an agreement that if she would advance money to prosecute the action she should have an assignment of the judgment, may hold it as against the claim of the judgment debtor to set off claims against the husband which he held at the time, but which 29 L. R. A.

Given, J., delivered the opinion of the court:

1. The facts necessary to be noticed are these: On March 26, 1890, plaintiff, Benson, obtained his judgment against defendant Haywood, of which fact defendants Chapman and Irwin had knowledge, they being engaged as attorneys in that case. At the August term following a verdict was returned in favor of defendant Haywood against plaintiff, Benson, in another action, wherein Chapman and Irwin appeared as attorneys for Haywood. On August 28th following the verdict, but before judgment was entered thereon, Chapman and Irwin filed notice claiming an attorney's lien "upon the judgment" for services as attorneys, for \$75-

he took no steps to set off until after the assignment. *Beard v. Puett*, 105 Ind. 68.

Insolvency as an equity.

Insolvency raises an equity to have judgments set off against each other which cannot be defeated by an assignment of one of them. *Merrill v. Souther*, 6 Dana, 305.

Mere assignees of a judgment in favor of an insolvent take subject to the right of set-off, unless they can show some superior equity. *Marshall v. Cooper*, 43 Md. 61; *Levy v. Steinbach*, Id. 212.

But insolvency of one of the parties is not sufficient to cause the set-off of cross-judgments, one of which has been assigned, unless it existed before the assignment was made. *Henderson v. McVay*, 32 Ala. 471.

Insolvency of the assignor is not a sufficient equity to cause a set-off against a judgment in the hands of the assignee, unless the insolvency is shown to have existed at the time of the assignment. *Robbins v. Holley*, 1 T. B. Mon. 191.

Where assigns the real party.

A set-off of cross-judgments will not be prevented by the assignment of the claim on which one of them is entered, if the assignee is the real plaintiff and also the real defendant in the cross-action. *Standeven v. Murgatroyd*, 27 L. J. Exch. 425.

In testing the right to a set-off it is not necessary that the judgments should be in the same right; it is enough if the judgment prayed to be set off may be enforced at law against the party recovering the judgment to be satisfied by the set-off, provided it is not in a representative capacity. *Brown v. Hendrickson*, 39 N. J. L. 239.

Assignment without consideration.

One who takes an assignment of a judgment without consideration holds it subject to the right of the judgment debtor to set off a judgment, of which he attempted to get an assignment, but which, because of a mistake in the transaction, resulted simply in an equitable assignment. *Frybarger v. Andre*, 106 Ind. 337.

Want of legal title.

One having merely an equitable title to a judgment cannot prevent a set-off. *Williams v. Taylor*, 69 Ind. 48.

In *Dorsey v. Reese*, 14 B. Mon. 157, an assignee of a judgment was held subject to the right of set-off of a note procured before the assignment, although it was procured under the agreement that it should be returned, if the set-off should not be allowed.

Judgment on note.

Following the rule in the case of set-offs to commercial paper assigned after maturity it is held that a judgment recovered on a note assigned

each, and on the same day they filed an assignment, as follows: "Storm Lake, Iowa, Aug. 28, 1890. For value received, I hereby assign, transfer, and set over to T. H. Chapman and Chas. A. Irwin all my right, title, and interest in and to the judgment this day recovered by me in the case of *Jonas Haywood v. E. W. Benson* for legal fees due from me to them for labor and services performed for me in the above-entitled case. Jonas Haywood." On August 30th judgment was rendered on the verdict against plaintiff, and in favor of Haywood, and on September 3, 1890, executions were issued on both judgments, and placed in the hands of the defendant James, as sheriff, who refused to offset the one against the other, and thereupon this action was brought. The right of Chapman and Irwin to an attorney's lien is not questioned, nor is the validity of the assignment to them. There is no allegation of fraud or want of consideration, and the evidence shows that the value of their services to Haywood in the case was equal to the amount of the judgment.

2. Appellants introduced evidence, over

appellee's objection, tending to show that the consideration for this assignment was service rendered as attorneys for Haywood in the action wherein the judgment against Benson was rendered of the amount of \$82.50, and \$55 for services rendered for Haywood in another case. The assignment from Haywood recites that it was "for legal fees due from me to them for labor and services performed for me in the above-entitled case." The above-entitled case is *Jonas Haywood v. E. W. Benson*. There is no allegation of fraud or mistake in the making of this writing, nor is it ambiguous or its meaning uncertain. It plainly states the consideration to be labor and services in the case wherein the judgment was rendered, and the evidence introduced is in direct contradiction of this plain recital, and therefore not admissible. Appellants cite *Moore v. Lowrey*, 25 Iowa, 338, 95 Am. Dec. 790, and *Fluster v. Trenary*, 65 Iowa, 623, where it is held that such an assignment may be verbal or in writing, "and if in writing, and the intent and contract of the parties is not fully expressed therein, it may be shown by evidence ali-

after maturity is subject to set-off of cross-judgments by the maker against the payee. *Burham v. Tucker*, 18 Me. 179.

Rights of holder of assigned judgment.

A judgment procured by assignment, which was not rendered when the cross-judgment was assigned to a third person cannot be set off against the latter. *Harper v. Keys*, 54 Ind. 512.

The holder of an assigned judgment cannot insist on a set-off against a judgment which has been assigned. *Goodwin v. Richardson*, 44 N. H. 125.

A judgment assigned to the attorney for services was held not to be subject to the set-off of a judgment obtained against the assignor by a third person, and assigned by him to the judgment debtor, on the ground that his equities were inferior to those of the attorney. *Lundgreen v. Stratton*, 79 Wis. 227.

Waiver.

The right to set off judgments may be waived by neglecting to make the application for set-off pending the action, if the claim is then existing. *Dunkin v. Calbraith*, 1 Browne (Pa.) 47.

After the entry of a judgment in favor of the assignee on the assigned claim, a judgment then existing against the assignor cannot be used as a set-off, since the existence of all defenses to the suit is negatived by the judgment. *Ault v. Zehring*, 38 Ind. 429.

Although it was held in *Harpstrie v. Vasei*, 3 Ill. App. 121, that a judgment against the assignor cannot be set off in a suit on a simple contract by the assignee.

Set-off of contingent liability.

The assignee of a judgment takes it subject to the right of the debtor to set off any sums he may be compelled to pay upon his existing obligation as surety for the creditor. *Neal v. Sullivan*, 10 Mich. Eq. 276.

A surety may set off against a judgment obtained against him by his principal, on private transactions between them and marked for the benefit of one claiming to be trustee for the principal's creditors for the use of the trust, under a parol agreement, the amount which he is compelled to pay because of his principal's default in the obligation upon which he was surety. *Gordon v. Rixey*, 86 Va. 853.

2; *L. R. A.*

Assignment in accordance with prior agreement.

There can be no set-off if a judgment has been assigned to the attorney in payment for services in pursuance of a prior parol agreement, and in turn assigned for value to a stranger, both parties being ignorant of the opposing judgment, although the latter was in existence when the assigned judgment was entered. *Simmons v. Reid*, 31 S. C. 389.

When before the recovery of the judgment, the plaintiff agrees with the attorneys to assign the judgment to them for their costs, which agreement is carried out, the defendant is not entitled to set off against the judgment in the hands of the attorneys a judgment previously recovered by him against the assignor, since at the time the judgment is recovered in favor of the assignor, it does not belong to him, but to the attorneys. *Perry v. Chester*, 53 N. Y. 243; *Ely v. Cooke*, 28 N. Y. 365.

And a similar ruling was made in *Zogbaum v. Parker*, 55 N. Y. 120, on the ground that the equities of the attorney were superior to those of the holder of the opposing judgment.

Set-off on motion.

Set-off has been denied at times on motion when under precisely similar circumstances it might have been allowed in an action to compel it. The motion is a process quite too summary to always meet the requirements of the adjustment of equities such as are usually represented in proceedings to procure a set-off against assignees.

Thus it has been held that a set-off cannot be obtained by motion, where the claim upon which one of the judgments was entered was assigned prior to the judgment. *Swift v. Prouty*, 64 N. Y. 546.

A claim assigned to counsel for services just before judgment is not subject to set-off of another judgment existing at the time, on motion. *Swift v. Prouty*, 6 Hun, 34.

But the fact that a motion to set off judgments has been denied does not bar a suit to obtain such set-off. *Pignolet v. Geer*, 19 Abb. Pr. 287.

Assignment to attorney may defeat his lien.

The assignment of the judgment for costs to the attorney may defeat his lien thereon so as to preclude his objecting to the set-off of a cross-judgment. *Perry v. Chester*, 4 Jones & S 228.

H. P. F.

unds." In this assignment the intent and contract is fully expressed, and, under familiar rules, that writing may not be contradicted, in the absence of an allegation of fraud or mistake. This evidence cannot be considered, but the consideration must be taken to be as expressed in the writing.

8. Appellants contend that it is only mutual judgments that may be set off; that to be mutual they must in fact belong to the respective parties; and that, by the assignment, the judgment against plaintiff ceased to belong to Haywood, and is therefore not a mutual judgment. Appellee's contention is that under section 8097 of the Code, and also under the rules of equity, the right to have these judgments set off against each other arose when, by the verdict, it was determined that plaintiff was indebted to defendant Haywood; and that by the assignment Chapman and Irwin took the judgment subject to all defenses which Benson has against it, including the right of set-off. It requires no citations to show that the judgments must be mutual. If it were not for the attorney's lien and assignment, there would be no question of the right of either party to have these judgments set off. It is well established that the assignee of a judgment takes it subject to any defense which the judgment debtor may have against it. Code, § 2546; *Edmonds v. Montgomery*, 1 Iowa, 148; *Hurst v. Sheets*, 14 Iowa, 822; *Davis v. Milburn*, 8 Iowa, 170; *Burtis v. Cook*, 16 Iowa, 194; *Preston v. Turner*, 36 Iowa, 671; *Ballinger v. Tarbell*, 16 Iowa, 491, 85 Am. Dec. 527; *Tiffany v. Stewart*, 60 Iowa, 211. The attorney's lien is upon "money due his client in the hands of the adverse party." Code, § 215. Plaintiff having the right to have the amount due from him to Haywood set off by his larger judgment against Haywood, there was no money due from him upon which the lien could attach. We understand appellants to rest their defense upon the assignment alone; hence the matter of the lien need not be further noticed. The question is whether the valid assignment of a judgment deprives the judgment debtor of

the right to thereafter have a judgment in his favor against the assignor rendered in a different action before the assignment set off against the judgment assigned. The basis of the right to set off judgments is not different from the right to set off mutual claims of any kind. If these parties had held mutual accounts against each other, and one of them had assigned his account against the other to a third person, and that person sued upon it, the right of the one sued to set up his account against the assignor, as an offset, would hardly be questioned. In such case the assignee takes the account subject to defenses. There is no distinction between such an assignment and an assignment of a judgment. It seems to us entirely clear that Chapman and Irwin took this judgment subject to plaintiff's right to offset it with his judgment, even though at the time they did not know that the judgment in favor of plaintiff was unpaid. *Tiffany v. Stewart*, 60 Iowa, 207, supports the view we have expressed. In that case two judgments were rendered against Henderson in favor of Tiffany, for costs on appeal, which Tiffany had paid. Upon the final trial judgment was rendered in favor of Henderson and against Tiffany. Tiffany sought to offset the judgments in his favor against that in favor of Henderson. Stewart, White, and Parks claimed an attorney's lien and assignment of the verdict and judgment in favor of Henderson. Tiffany asked an injunction against the defendants Stewart, White, and Parks, to restrain them from collecting the judgment against him. This court held that the injunction should have been granted. What is said in that case applies with equal force to this. It is true those judgments were all rendered in the progress of the same action, but they were separate and independent judgments, and though, as said, "they were more than mutual in the ordinary sense of that term," that does not question the mutuality of these judgments. See also *Ballinger v. Tarbell*, *Burtis v. Cook*, and other cases cited above.

The decree of the District Court is affirmed.

WASHINGTON SUPREME COURT.

STATE of Washington, *ex rel.* Thomas M. REED, Jr.,

vs.
W. C. JONES, Attorney-General.

(6 Wash. 452.)

An enrolled bill on file in the office of the secretary of state must be accepted without question by the courts as having been regularly enacted by the legislature.

(June 5, 1893.)

NOTE.—Conclusiveness of enrolled bill.

The question how far courts must treat an enrolled bill as conclusive of the existence of the law including the regularity and validity of its passage through all necessary stages is one of some difficulty. The conclusion which will be reached depends upon the line of argument adopted. One of two different premises is usually adopted as a basis for the decision. Either of these seems perfectly proper and the one will be adopted which at the time

APPPLICATION for a writ of mandamus to compel respondent to approve a bond tendered by relator as one of the board of land commissioners. *Writ granted.*

An Act passed by the state legislature on March 15, 1893, purported to create a board of land commissioners, and charged the attorney-general with the duty of approving the official bond of persons appointed as members of such board. Relator was duly appointed a member of that board under the provision by the act,

seems most important. But the arguments from them lead inevitably to opposite conclusions. The one premise is that the constitution is binding on the legislature and that unless its provisions are complied with the legislative acts will fail. The other is that the legislature is a co-ordinate branch of the government and that it must be presumed to obey its conscience and do its duty and its assertion that it has done so in the manner usually adopted is conclusive of that fact. Of course if

and tendered to respondent a bond which was admitted to be sufficient but which the respondent declined to approve on the ground that the act creating the board had not been constitutionally passed. The objections made by respondent to the constitutionality of the act are as follows: (1.) It was not introduced into either house of the legislature ten days before the date of final adjournment, as provided by section 86, article 2, of the State Constitution. (2.) Section 1 and section 28 of the enrolled bill are substantially different from such sections as they passed both houses of the state legislature. (3.) An important section was added to the bill in the house and was a part of that bill when it passed that body in the regular way, which section was not acted upon by the senate in any way, and does not appear in the enrolled bill. (4.) It appears from the journals that the house and senate did not pass the same bill. That after the bill had received a preliminary consideration by the senate, it was sent to the house and important changes made, and that when it was returned to the senate it was never passed again in that body in the manner provided by section 22, article 2, of the Constitution. The ayes and nays were not called on any of the amendments on the bill so amended.

Further facts appear in the opinion.

Messrs. Greene & Turner, for relator:

Unconstitutionality of the statute, even supposing it to have been in fact unconstitutional, was not a good ground for the attorney-general to refuse his approval of the bond.

It was not for the defendant officer charged with the simple duty of approving an official

bond to sit in judgment upon the constitutionality of this enactment and refuse to approve the bond on the sole ground that the law charging him with the duty of approval was unconstitutional. He should have assumed the constitutionality of the act until the contrary had been decided in some appropriate direct proceeding in a court of competent jurisdiction.

State v. Stevenson, 18 Neb. 416; *Jones v. Black*, 48 Ala. 540; *State v. Crawford*, 14 L. R. A. 258, 28 Fla. 441; *State v. Wrotnowski*, 17 La. Ann. 156; *Dejarnett v. Haynes*, 23 Miss. 600; *Dorman v. State*, 84 Ala. 216; Cooley, Const. Lim. 5th ed. 197.

The act in question is authenticated by the signatures of the presiding officers of both houses and approved by the governor, and being so authenticated this court will not go behind that authentication and search to ascertain whether such facts exist as gave these officers constitutional warrant for their action. It is not a function of the journals under our constitution to enable the courts to try the validity of statutes.

Wash. Const. art. 2, §§ 11, 21, 22, 27, 31; 1 Hill, Statutes & Codes, § 2935; *Ree v. Arundel*, Hob. 109; *Louisiana State Lottery Co. v. Richoux*, 28 La. Ann. 748, 8 Am. Dec. 603; *Green v. Weller*, 32 Miss. 650; *Swann v. Buck*, 40 Miss. 268; *Duncombe v. Prindle*, 12 Iowa, 1; *Eld v. Gorham*, 20 Conn. 8; *Warner v. Beers*, 28 Wend. 172; *Hunt v. Van Alstyne*, 25 Wend. 605, note; *People v. Deolin*, 83 N. Y. 269, 88 Am. Dec. 377; *People v. Marlborough Highway Comrs.* 54 N. Y. 276, 18 Am. Rep. 581; *Sherman v. Story*, 30 Cal. 256, 89 Am. Dec. 93, overruling *Fowler v. Pierce*, 2 Cal. 165; *People v. Burt*,

the constitution requires the evidence of proper action to be preserved its absence may be fatal to the law.

The English rule.

In England there is no written constitution to control the action of parliament and its acts cannot therefore be questioned. Hence the courts there hold that—

The parliament roll is sufficient to prove the authenticity of an act. *Rex v. Jeffries*, 1 Strange, 446.

The journals of parliament are not records and cannot weaken or control a statute which is a record and to be tried only by itself. *Rex v. Arundel*, Hob. 110.

So *no tuel record* cannot be pleaded against a general act of parliament. *The Prince's Case*, 8 Coke, 28.

Even the certificate of the bill from chancery is conclusive without resorting to the original act. *College of Physicians v. Hubert*, 3 Keb. 587.

Decisions holding the enrolled act conclusive.

There are many decisions in this country which go to the full extent of *STATE v. JONES*, *supra*, and refuse to go behind the enrolled bill.

Where the legislature had provided a method of authenticating the revised statutes of the state, the court held that the authenticated statutes became part of the records of the legislature and imported absolute verity. *Eld v. Gorham*, 20 Conn. 8.

The certificate of the presiding officers that the act was passed is conclusive on courts. *Stout v. Grant County Comrs.* 107 Ind. 343.

The right to look behind the enrolled act is not sustainable on the theory of the independence and separate action of the three branches of the state government. *Louisiana State Lottery Co. v. Richoux*, 28 La. Ann. 743, 8 Am. Rep. 602; *Whited v. Lewis*, 25 La. Ann. 568, 23 L. R. A.

The original act is the ultimate proof of the law. *Clare v. State*, 5 Iowa, 509; *Duncombe v. Prindle*, 12 Iowa, 1.

The enrolled bill is better evidence of what law is than the journals. *Fouke v. Fleming*, 13 Md. 362; *Annapolis v. Harwood*, 32 Md. 471.

In considering the effect of omitting a law from the printed volume, the court said: "The highest and most conclusive evidence of a statute is the enrolled bill." *Greer v. State*, 54 Miss. 378.

In *Com. v. Martin*, 107 Pa. 185, the trial judge held that an act was a record which imported absolute verity and could not be impeached by journals which were not records. The supreme court reversed the decision on other points while concurring in most that the presiding judge decided, but the ruling in preference to the records does not seem to have been questioned in such a way as to have brought the matter before the supreme court.

The court cannot look to the journals to see if a constitutional quorum was present when the act was passed. *Evans v. Browne*, 30 Ind. 514, 95 Am. Dec. 710; *Bender v. State*, 53 Ind. 254; *Madison County Comrs. v. Burford*, 98 Ind. 383.

In the following cases it has been held that the authenticated act is conclusive evidence of its existence and contents: *State v. Young*, 32 N. J. L. 20, recognized in *Standard Underground Cable Co. v. Attorney-General*, 46 N. J. Eq. 270; *Sherman v. Story*, 30 Cal. 256, 89 Am. Dec. 93; *People v. Burt*, 48 Cal. 560; *Weeks v. Smith*, 81 Me. 538; *Green v. Weller*, 32 Miss. 650; *Swann v. Buck*, 40 Miss. 268; *Es parte Wren*, 63 Miss. 512, 56 Am. Rep. 825; overruling *Brady v. West*, 50 Miss. 68; *Hunt v. Wright*, 70 Miss. 208; *Pacific Railroad v. The Governor*, 38 Mo. 353, 66 Am. Dec. 673; *State v. Swift*, 10 Nev. 176, 21 Am. Rep. 721; *State v. Rogers*, 10 Nev. 250, 21 Am. Rep. 738; *State v. Glenn*, 18 Nev. 84; *People v. Marlborough Highway Comrs.* 54 N. Y. 276, 18 Am. Rep.

48 Cal. 560; *Pacific Railroad v. The Governor*, 28 Mo. 353, 66 Am. Dec. 673, overruling *State v. McBride*, 4 Mo. 303, 29 Am. Dec. 636; *State v. Swift*, 10 Nev. 176, 21 Am. Rep. 721; *Fouke v. Fleming*, 18 Md. 392; *Evans v. Browne*, 30 Ind. 514, 95 Am. Dec. 710, overruling *Skinner v. Deming*, 2 Ind. 558, 54 Am. Dec. 463, and *Coleman v. Dobbins*, 8 Ind. 156; *Bender v. State*, 53 Ind. 254; *State v. Young*, 32 N. J. L. 41; *People v. Chenango Suprs.* 9 N. Y. 317; *Brodnaa v. Groom*, 64 N. C. 244; *McClinch v. Sturgis*, 72 Me. 288; *South Ottawa v. Perkins*, 94 U. S. 260, 24 L. ed. 154; *Green v. Weller*, 32 Miss. 650; *People v. Starne*, 35 Ill. 138; *Ex parte Wren*, 63 Miss. 512, 56 Am. Rep. 325; *Marshall Field & Co. v. Clark*, 143 U. S. 649, and note, 36 L. ed. 294; *Weeks v. Smith*, 31 Me. 538; *Re Welman*, 20 Vt. 656; *Ex parte Tipton*, 28 Tex. App. 438; *Edger v. Randolph County Comrs.* 70 Ind. 331; *State v. Denny*, 4 L. R. A. 65, 118 Ind. 449; *Clare v. State*, 5 Iowa, 509; *Whited v. Lewis*, 25 La. Ann. 568; *Passaic County Chosen Freeholders v. Stevenson*, 46 N. J. L. 173; *Standard Underground Cable Co. v. Atty-Gen.* 46 N. J. Eq. 270; *State v. Robinson*, 81 N. C. 409; *Kilgore v. Magee*, 85 Pa. 401; *Com. v. Martin*, 107 Pa. 185.

If it should appear that introduction ten days before the final adjournment was necessary to validate this act and the journal evidence as to whether the bill was so introduced is equivocal the act must be held valid.

Pack v. Barton, 47 Mich. 520; *State v. Francis*, 26 Kan. 724; *State v. Peterson*, 38 Minn. 143; *Larrison v. Peoria, A. & D. R.*

Co. 77 Ill. 11; *Schuyler County Supra. v. People*, 25 Ill. 181; *Worthen v. Badgett*, 32 Ark. 496; *Williams v. State*, 6 Lea, 549; *People v. McElroy*, 2 L. R. A. 609, 72 Mich. 446; *Miller v. State*, 3 Ohio St. 475; *Atty-Gen. v. Rice*, 64 Mich. 385; *People v. Burch*, 84 Mich. 406; *Detroit v. Detroit Board of Assessors*, 91 Mich. 78; *Nelson v. Haywood County*, 91 Tenn. 596; *Sackrider v. Saginaw County Suprs.* 79 Mich. 59; *Ex parte Wren, supra*; *Territory v. O'Conner*, 3 L. R. A. 355, 5 Dak. 397; *Happel v. Brethauer*, 70 Ill. 167, 22 Am. Rep. 70.

Mr. W. C. Jones, Atty-Gen., in propria persona:

In the brief of the government filed in the case of *Marshall Field & Co. v. Clark*, 143 U. S. 661, 36 L. ed. 294, an exhaustive collation of the authorities on this subject is given. From that it appears that in twenty-two of the states the courts have unhesitatingly gone to the journals to ascertain whether the legislature has complied with the provisions of the constitution, in the enactment of laws. From that digest it appears that California and Kentucky at first adhered to the English rule, but since the adoption of the new constitution in the former state, the other rule has been adopted, and it would seem from the case of *Norman v. Kentucky Managers of World's Columbian Exposition*, 18 L. R. A. 556, 93 Ky.—, that Kentucky has also placed itself in line with the weight of authorities and the more modern ideas.

The courts will look beyond even the journal and consult the files of the legislature, the

561; *Williams v. Taylor*, 33 Tex. 367; *Usener v. State*, 3 Tex. App. 177.

Of these cases perhaps those which best set out the argument of this side of the question are: *State v. Young*, *Sherman v. Story*, *Green v. Weller*, *Pacific Railroad v. The Governor*, and *State v. Swift, supra*.

There are besides the above some cases in which although the question is not positively decided the judges writing the opinions have plainly indicated a leaning towards that rule.

In *Falconer v. Campbell*, 2 McLean, 195, the court, although stating that the question is not before it, plainly intimates that the enrolled act is conclusive upon the question of its having received the constitutional majority.

In *State v. Robinson*, 81 N. C. 409, where the question was as to the effect of the omission from the act of the signature of the presiding officer of the assembly, the court seems to incline to the opinion that the journals are not competent evidence.

Day Land & Cattle Co. v. State, 69 Tex. 523, shows a disinclination on the part of the court to go behind the legislative action.

The effect of constitutional provisions.

There is another class of cases in which the courts have considered it part of their duties to ascertain that the legislature has complied with the constitutional provisions although conceding as stated by the West Virginia court that, "when an act has been constitutionally passed the court cannot go behind it for any purpose whatever." *Lusher v. Scites*, 4 W. Va. 11.

So the presumption from the enrollment is conclusive except as to matters upon which the constitution makes the validity of the enactment rest. *State v. Wray*, 109 Mo. 594.

So the journals are not admissible to show that the bill did not pass. But this does not preclude an

inquiry into the prerequisites fixed by the constitution of which the journals are required to furnish evidence. *State v. Chester* (S. C.) May 16, 1893.

If the constitution requires certain things, the court may look to the journals to see that they are done. *Hunt v. State*, 22 Tex. App. 396.

The court may take notice of the journals to determine whether or not constitutional requirements were complied with. *People v. Mahaney*, 13 Mich. 431; *Atty-Gen. v. Joy*, 55 Mich. 94; *Callaghan v. Chipman*, 59 Mich. 610.

Provisions as to quorum and recording vote.

One of the provisions of the constitution which are most frequently relied on to give the court the right to inspect the journals is that requiring the record of the yeas and nays, and requiring a certain number of members to be present.

Under a constitution requiring all bills to be passed by yeas and nays votes of record, the court may look to the journals to see if an act was actually passed. *Rode v. Phelps*, 30 Mich. 596; *Detroit v. Detroit Board of Assessors*, 91 Mich. 73.

The journals are competent to show that an act was not passed by the required majority. *Skinner v. Deming*, 2 Ind. 553, 54 Am. Dec. 463.

Journals may be examined to see if the act received the required vote. *Fordyce v. Godman*, 20 Ohio St. 1.

Where the constitution requires the vote to be taken by yeas and nays, to be entered on the journal, and a certain number to pass an act, the court may look to the journal to see if the act was passed. *Osburn v. Staley*, 5 W. Va. 85, 13 Am. Rep. 640.

Resort to the journals is not precluded by a constitutional provision that the bills shall be signed by the presiding officers in open session and the fact noted on the journals when it elsewhere provides that each house shall keep a journal and that after a bill has been rejected, no similar bill shall

original bills on file in the office of the secretary of state or any other competent evidence to determine these questions.

Under our constitution it would seem that the court must of necessity examine the files and original bills in case any question is presented which necessitates such an examination for its correct solution.

Article 2, § 38, provides as follows: "No amendment to any bill shall be allowed which shall change the scope and object of the bill." When it is alleged before our courts that any act is obnoxious to the constitution because the legislature has violated this provision by allowing an amendment to a bill which changed its "scope and object," the court can only determine the question by examining the bill as it was originally introduced, the amendments which were made and the bill as finally passed.

See *Cooley*, Const. Lim. p. 163; *Sutherland*, Stat. Constr. pp. 42-45; *State v. Platt*, 2 S. C. N. S. 159, 16 Am. Rep. 647; *State v. Hagood*, 18 S. C. 57; *Ramsey County Supra. v. Heenan*, 2 Minn. 330; *Mercade v. Down*, 64 Wis. 327; *People v. De Wolf*, 62 Ill. 253; *Opinion of Justices*, 35 N. H. 579, 52 N. H. 622; *Moody v. State*, 48 Ala. 115, 17 Am. Rep. 28; *Jones v. Hutchinson*, 43 Ala. 721; *Stein v. Leeper*, 78 Ala. 517; *Berry v. Baltimore & D. P. R. Co.* 41 Md. 446, 20 Am. Rep. 69; *Legg v. Annapolis*, 42 Md. 203; *Norman v. Kentucky Managers of World's Columbian Exposition, supra*; *Nelson v. Haywood County*, 91 Tenn. 596.

be passed at the same session. *Brewer v. Huntingdon*, 36 Tenn. 732.

Under a constitutional provision that on the final passage of bills, the vote shall be by yeas and nays, entered on the journal, and that no bill shall become a law without a concurrence of a majority of the members elected, the court to determine whether or not a bill was constitutionally passed will look to the journals. *San Mateo County v. Southern Pac. R. Co.* 13 Fed. Rep. 722.

But the Supreme Court of the United States has held that a constitutional provision that each house shall keep a journal of its proceedings and the yeas and nays of the members shall be entered thereon, does not make the journal better evidence of the bill as passed by the legislative body, than the bill as enrolled, attested by the presiding officers of each house, signed by the president, and deposited in the office of the secretary of state. *Marshall Field & Co. v. Clark*, 143 U. S. 649, 38 L. ed. 294.

Although in *United States v. Ballin*, 144 U. S. 1, 36 L. ed. 321, the court assumes without deciding that the journals may be resorted to for the purpose of determining whether or not constitutional requirements were complied with in passing a law, although at the same time pointing out matters which suggest the unreliability of such evidence.

Requirements as to special legislation.

Where the constitution requires notice to be given of intention to introduce special or local bills, and that the legislature shall provide the means for obtaining and preserving the evidence thereof, the authentication of the bill is not conclusive, but the courts may look to the preserved evidence to see if the requisite notice was given. *Passaic County Chosen Freeholders v. Stevenson*, 48 N. J. L. 173.

But in *Arkansas* it was held that no issue can be raised in the courts as to whether or not the legislature complied with the constitutional require-

Hoyt, J., delivered the opinion of the court:

Respondent, as attorney-general, was charged by an act of the legislature, or what purports to be such, with the duty of approving the bond of the relator as one of the board of state land commissioners provided for by said act. This duty he refused to perform, on the ground that what purported to be the act of the legislature was not in fact such, for the reason that the constitutional requirements had not been observed by the legislature in its passage. This proceeding is brought on the part of the relator to compel such action by respondent.

There is a line of authorities which we might follow and dispose of this case without at all entering into the question as to whether or not in fact said purported act of the legislature should have force as such; but in view of the great importance of a prompt determination of the question as to whether or not said purported act is in force, and of the further fact that the elaborate briefs filed upon the part of the respective parties will enable the court to as intelligently determine that question in this proceeding as in any other, we have concluded that our duty to the parties and to the public will be best performed by disregarding all preliminary questions which might be raised, and determining the rights of the parties upon the broad ground, upon which it has been largely argued, as to whether or not such purported act is in fact a part of the statute law of this state.

ments as to notice of special legislation. *Davis v. Gaines*, 48 Ark. 370.

General expressions as to compliance with constitution.

If it appears affirmatively on the journal that in the passage of any bill some mandatory provision of the constitution has not been complied with it will be fatal to the validity of the statute. *Smithee v. Garth*, 33 Ark. 17.

It is well settled that courts will look to the legislative journals to ascertain whether or not the act in fact passed in accordance with the forms and in the manner prescribed by the constitution. *Worthen v. Badgett*, 32 Ark. 493.

The courts are gravitating towards the English rule, for while they say that the enrolled bill is not conclusive of the valid enactment of a law and that they may look behind it to the journals, they supply by presumption everything necessary to its validity save where the journals affirmatively show a violation of the constitution. *Glidewell v. Martin*, 51 Ark. 559.

Courts will see if constitutional provision is complied with. *Weill v. Kenfield*, 54 Cal. 111.

The courts may go behind the act itself to inquire whether or not the legislature or the executive has violated or disregarded the mode pointed out by the organic law. The power is incident to all courts of general jurisdiction and necessary to the protection of public rights and liberties. *Fowler v. Pierce*, 2 Cal. 165.

The bill is a nullity if the journals show that the constitutional requirements were not complied with. *McCulloch v. State*, 11 Ind. 424.

The journals may be examined to ascertain whether or not the act was constitutionally passed. *People v. Burch*, 34 Mich. 408.

As to fact of passage.

Some of the cases contain expressions at least

It is claimed on the part of the respondent that it cannot have such force, by reason of the fact that the legislature has not complied with the constitutional requirements by which a certain subject-matter can be enacted into a law. It is not contended but that the enrolled bill on file in the office of the secretary of state is in all respects regular upon its face, and bears the signatures of the presiding officers of the respective houses of the legislature in due form, and has been regularly approved by the governor, and deposited in said office, as required by the provisions of the constitution in that regard; but it is claimed that an examination of the journals of the respective houses will show that the legislature disregarded several mandatory provisions of the constitution which it was incumbent upon them to observe before any bill could become a law. The argument upon what is shown by the journal, and the effect thereof, has been elaborate and full; and the publicity which has been thereby given to the manner in which such journals have been kept, and the want of care exercised by the legislature in seeing that a compliance with constitutional provisions is made to appear therein, cannot but be beneficial, whatever may be the effect thereof in the decision of the question now before the court.

Preliminary to entering upon the question thus argued, we must decide another question, which, if determined adversely to the position of the respondent, will make it improper for us to enter at all upon the dis-

cussion as to the effect of the journal entries above referred to. This is as to the effect to be given to the enrolled bill on file in the office of the secretary of state. It is claimed on the part of the relator that such enrolled bill is absolutely conclusive of the fact that it had been regularly enacted into a law by the legislature, and, if this be true, it is of course immaterial as to what the journals or any other proof may or may not show upon this subject. As to just what force the respondent is willing to concede to such enrolled bill is not entirely clear from his argument, though it may probably be fairly deduced therefrom that he is willing to concede that it prima facie establishes the fact of the regularity of its passage through the legislature, but that such prima facie proof is overcome whenever there is a suggestion to the court that the journal or other competent proof shows that some constitutional requirement has not been complied with; that, upon such suggestion, the courts must take judicial notice of what the journals show in that regard, and, if it appear to the court therefrom that there has been such violation of constitutional requirements, it must be held that the enrolled bill is not in force as a law. That this is the position of the respondent seems certain from the line of authorities which he has cited to sustain it, as nearly or quite all of them hold that such prima facie presumption attaches to the enrolled bill. If this is not his position, then it must be that the enrolled bill is proof of nothing, and that in every case the courts

which tend to show that the journals may be examined as to each and every step in the course of the passage of a bill, and that the enrollment creates merely a presumption in favor of the bill which may at any time be overthrown by evidence furnished by the journals. Of course such a rule makes the journals a record of higher grade than the enrolled bill.

In *State v. Hagood*, 13 S. C. 46, the chief justice in discussing the question of the right of the court to go behind the enrolled act, said: "Fictions of law are often convenient when dynastic interests are to be upheld against the reason that commends popular rights, but have no place in interpreting the instrument from which all governmental power springs and by which its efficacy is to be tested."

The court will look to the journals to ascertain whether or not a statute has a legal existence. *Jones v. Hutchinson*, 43 Ala. 721; *Moody v. State*, 48 Ala. 115, 17 Am. Rep. 28; *Henderson v. State*, 94 Ala. 95.

The court may go behind the certificate of the presiding officers as to the fact of passage. *State v. McLeiland*, 18 Neb. 236, 53 Am. Rep. 814; *State v. Robinson*, 20 Neb. 95.

The journals are official records. *State v. Wright*, 14 Or. 365.

In Illinois the legislative journals may be resorted to. *Walnut v. Wade*, 108 U. S. 683, 26 L. ed. 526.

In *Miller v. State*, 3 Ohio St. 475, it is assumed that the journals might be looked at.

The court may examine the journals for certain purposes. *People v. McElroy*, 2 L. R. A. 609, 72 Mich. 446; *Sackrider v. Saginaw County Suprs.* 79 Mich. 59; *Stow v. Grand Rapids*, Id. 595.

In *People v. McElroy*, *supra*, the court stated that in Michigan it has been the practice of the 23 L. R. A.

court to look into the journals, and the judge writing the opinion states that in his opinion it is right for the courts to look to the journals for certain purposes, although he further states that it is not necessary to determine in that case how far it may be examined to impeach duly authenticated acts.

The courts cannot wholly ignore the journals. *State v. Francis*, 26 Kan. 724; *Re Vanderberg*, 23 Kan. 243; *Weyand v. Stover*, 35 Kan. 545.

The prima facie validity of a bill may be overcome by evidence furnished by the journals. *Illinois Cent. R. Co. v. People*, 19 L. R. A. 119, 143 Ill. 424.

The enrolled bill is not conclusive. *Smithee v. Campbell*, 41 Ark. 471.

Gaines v. Horrigan, 4 Lea, 608, stated that the weight of authority was that journals were admissible but refused to determine whether or not such was the rule in Tennessee.

Also in Kentucky it has been stated that the majority of the states permit resort to the journals. *Norman v. Kentucky Managers of World's Columbian Exposition*, 18 L. R. A. 556, 98 Ky. —.

It is stated in the brief of the attorney-general in the case of *Marshall Field & Co. v. Clark*, 143 U. S. 649, 36 L. ed. 291, that in Wyoming the journals may be examined,—citing *Brown v. Nash*, 1 Wyo. Terr. 85; *Union Pac. R. Co. v. Carr*, 1 Wyo. Terr. 96.

In the following cases it is held that the enrolled act is not conclusive but that the court may resort to the journals for the purpose of overthrowing it under certain circumstances. *Re Roberts*, 5 Colo. 525; *Illinois Cent. R. Co. v. Wren*, 43 Ill. 77; *Larrison v. Peoria, A. & D. R. Co.* 77 Ill. 11; *Sins v. Weber*, 81 Ill. 283; *People v. Loewenthal*, 93 Ill. 191; *Wenner v. Thornton*, 98 Ill. 158; *Coleman v. Dobbins*, 8 Ind. 156; *Coburn v. Dodd*, 14 Ind. 347; *Cordell v. State*, 22 Ind. 4; *Ramsey County Suprs. v. Heenan*, 2 Minn. 330; *State v. Gould*, 31 Minn. 189

and all the inhabitants of the state must take notice of the course of the legislature as to every step relating to the passage of a bill, so far as such steps are made obligatory upon the legislature by the constitution. If the courts were to hold with this latter contention, it would lead to such results as to almost justify revolution on the part of the people. With such a construction once sanctioned by the courts, it would follow that, in however good faith an individual or an officer might act in view of the law as it appeared in the enrolled bill, such seeming law or such good faith could in no manner protect him from the result of his acts if in fact the journals failed to show that the act had been regularly passed by the legislature. Hence a person might, while supposing that he was acting directly in accordance with the laws of the state, be in fact committing a crime, and an officer who should venture to pay out money in pursuance of what thus seemed to be the law could be called upon to account for the same as having been paid out in violation of all law if in fact such seeming law had not been constitutionally passed, as shown by the legislative journals. That such must be the result if the signing by the presiding officers and the approval by the governor are to be considered only as steps in the act of making the bill a law, and not in themselves proof of such fact, seems clear under well-settled rules relating to construction. If such signing and approval are only steps, then the fact that they have been taken in no manner proves that

any other required step has been taken, and it must follow that, before the courts can find that the bill has become a law, they must look and see that all the steps required by the constitution to constitute it such have been observed by the legislature. Such a construction given to the enrolled act would render it practically impossible for the courts even to determine what was the law, and would render it absolutely impossible for the average citizen to ascertain that of which he must at his peril take notice. There is enough injustice in requiring the citizen to take notice of the statute law when to do so he has only to determine the legal effect of the enrolled acts on file in the office of the secretary of state, and, if he is further required to take notice of all that is shown by the journals of the legislature which may affect the regularity with which such acts have been passed, he will indeed be in a sorry condition. The absolutely disastrous result of this construction has led the courts which have held that they could go behind the enrolled act to adopt the theory, which seems to us to be entirely illogical, that the enrolled acts *prima facie*, but not conclusively, establish the fact of their regular enactment. Such holding compels the further one that, whenever the attention of the courts is directed to the particular parts of the journal which show a want of compliance with constitutional requirements, the courts must take judicial notice of all facts therein contained in relation to the point to which their attention has thus been called, and, if such

State v. Mead, 71 Mo. 266; *Ballou v. Black*, 17 Neb. 389; *Opinion of the Justices*, 35 N. H. 579, 45 N. H. 607, 52 N. H. 622; *Gatlin v. Tarboro*, 78 N. C. 119; *Nelson v. Haywood County*, 91 Tenn. 596.

In a few of the cases in this class the statutes have been attacked for failure to comply with some constitutional requirement, or the court has limited the right to go to the journals to such cases: as in *Spangler v. Jacoby*, 14 Ill. 207, 58 Am. Dec. 571; *People v. Starne*, 35 Ill. 126; *People v. DeWolf*, 68 Ill. 233; *Ryan v. Lynch*, 68 Ill. 160; *Turley v. Logan County*, 17 Ill. 151; *Prescott v. Illinois & M. Canal Trustees*, 19 Ill. 324; *State v. Brown*, 20 Fla. 407.

If it affirmatively appears that the act was not passed, the court will pronounce it invalid. *State v. Rogers*, 23 Or. 348; *Currie v. Southern Pac. Co.* 31 Or. 566.

To contradict enrolled bill.

In accord with the expressions found in cases cited under the last preceding subdivision some of the courts have held that the enrolled bill was not conclusive, even upon the question of the language of the act, but that it might be contradicted or corrected by entries found in the journals.

The journals may be consulted to determine what the act was which passed the legislature and whether or not it corresponds with the enrolled act. *State v. Platt*, 3 S. C. N. S. 150, 16 Am. Rep. 647; *State v. Deal*, 24 Fla. 203.

The court may examine the journals to see whether or not the act as published was the one which received the assent of the legislature. *Berry v. Baltimore & D. P. Co.* 41 Md. 446, 20 Am. Rep. 69; *Legg v. Annapolis*, 42 Md. 203; *Strauss v. Heise*, 48 Md. 292.

The act will be declared void if it differs materially from that shown by the journals to have 23 J. R. A.

been passed. *Moog v. Randolph*, 77 Ala. 597; *Sayre v. Pollard*, Id. 608; *Abernathy v. State*, 78 Ala. 411; *Stein v. Leeper*, Id. 517.

Journals may be examined to determine what the bill is. *Chicot County v. Davies*, 40 Ark. 200.

In *Hollingsworth v. Thompson*, 45 Ia. Ann.—, the court looked into the journals upon an allegation that the act as published was not the same as the one enacted, without any extended discussion of the right to do so, and also without noticing its former decisions on the subject.

Where the enrolled bill showed interlineations on its face, the court looked to the journals stating that the rule of *Green v. Weller* must be received with some qualification. *Brady v. West*, 50 Miss. 68.

But in Texas it has been held that the journals are not admissible for the purpose of showing that the enrolled bill is not the one which passed the house. *Re Tipton*, 8 L. R. A. 326, 28 Tex. App. 438.

How far journals may establish a law for which no enrolled bill is found.

The journals cannot be used to show the passage of a law which cannot be found among the enrolled acts. *Graves v. Alsap*, 1 Ariz. 274.

That the act contained an emergency clause when passed cannot be shown by the journals. *Re General Appropriation Bill*, 16 Colo. 539.

The journals cannot be used to add an alleged omission to the enrolled bill. *State v. Leidtke*, 9 Neb. 462.

But in Texas it has been held that the journals may show the passage of a bill if other evidence is wanting. *Houston & T. C. R. Co. v. Odum*, 58 Tex. 343.

It seems that in some of the states no weight whatever is given to the enrollment, but the whole question of the existence of the law is determined from the journals alone. In such jurisdictions the

journals show any want of compliance with the mandates of the constitution, declare such prima facie presumption overcome, and the law invalid. The result of this construction will lead to results as disastrous and embarrassing as would the other construction of which we have been speaking. For a number of years after the passage of an act it may be given force by the courts, by reason of the prima facie presumption flowing from the finding of the act regularly enrolled and signed in the office of the secretary of state. Then, after said act, to all intents and purposes, has been treated as in force during all of these years, upon the suggestion of some person that there was a fatal omission in the journal entries regarding the passage thereof, the court must take judicial notice of such facts, if shown by the journal, and from that time on it must be held, not only that such bill was not then a law, but that it never had been such. The confusion as to rights and duties growing out of such a state of uncertainty as to what the statute law of the state is may well appall one who even superficially contemplates the same. Worse than this may happen, however. The suggestion as to the invalidity of the law may be made to one superior court in the state, and from that moment such court must hold the law invalid if the journal shows any constitutional irregularity in its passage; while in another superior court said act will still be given full force as a law, by reason of the fact that no suggestion has been made which will authorize the court to go behind the

prima facie presumption flowing from the enrolled bill. If, from the enrolled bill on file, it can be conclusively presumed that it has been regularly enacted by the legislature, none of these evil consequences will follow, and the duty of the courts will be confined exclusively to ascertaining the effect of such law. It follows that, as a matter of public policy, as well as of convenience and certainty, the court should adopt the rule which makes such enrolled bills conclusive evidence of their regular enactment, if it can do so without violating some fundamental constitutional provision or well-settled rule of construction. As we have already stated, none of the cases cited by respondent go to the extent of holding, as first above suggested, that the enrolled act on file is proof of nothing at all, and that the fact of its being thus found on file must be supplemented by the further affirmative finding from the journals that it has been regularly enacted before it can be given any force whatever; nor have we been able to find any cases going to that extent. We may therefore dismiss that construction from further consideration, though to us it seems to follow more logically from the course of the argument of respondent than does that upon which, under the authorities, he must rest his case.

As a basis for our further discussion, then, it may be accepted as a fact that all of the courts hold that these enrolled bills are prima facie the law, and that they must be given force as such until their invalidity is suggested in some proceeding. Yet to hold that

signatures of the presiding officers to the bill are not necessary. *Speer v. Alleghany & M. Pl. Road Co.*, 22 Pa. 373; *Cottrell v. State*, 9 Neb. 128.

The fact of passage might be determined from the journals. *Leavenworth County Comrs. v. Higginbotham*, 17 Kan. 62.

Although if the enrollment was to be considered as a record the signatures of the presiding officers to the bill would be essential, as was held in an Ohio case. *State v. Kleesewetter*, 45 Ohio St. 263.

The New York decisions.

The New York decisions are not very satisfactory on this question. The early cases held that—

The objection that the act was not passed by the constitutional majority cannot be taken by demurrer. *Thomas v. Dakin*, 22 Wend. 9.

In *Warner v. Beers*, 23 Wend. 172, it is intimated that the bill is conclusive with the possible exception of the question whether or not it received the vote required by the constitution.

In *Hunt v. Van Alstyne*, 25 Wend. 605, the chief justice stated that in his opinion the court could not go behind the certificate of the presiding officers to determine whether or not the bill received the constitutional majority.

In *Commercial Bank of Buffalo v. Sparrow*, 2 Denio, 97, it was held that the original act may be inspected, but as that referred simply to the enrolled bill as against the printed one, the case is not very valuable on this question.

In *People v. Purdy*, 2 Hill, 84, it is stated that the court may look beyond the printed statute back to the enrolled bill, and that case was affirmed on that point in 4 Hill, 384, while Senators Page and Franklin were of opinion that the investigation might extend to the journals. The court may examine the original law on file in the office of the secretary of state. And it seems that the journals

may also be consulted. *De Bow v. People*, 1 Denio, 9.

The later cases have likewise exhibited an uncertainty which suggests a doubt as to what is the rule in that state.

It is not permissible to prove that a quorum was not present or that the yeas or nays were not entered on the journal. But the court states that the failure of the presiding officer to state that a required three-fifth majority were present at the passage of the act is not conclusive that it was not, but that fact can be shown by the journals. *People v. Chenango Supra*, 8 N. Y. 317.

Courts cannot go to the journals to impeach a statute. *People v. Devlin*, 33 N. Y. 269, 33 Am. Dec. 377.

Whenever the question arises as to the constitutionality of a statute the court may resort to any source of information which in its nature is original evidence of any fact relating to the inquiry including the journals of the legislature. *People v. Petrea*, 32 N. Y. 128.

The certificate to the original bill may be aided by the journals. *Rumsey v. New York & N. E. R. Co.*, 130 N. Y. 88.

Special circumstances.

The journals will not be searched to overthrow a law after it has been recognized and acted upon for a long period of years, in this case nearly ten. *Mitchell v. Campbell*, 19 Or. 198.

In case where the certificate of the proper officers raised a doubt as to whether or not the act had passed the court thought proper to look into the journals to determine that question. *Burr v. Ross*, 19 Ark. 250.

The legislative journals will not be consulted to determine the validity of an act creating a court which was duly enrolled, signed by the presiding

his *prima facie* presumption attaches, and a conclusive one does not, seems to us to be illogical in the highest degree. Besides, there is something ridiculous in holding that there can be such a thing as a *prima facie* law. It is true that it is frequently the duty of courts and citizens to accept certain things as *prima facie* proof of what the law is, but that is an entirely different proposition from holding that a certain thing is *prima facie* a law. An act of the legislature, when regularly on file in the office of the secretary of state, is, and must necessarily be, either a law or not a law; and it is preposterous to hold that that which is the law is so only *prima facie*, or to hold that that which is in fact not a law is even *prima facie* so. What constitutes the statutory law of a state must necessarily be an absolute proposition, and not simply a *prima facie* one. The statutes published by authority do not purport to be the law; they only purport to be copies of the law as it is, and *prima facie* show that fact. It is perfectly competent for the legislature not only to so provide, but it may in almost any other way provide what may *prima facie* be taken to have the force and effect of the original law, but this is the extent to which the legislature can go. It can provide various methods of proving the existence of the original law other than its actual production, but the entire force of all these substitutes is to show what the original law on file in the office of the secretary of state is. The enrolled bill on file is either what it purports to be,—a law regularly

passed through the legislature,—or it is nothing whatever. If it was in fact regularly passed, it is a law; not simply *prima facie* a law, but conclusively so. If the courts can give any force whatever to the fact that it has not been regularly passed through the legislature, then the courts must take it as the facts show, and cannot, in the event of its not having been regularly passed through the legislature, give it any force whatever. But, as we have seen, there are none of the courts but what go so far as to hold that such enrolled bills are *prima facie* the law. Upon what ground can they do this? We are unable to discover but one ground upon which any satisfactory reasoning can be founded, and that is because they are the final records of the acts of the legislative department, regularly certified by it, as required by the constitution, for the information and guidance of the other departments of the government. If they are not such final records, then the placing of them on file, signed and approved, can be no more than one of the steps devolving upon the legislature in making a law, and, until the other necessary steps are also made to appear, there is nothing to show the court in any manner whatever that the necessary steps to make it a law have been taken. It seems therefore to follow as a necessary conclusion that all of the courts have looked upon these enrolled bills as the final records of the legislative department in the enactment of law, and, if this is so, why should they not be given the sanctity and force incident to final records? If they are final rec-

officers of each house, approved by the governor, and promulgated with the other laws of the session in a collateral attempt to impeach a judgment of the court by showing that it was not lawfully constitutional. *Comstock v. Tracey*, 46 Fed. Rep. 163.

What evidence may be considered.

The court will not go behind the journals. *Wise v. Bigger*, 79 Va. 209; *Miller v. Goodwin*, 70 Ill. 559.

Courts will not go behind the act itself, the enrolled bill, and the journals. *Hughes v. Felton*, 11 Colo. 489.

Parol evidence is not admissible to impeach the enrolled bill. *State v. Smith*, 44 Ohio St. 343.

In deciding that extrinsic evidence cannot be given to show that proper notice was not given of the introduction of a local law, the court said: "The legislative journals are the only evidence which courts can receive in an attack of this kind upon the constitutionality of an act." *Speer v. Athens*, 9 L. R. A. 402, 85 Ga. 49.

As to the consideration of extrinsic evidence to show unconstitutionality of statute, see *note* to *Stevenson v. Colgan* (Cal.) 14 L. R. A. 459.

Evidence.

The impeaching evidence must be offered. The appellate court will not examine the journals for the first time when the case reaches it. *Bedard v. Hall*, 44 Ill. 91; *Grob v. Cushman*, 45 Ill. 119.

Evidence to overthrow the statute must be introduced to the trial court. *State v. Brown*, 33 S. C. 151.

The court will not take judicial notice of the journals. *Burt v. Winona & St. P. R. Co.* 31 Minn. 472.

The invalidity of a statute cannot be proved by admissions of the parties. *Happel v. Brethauer*, 70 Ill. 167, 32 Am. Rep. 70, 23 L. R. A.

Parties cannot stipulate that the act was not properly passed. *Atty-Gen. v. Rice*, 64 Mich. 385.

Collateral decisions.

Many of the decisions which are sometimes referred to as authorities upon the question whether or not the court could look into the journals to determine the existence or constitutionality of a statute have turned upon the question of the effect of the failure of the journals to state certain facts and are therefore of no positive authority upon the main question, and are valuable merely as showing the policy of the court in reference to going behind the enrolled bill.

Among the cases of that class are the following: *South Ottawa v. Perkins*, 94 U. S. 260, 24 L. ed. 154; *Amoskeag Nat. Bank v. Ottawa*, 105 U. S. 867, 26 L. ed. 1204; *Illinois v. Illinois Cent. R. Co.* 33 Fed. Rep. 761; *Harrison v. Gordy*, 57 Ala. 49; *Walker v. Griffith*, 60 Ala. 361; *Hall v. Steele*, 52 Ala. 562; *Jennings v. Russell*, 92 Ala. 603; *Vinsant v. Knox*, 27 Ark. 268; *English v. Oliver*, 28 Ark. 317; *State v. Little Rock & M. R. Co.* 31 Ark. 701; *State v. Crawford*, 35 Ark. 237; *People v. Dunn*, 80 Cal. 212; *Territory v. O'Connor*, 3 L. R. A. 355, 5 Dak. 397; *Schuyler County Suprs. v. People*, 25 Ill. 181; *Wabash R. Co. v. Hughes*, 38 Ill. 189; *State v. Robertson*, 41 Kan. 200; *Chicago, K. & N. R. Co. v. Manhattan*, 45 Kan. 419; *State v. Hastings*, 24 Minn. 78; *State v. Peterson*, 38 Minn. 143; *Lincoln v. Haugan*, 45 Minn. 451; *Hull v. Miller*, 4 Neb. 503; *State v. Van Dryn*, 24 Neb. 566; *Mumford v. Sewall*, 11 Or. 71, 50 Am. Rep. 463; *Bond Debt Cases*, 12 S. C. 200; *State v. McConnell*, 3 Lea, 332; *Williams v. State*, 3 Lea, 549; *Blessing v. Galveston*, 42 Tex. 641; *Bound v. Wisconsin Cent. R. Co.* 45 Wis. 543.

The court looked into the journals in *Division of Howard County*, 15 Kan. 194, without deciding whether or not it had the right to do so, but held

ords in any sense whatever, it is because under the provisions of the constitution, interpreted in the light of the universal practice of legislative bodies, it must be held that such bodies are authorized to make up an authoritative record certified in a certain way, and that this record, when so made up, carries with it as a necessary import the fact that all the steps which led up to the making of such record have been regularly taken; and, if from such record it can be *prima facie* presumed that all the necessary steps have been taken, it seems to logically follow that such facts should be conclusively presumed therefrom. The legislature is a co-ordinate branch of the government, and cannot in any sense be said to be an inferior body. Consequently its final record, when certified and recorded as required by the constitution, imports absolute verity. There is no reason why the final record thus made up by the legislative department of the government should not be conclusive of the fact that all the steps necessary to make up such record had been regularly taken, the same as the judgment of a court of competent jurisdiction is of all the facts necessary to sustain it. The decree of a court of general jurisdiction, if fair upon its face, proves itself, and is conclusive of all the facts necessary to sustain it, and, upon principle, the same rule should obtain as to the final record of the legislature in the enactment of a law. In this regard it may be suggested that the final record of a court of general jurisdiction may be attacked upon several grounds, and the attack sustained by proof of what occurred in the progress of the case before it was made up. This is only true when such attack is made in a direct proceeding against such record, and never when the same is brought in question collaterally; and, as there is no method provided by the constitution or laws for a direct attack upon an enrolled bill, it follows that, if an attack upon it is to be made at all, it must be made in a collateral proceeding; hence the point we are

trying to make is aided, instead of met, by such suggestion.

But it is argued with great force on the part of the respondent that if the courts do not look into the proceedings of the legislature, and set aside laws when not enacted with the formalities required by the constitution, the legislature can at pleasure nullify all such provisions. This is no doubt true, and it is upon this line of reasoning that those courts which have gone behind the enrolled bill have justified themselves in so doing. This line of reasoning seems to assume that the judicial department is charged with seeing that all the mandatory provisions of the constitution are complied with. But is this a reasonable construction in view of the theory of our government, and the principles enunciated in our constitution? Each of the three departments into which the government is divided are equal, and each department should be held responsible to the people that it represents, and not to the other departments of the government, or either of them. What are the respective duties of these departments? They may be briefly stated thus: The legislature enacts laws, and is commanded by the constitution to enact them in a certain way. The executive enforces the laws, and by the constitution it is made his duty to take certain steps looking towards such enforcement in the manner prescribed therein upon the happening of certain contingencies. The judicial department is charged with the duty of interpreting the laws, and adjudging rights and obligations thereunder. What is the law upon which the judicial department must thus determine rights and obligations? It is—First, the constitution of the state; second, so much of the common law as is in force here, and the laws of the legislature; and, third, the acts of the executive department in those matters in which, under the constitution, it is given the power to exercise discretion under certain contingencies. Such being the respective duties of the several departments,

that even by so doing, the enrolled bill was not avoided.

In *Norman v. Kentucky Managers of Worlds Columbian Exposition*, 18 L. R. A. 556, 93 Ky.—, the question is not decided, but there is a valuable discussion of principles and authorities in the dissenting opinion.

In *Bradley v. West*, 60 Mo. 33, the court decided the case on the ground that the question cannot be raised in the supreme court for the first time.

In *Lyman v. Martin*, 2 Utah, 136, the question was raised but not decided.

The enrolled bill is the best evidence as between it and the printed statutes. *Central R. Co. v. Hearne*, 32 Tex. 546.

The printed law may be rebutted. *Meracle v. Down*, 64 Wis. 323.

Vacillation of judicial opinion.

It will be noticed that in many instances decisions from the same state appear on both sides of the question, and it is a fact that many of the states have changed their rule once, and sometimes two or more times, and in some instances where judges have felt themselves bound by precedent to follow the rule established they have expressed their

dissatisfaction with it and their conviction that the rule which had not been adopted in their state was the proper one.

As illustrations of the change of opinion, see the New York decisions cited *supra*. Compare *Marshall Field & Co. v. Clark*, 143 U. S. 649, 36 L. ed. 294, with *United States v. Ballin*, 144 U. S. 1, 36 L. ed. 321; *Fowler v. Pierce*, 2 Cal. 165, and *Weill v. Kenfield*, 54 Cal. 111, with *Sherman v. Story*, 30 Cal. 253, 39 Am. Dec. 93, although in California there was a change of constitutional requirements which may account for the second change of opinion. Examine also the Mississippi and Indiana and Texas decisions as cited *supra*. The Missouri decisions also show some change. In fact the court seems to be exceptional which has adopted at the outset a rule which has proved perfectly satisfactory.

In *State v. Moore*, 36 Neb. —, the court in following *State v. McLelland*, 18 Neb. 236, 53 Am. Rep. 814, says: "Were the question a new one, they would say that a bill duly deposited and authenticated would import absolute verity."

In *Webster v. Little Rock*, 44 Ark. 536, the writer of the opinion expressed his individual preference for the English doctrine but followed the precedents of the state.

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it seems to us that the acts of each of them, when certified as required by the constitution, or by such a universal course of practice as to have the force of a constitutional provision, should be conclusive upon each of the other departments; and there would seem to be no more impropriety in the legislature seeking to go behind the final record of a court, for the purpose of determining whether or not it had obeyed the constitutional directions in making such a record, than there would be in the courts seeking to go behind the final record made by the legislative department. As we have seen, the executive, under the constitution, is charged with doing certain things upon certain contingencies happening, and under the constitution he is given no power thus to act excepting upon such contingency; yet if the governor determines that such contingency exists, and acts in pursuance thereof, no court, so far as we have been able to see, has ever sought to inquire into the fact as to whether or not the contingency upon which the governor had founded his action in fact existed. For instance, under the constitution, the governor is authorized to convene the legislature upon extraordinary occasions, and there would seem to be the same reason for a court refusing to give force to his proclamation thus convening the legislature if upon investigation it found that the extraordinary occasion upon which the governor had assumed to act did not in fact exist as there would be to go back of the record made by the legislature. To preserve the harmony of our form of government it must be held that these several mandatory provisions are addressed to the department which is called upon to perform them, and that neither of the other departments can in any manner coerce that department into obedience thereto. Courts have gone behind the final records of the legislative department upon what seems to us a false theory. They have assumed that the mandatory provisions of the constitution are safer if the enforcement thereof is intrusted to the judicial department than if so intrusted to the legislature; in other words, they have acted upon the presumption that their department is the only one in which sufficient integrity exists to insure the preservation of the constitution. How the courts have obtained this idea is somewhat difficult to ascertain, but that they entertain it, and have allowed it to influence their decisions, is so evident that even a superficial examination of such decisions will satisfy any one of the fact.

But it is said that all courts assume some superiority over the legislature, for the reason that they refuse to give force to an act which upon its face violates some provision of the constitution. A brief examination will show that such conclusion is unwarranted by the fact stated. The courts are called upon to adjudicate rights under the laws of the state. Those laws are made up of the provisions of the constitution, the common law, and the acts of the legislature, and the acts of the executive when by the constitution he is authorized to act in such a way as to affect rights or obligations. The con-

stitution comes to all of the departments directly from the people, and is the supreme law of the land, and can in no manner be changed or affected by the action of either the legislative or executive department. The rest of the law comes to each of such departments, authenticated in the way the constitution or custom requires, from the hands of the other departments; and though they each take it as verity, and give it the full force which it can derive as the expressed will of the department from which it emanates, yet when it comes in conflict with the constitution, it must yield, for the reason that such constitution has a sanction greater than could be given by the action of all of the departments, and must stand as against the action of any one or all of them. Upon principle, then, in view of the division into departments under our form of government, each of equal authority, one department cannot rightfully go behind the final record certified to it or to the public from either of the other departments; and the judicial department is no more justified in going behind the final act of the legislature to see if it has obeyed every mandatory provision of the constitution than has the legislature to go back of the final record made by the courts to see whether or not they have complied with all constitutional requirements. If we investigate the question in the light of authority, and analyze the cases upon the subject in the light of the principle at the bottom thereof, it will be found that the overwhelming weight of authority is in favor of the proposition that courts will not go back of the enrolled bills on file in the secretary of state's office. It is true that a large number of courts have held that they would investigate the proceedings of the legislature to see if constitutional requirements had been complied with, but even these courts have nearly all of them conceded that the older decisions clearly establish the doctrine that such enrolled acts are conclusive, and have yielded their assent to such doctrine under the constitutions existing at the time the older cases were decided. They have argued, however, that, for the reason that the newer constitutions contain many provisions mandatory upon the legislature as to its practice in enacting laws, the courts must see to it that such mandatory provisions are enforced, and, as they cannot do this if they hold to said doctrine they must refuse so to do, and look to the proceedings of the legislature which culminated in the enrolled act. If the courts are justified in the position above suggested, that the judicial department is superior to the others, this reasoning will have force; otherwise, it cannot.

It is further argued that, from the fact that most constitutions recently adopted contain an increased number of mandatory directions to the legislature, the courts are justified in changing the old rule, and in going behind the enrolled act to see that the legislature obeys such directions. We are unable to see any force in such an argument. Under every government which has as a part thereof a legislature, certain formalities on the part of such legislature are necessary before any

subject-matter can be given the force of law; and, if the courts could not properly inquire into the fact as to whether or not such formalities had been complied with when but a single one was enjoined upon the legislature, there can be no good reason why it could do so when several are thus enjoined. The theory upon which the courts refused to go behind the enrolled bill when only such single formality was required was that the enrolled bill was a final record, and imported verity; and, if it imported verity when the one formality was required, why should it not import like verity when more than one is required? Under no government of this form could a bill become a law without the vote of a majority of a quorum in its favor, as such must be taken to be a part of the constitution, either written or unwritten, of every government proceeding according to any constitutional form whatever. If the alleged want of any requirement would justify going behind the enrolled bill, it would seem that it would be the one that a quorum was not present when the bill purported to have been passed, for the reason that such an allegation would not only show that a formality required by every constitution before a bill should become a law had been omitted, but would also show that a legal legislature had not been present at that time; yet, when such requirement was the principal one, substantially all of the courts held that the enrolled bill imported verity, and could not be attacked by showing that a quorum was not present when it was passed. The cases were not only practically uniform when such single formality was required, but they so continued even after they were called upon to adjudicate as to the effect of such enrolled acts, where some provisions of the constitution as mandatory as any of ours were in full force; and, in many of the states where such formalities were required by the constitution, there was fully as mandatory a provision as to the keeping of a journal, and requiring these formalities to be made of record therein, as is that in our constitution. This course of decisions continued for a long time, until at last some of the appellate courts seemed to assume that it was their duty, not only to supervise inferior courts, but also the other departments of the government.

We shall hereafter review a few of the many cases upon this subject, but at this point a word as to the opportunities for fraud growing out of the holding of such enrolled bills to be conclusive as compared with the contrary holding. We have already seen the disastrous results of the contrary holding in its general effect upon the community, and even a superficial examination of the question will show that the opportunities for committing a fraud upon the members of the legislature themselves will be much greater if the journals are allowed to control than they would be if the enrolled act is held conclusive. The enrolled acts are prepared with some care, and, under the rules of our legislature and of every legislative body of which we have any knowledge, some committee is charged with the responsibility of

seeing that such enrolled bills are compared with the one which actually passed the legislature before they are presented to the presiding officer for signature. There is therefore some protection thrown around these enrolled acts, and it would be a difficult matter for any one through carelessness or fraud to prevent the will of the legislature, as expressed in the bill actually passed, being embodied in the enrollment thereof. But, if the doctrine be once established that the fact that such bill had passed can be negatived by the journal, there would be very little to prevent a bill which had been properly passed being defeated by the carelessness or fraud of the journal clerk or some employee under him. Under the practice prevailing in the legislature of this state, and in most of the other states, there is very little assurance that the journal will fully and accurately show the proceedings of the body for which it is kept. The practice in nearly all such bodies is to have the journal read, if read at all, from loose slips of paper, made up partly in writing and partly by pasted slips, and, after being thus read, ordered approved. It is also a fact of which every one has knowledge that often upon such reading there is such inattention on the part of the members of the legislature that gross errors might pass unnoticed. The journal, as thus read and approved from loose slips of paper, is then passed to the journal clerk, and by him, or under his direction, transcribed into a book, and the slips then carelessly preserved or entirely destroyed. The transcription of these minutes, without any further action on the part of the legislature, or of any person but the one who makes it, except superficial examination by the journal clerk, and possibly by the presiding officer, becomes the formal journal. It follows that the chances of mistake are very great, and for fraud upon the part of the copyist even greater. The constitution requires that there should be a majority of the body recorded as voting in favor of a bill upon its final passage. Upon such passage the bill in fact receives one or two more than such constitutional majority, and is duly passed; but if, by carelessness or fraud, the copyist should change one or two of the names of those voting, from the affirmative to the negative, the will of the legislature, regularly expressed, would be defeated; and the same result might follow if in copying he should omit a name. Not only would such results follow in the cases specified, but in many other ways the least error in making up or transcribing the journal might result in the defeat of the will of the legislature. Unless the method of keeping journals should at once be revolutionized, and so much attention be paid to them that they will be made to absolutely represent all the doings of the body to such an extent as to very much prolong the sessions of the legislature, the sanctity of legislative enactments will be entirely dependent upon the carefulness and good faith of some copyist employed by the legislature at a few dollars a day. Much less evil will grow out of a course of decision which will give the people to understand that the legis-

lative is a department of the government, of as high authority as the judicial, and that with the mandatory provisions directed to it the other departments of the government have no concern. When this is once well understood, the people will see to it that such mandatory provisions are complied with by the legislature, or, if they do not, the blame must rest upon themselves or the system of government which has as its basis the equal authority of the three departments into which it is divided.

We shall not attempt to review to any great extent the cases upon this subject. They are very numerous, and the older ones almost universally recognize the conclusiveness of the enrolled acts, and, even under mandatory constitutional provisions of substantially the same effect as our own, there are enough of the states which have adhered to the old doctrine to furnish us abundant authority for so doing, especially as such a course will, in our opinion, best subserve the public interest. The reasoning of the cases which uphold such doctrine is much more satisfactory than that of those upon the other side, for, as we have seen, the reasoning of the latter class of cases is founded upon the assumption that the courts are the guardians of all the mandatory provisions of the constitution, whether addressed to the judiciary, legislative, or executive department. This seems to us to be an untenable position, and, if it is, the reasoning of this class of cases is worthy of very little consideration. While, upon the other side, the cases have for their sanction not only a course of decisions running back hundreds of years, but are also abundantly supported by the reasoning therein contained, founded upon the nature and form of our government, and upon grounds of public policy. In our review of the cases upon the subject we shall omit entirely all reference to the older ones, as it is conceded that they are substantially all in favor of the proposition that the enrolled acts are conclusive. We shall confine ourselves to the cases which may be called modern, and substantially to those in states which have one or more provisions in their constitution directed to the legislature as mandatory as any in our own and where, by the provisions of the constitution, the legislature is required to keep and publish a journal of its proceedings.

The Constitution of the United States expressly requires a quorum of congress to be present for the transaction of business. It further requires that congress should keep a journal of its proceedings, and publish the same from time to time. In *Marshall Field & Co. v. Clark*, 143 U. S. 649, 36 L. ed. 294, the effect which the court would give to an enrolled act was directly passed upon, and, after an elaborate consideration, it was held that the court must accept it as conclusive proof that it had been regularly passed by congress. This case is entitled to more than ordinary consideration, for the reason that it was briefed by counsel of national reputation, and involved questions of the greatest magnitude. It is contended by respondent that much of the force of this case is lost by

reason of the fact that the number of mandatory provisions in the Constitution of the United States is small compared with that in our own, but since, as we have attempted to show, the single requirement was of the most radical character, and went to the foundation of our form of government, such fact can in no manner detract from the force of the decision. And we cannot agree with the further contention of the respondent that the judge who wrote the opinion intended to give any force to this line of argument in the reference therein made to the course of decisions in the states which had, as a part of their constitution, numerous mandatory provisions of this nature. We look upon the use of such language as having been simply by way of argument, and as tending to show that, even although the decisions in such states might be warranted under their constitutional provisions, yet such fact did not necessarily militate against the position taken by him.

In the state of Louisiana, when the constitution of that state contained, among other mandatory provisions, one requiring it to keep a journal, and the express provision that "no bill shall have the force of a law until on three several days it be read in each house of the general assembly, and free discussion allowed thereon, unless four fifths of the house where the bill is pending may deem it expedient to dispense with that rule," the supreme court of that state, in the case of *Louisiana State Lottery Co. v. Richour*, 23 La. Ann. 743, 8 Am. Rep. 602, directly held that the enrolled bill was conclusive upon the courts of the fact that all constitutional requirements had been complied with in its passage. In *Whited v. Lewis*, 25 La. Ann. 568, the question was again before the court, and the same doctrine was unhesitatingly announced.

The constitution of the state of Mississippi contained many provisions as mandatory as any in our constitution, and in *Green v. Weller*, 32 Miss. 650, after a most elaborate consideration, it was adjudged by the supreme court of that state that the enrolled act was conclusive. Under the particular facts of that case, there was some division of opinion among the members of the court, for the reason that the bill the effect of which they were passing upon was one providing for a constitutional amendment, and some of them thought that proposals for amendments to the constitution should stand upon a different basis than other acts of the legislature; but they all agreed that the rule would obtain in full force when applied to an ordinary act of the legislature. In *Siemann v. Buck*, 40 Miss. 268, the same court had before it the question of the effect to be given to an enrolled act on file in the proper office, and held directly that such acts, when enrolled, signed by the presiding officers of the two houses, approved by the governor, and deposited in the office of the secretary of state, had all the legal incidents of a record, imported absolute verity, and could not be impeached. In *Brady v. West*, 50 Miss. 68, this court seems to have inclined to the contrary doctrine; but in *Ex parte Wren*, 63

Miss. 512, 56 Am. Rep. 825, after a very full consideration of all the cases, the court returned to the doctrine originally announced, and showed by the most cogent reasoning that such enrolled acts were and must necessarily be conclusive upon the courts.

In the constitution of the state of New Jersey there were many mandatory provisions directed to the legislature, among which was one requiring a majority of all the members to vote in favor of the final passage of a bill before it became a law by ayes and nays to be entered upon the journal. In *State v. Young*, 82 N. J. L. 29, the question under discussion was passed upon by the court of errors and appeals of that state, and, after most elaborate consideration, it was held that the courts could not go behind the enrolled act.

The state of Indiana has several provisions in its constitution of the mandatory nature of which we have been speaking; yet its supreme court has in a number of cases decided that the prior proceedings of the legislature could not be gone into for the purpose of affecting the validity of the enrolled act on file in the office of the secretary of state. One of such cases was that of *Etans v. Browne*, 80 Ind. 514, 95 Am. Dec. 710, in which the court made use of language which so well meets the position taken by many who argue against the rule which we are contending that we quote a portion thereof: "But it is argued that, if the authenticated roll is conclusive upon the courts, then less than a quorum of each house may, by the aid of corrupt presiding officers, impose laws upon the state in defiance of the inhibition of the constitution. It must be admitted that the consequence stated would be possible. Public authority and political power must, of necessity, be confided to officers, who, being human, may violate the trusts reposed in them. This, perhaps, cannot be avoided absolutely. But it applies also to all human agencies. It is not fit that the judiciary should claim for itself a purity beyond others; nor has it been able at all times with truth to say that its highest places have not been disgraced. The framers of our government have not constituted it with faculties to supervise co-ordinate departments, and correct or prevent abuses of their authority. It cannot authenticate a statute. That power does not belong to it. Nor can it keep the legislative journal. It ascertains the statute law by looking at its authentication, and then its function is merely to expound and administer it. It cannot, we think, look beyond that authentication, because of the constitution itself. If it may, then, for the same reason, it may go beyond the journal when that is impeached; and so the validity of legislation may be made to depend upon the memory of witnesses, and no man can in fact know the law, which he is bound to obey. Such consequences would be a large price to pay for immunity from the possible abuse of authority by the high officers who are, as we think, charged with the duty of certifying to the public the fact that a statute has been enacted by competent houses. Human governments must repose confidence in officers.

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It may be abused, and there may be no remedy. Nor is there any great force in the argument, which seems to be regarded as of weight by some American courts, that some important provisions of the constitution would be a dead letter if inquiry may not be made by the courts beyond the rolls. This argument overlooks the fact that legislators are sworn to support the constitution, or else it assumes that they will willfully violate that oath. It is neither modest nor just for judges thus to impeach the integrity of another department of government, and to claim that the judiciary only will be faithful to its obligations."

In the state of California the courts have been upon both sides of the question. In the first case, reported in 2 Cal. 165 (*Forster v. Pierce*), it was held that the courts would go behind the enrolled act. But in *Sherman v. Story*, 80 Cal. 253, 89 Am. Dec. 98, the court, after a most thorough consideration of the question in all its aspects, and in an opinion showing great research and learning, rendered by that distinguished jurist, Judge Sawyer, came to the conclusion that the enrolled act was conclusive, and overruled the former case. This case, in our opinion, is entitled to great weight, for, although there has been an attempt to show that a different ruling would have obtained had the present constitution of California been in force, we are not satisfied that such would have been the case; for while it is true that the supreme court of that state, since the adoption of its new constitution, has gone back to its original position, the opinions in the cases in which it has done so show upon their face that they received no such consideration as did the one reported in 80 Cal., above cited. It is true that the distinguished jurist who wrote the opinion in *Sherman v. Story*, *supra*, afterwards, when holding a federal court, came to the conclusion that, under the new constitution of California, the courts were authorized to go behind the enrolled act, but we do not think that in the latter case his reasoning at all compares with that in the former, and it is probable that his mind was unconsciously influenced by the fact that the legislation embodied in the bill under consideration was so unjust that Judge Field, of the Supreme Court, was willing to set it aside, as being in violation of the Constitution of the United States. And here it may be remarked that in the great majority of cases, in which the courts have held that they could go behind the enrolled act, the legislation attacked has been of such a vicious nature that the mind of any honest judge would naturally seek some excuse by which its effect could be destroyed.

The constitution of Pennsylvania had mandatory provisions directed to its legislature of a pronounced type, and yet the supreme court of that state, in a comparatively recent decision,—that of *Kilgore v. Magee*, 85 Pa. 401,—fully recognized the doctrine for which we are contending, and, in its opinion therein rendered, made use of the following pertinent language: "In regard to the passage of the law, and the alleged disregard of the forms of legislation required by the consti-

tution, we think the subject is not within the pale of judicial inquiry. So far as the duty and the consciences of the members of the legislature are involved, the law is mandatory. They are bound by their oaths to obey the constitutional mode of proceeding, and any intentional disregard is a breach of duty and a violation of their oaths. But when a law has been passed and approved, and certified in due form, it is no part of the duty of the judiciary to go behind the law as duly certified to inquire into the observance of form in its passage. The presumption applies to the act of passing the law that applies generally to the proceedings of any body whose sole duty it is to deal with the subject. The presumption in favor of regularity is essential to the peace and order of the state. If every law could be contested in the courts on the ground of informality in its enactment, the floodgate of litigation would be opened so widely, society would be deluged in the flow."

In *Weeks v. Smith*, 81 Me. 588, the supreme court of that state, after a review of the authorities pro and con, decided that the enrolled act was conclusive upon the courts.

In *Pacific Railroad v. The Governor*, 28 Mo. 353, 66 Am. Dec. 673, the supreme court of that state, in sustaining the doctrine for which we are contending, made use of the following language: "The constitution is designed to limit the powers of the government, and to confine each of the departments to its appropriate sphere. If the legislature exceed its powers in the enactment of a law, the courts, being sworn to support the constitution, must judge that law by the standard of the constitution, and declare its validity. But the question whether a law on its face violates the constitution is very different from that growing out of the noncompliance with the forms required to be observed in its enactment. In the one case, a power is exercised not delegated, or which is prohibited, and the question of the validity of the law is determined from the language of it; in the other, the law is not in its terms contrary to the constitution. On its face it is regular, but resort is had to something behind the law itself in order to ascertain whether the general assembly in making the law was governed by the rules prescribed for its action by the constitution. This would seem like an inquisition into the conduct of the members of the general assembly, and it must be seen at once that it is a very delicate power, the frequent exercise of which must lead to endless confusion in the administration of the law."

In *State v. Robinson*, 81 N. C. 409, this question, in principle, was passed upon, and the peculiar circumstances render it particularly pertinent to the question now under discussion. In that case an act had regularly passed the legislature, but had failed to receive the signature of one of the presiding officers, and it was sought to give it force by proving the fact of its regular enactment otherwise than by the enrolled bill properly signed. The court held that this could not be done; that the enrolled bill was the final record of the legislature in the enactment of

a law; and that such final record was the only thing of which the court could take notice.

The constitution of the state of Texas abounded in mandatory provisions of the most positive nature, directed to the legislature; yet in the recent case of *Ex parte Tipton*, 28 Tex. App. 488, it was held, after full consideration, that the courts could not go behind the enrolled act for any purpose whatever.

In *State v. Swift*, 10 Nev. 176, 95 Am. Dec. 710, this question was fully considered, and, in the opinion therein rendered, the matter very ably argued, and the conclusion reached that enrolled bills are conclusive.

In addition to the above cases we have examined each of the following cases, and cite them as being directly in point upon the question which we are discussing: *People v. Burt*, 43 Cal. 560; *Standard Underground Cable Co. v. Atty-Gen.* 46 N. J. Eq. 270. And the following cases, which, though not so directly in point, clearly sustain the principle for which we are contending: *Duncombe v. Prindle*, 12 Iowa, 1; *Clare v. State*, 5 Iowa, 509; *Eld v. Gorham*, 20 Conn. 8; *Warner v. Beers*, 23 Wend. 172; *Hunt v. Van Alstyne*, 25 Wend. 605; *People v. Devlin*, 83 N. Y. 269, 88 Am. Dec. 377; *People v. Marlborough Highway Comrs.* 54 N. Y. 276, 18 Am. Rep. 581; *Fouke v. Fleming*, 18 Md. 392; *Bender v. State*, 58 Ind. 254; *Brodnaa v. Groom*, 64 N. C. 244; *Passaic County Chosen Freeholders v. Stevenson*, 46 N. J. L. 178.

This citation of cases not only furnishes us abundant authority for holding that the enrolled acts are conclusive, but equally good reason for so holding appears in what has been said by the courts of the states in which the contrary doctrine obtains. In recent opinions rendered in several cases in the courts of these states, the judges, while recognizing the fact that the rule was so well settled there that they could not properly change it, have expressed regret that the rule which holds to the conclusiveness of such enrolled bills had not been adopted therein. Even in the state of Illinois, where the courts have established a rule of the utmost liberality as to their right to go behind the enrolled acts, the judge who pronounced the decision of the supreme court of that state, in a comparatively recent case,—that of *People v. Starns*, 35 Ill. 136,—seems to clearly indicate that he regretted that a different rule had not been adopted by the courts of that state. If in that state, which may be said to have been the leader upon that side of the question, even a doubt is expressed as to the policy of the rule there adopted, it is a fact so pertinent that it is entitled to great consideration when a rule upon this subject is to be first announced by the courts of a state.

In our opinion, authority, reason, public policy, and convenience require us to hold that the enrolled bill on file, when fair upon its face, must be accepted without question by the courts, as having been regularly enacted by the legislature.

It follows that the act under consideration is a part of the statute law of the state, and

that thereunder it was the duty of the respondent to have approved the bond of the relator, and, he having refused to perform this duty, a *peremptory writ of mandamus*

must issue requiring such action on his part.

Dunbar, Ch. J., and Scott, Anders, and Stiles, JJ., concur.

NEW JERSEY SUPREME COURT.

ATTORNEY-GENERAL, *ex rel.* George T. WERTS, Governor,
v.

Maurice A. ROGERS *et al.*

(.....N. J.....)

1. The judicial department has jurisdiction to decide which of two rival bodies, each claimed to be the state senate, is the constitutional body.
2. The president of the senate is an officer whose title can be tested by quo warranto, under a statute providing that remedy in case of any office or franchise within the state.
3. The senate of New Jersey is not a permanent, continuous body, such that the old or hold-over members are entitled to pass upon the title of the newly elected members, but the latter are entitled to enter the body, since the constitution appoints a day on which "the two houses shall meet separately," imposing the duty of yearly organization, and also provides that the senate shall be composed of "one senator from each county," thus entitling each senator to a voice in all proceedings.

(March 21, 1894.)

ON RULE to show cause why leave should not be granted to the Attorney-General to exhibit an information in the nature of a quo warranto against defendants for usurping, introducing into, and unlawfully holding and exercising the office of president of the senate of the state of New Jersey. *Judgment in favor of defendant Rogers.*

Statement by Beasley, Ch. J.:

The facts are substantially as follows:

On the 21st day of February, 1894, the attorney-general presented to this court the petition of the relator, who is the governor of the state, setting forth that the defendants each claimed to be possessed of the office of president of the senate of New Jersey, with all the rights, powers, and privileges appertaining to that office, and that each of them, in pursuance of such claim, is actually engaged in exercising the functions of said office. The petition shows that the interests of the people of this state are being greatly imperiled by these conflicting claims, and that a speedy determination of the same is imperatively demanded, in the interest of good government and public order. On the filing of this petition, a rule was granted re-

quiring the defendants to show cause before this court why leave should not be given to the attorney-general to exhibit an information in the nature of a quo warranto against them, and each of them, for usurping, intruding into, and unlawfully holding and exercising the office of president of the senate of the state of New Jersey. Leave was also given to all parties to take affidavits, to be used on the return of the rule. The attorney-general immediately gave notice to both defendants of the taking of affidavits before a supreme court commissioner on the 24th day of February last. At the time designated, both defendants appeared in person and by counsel, and the examination of witnesses was proceeded with. On behalf of the attorney-general and the relator only two witnesses were examined. They were Samuel C. Thompson, secretary of the body which elected Robert Adrain president, and Wilbur A. Mott, secretary of the body which elected Maurice A. Rogers. Several witnesses were sworn on behalf of Maurice A. Rogers, and one on behalf of Robert Adrain. The testimony was closed on Wednesday, February 28, and the parties are now here to present their case.

The state of facts thus exhibited, in so far as it appears to be pertinent to this inquiry, is as follows: A short time before 3 o'clock on the afternoon of January 9, the nine Democratic hold-over senators assembled in the senate chamber. At about three minutes before 8 o'clock, Samuel C. Thompson, who was secretary of the session of 1893, called the senate to order, and Senator Daly offered a resolution naming Robert Adrain as president *pro tempore*. This resolution was immediately adopted. Robert Adrain thereupon took the chair, and, after waiting until 8 o'clock or later, ordered a roll call of the senate. The nine senators referred to alone answered to their names. There was then another wait of three or four minutes, ending in another roll call. To this roll call, also, only the nine senators referred to answered. Thereupon Senator Daly moved a recess of five minutes which motion was adopted. At about fifteen minutes past 8 o'clock the senate came to order again. At this time the four hold-over Republican senators, accompanied by the seven Republican senators-elect, entered the chamber, and took their seats on the floor. Immediately after the Republican senators had taken their seats,

NOTE.—The above decision is we believe the pioneer on the important question of the continuing existence of the senate and the right of the hold-over members to exclusive authority in organization of the body. The unseemly controversies and conflicts of authority between depart-

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ments of government which have in recent years been shamefully frequent and sometimes alarming have at least done something to develop constitutional law relating to the powers of the different departments of government.

Robert Adrain, as presiding officer, ordered another roll call. The names of the hold-over senators, both Republican and Democratic, were called. At the conclusion of the call, the secretary announced, in a loud tone of voice: "Mr. President, there are thirteen senators present, and have answered to their names." The secretary testified that he believed the whole thirteen did answer to their names. He did not, however, swear positively that they did; and the evidence given by other witnesses makes it very clear, I think, that they did not. However, no objection was made by anybody to the announcement of the result of the roll call by the secretary as above mentioned, and the president thereupon declared that there was a quorum present. No objection appears to have been made by anybody to this declaration. While this roll call was proceeding, Senator Stokes, one of the hold-over Republican senators, arose, and entered a protest against the organization of the senate on account of its having been effected in the absence of the Republican senators. Senator Adrain ruled him out of order, on the ground that a roll call was in progress. At the conclusion of the roll call, Senator Adrain recognized Senator Stokes, and the latter said he arose to a question of the highest privilege, and asked Senator Adrain, as presiding officer, if the usual custom would be followed, and senators admitted on their credentials. Senator Adrain replied that he was only one of the body, and could not give the desired information. Senator Skirm, another of the Republican hold-over senators, then arose, and announced to Senator Stokes, without addressing the chair, that he had the credentials and affidavits of the seven newly elected Republican senators. At that point Senator Adrain stated that Senator Daly had a resolution which he thought would cover the matter and give the information desired. Thereupon Senator Daly, one of the Democratic hold-over senators, offered the following resolution: "Resolved, that all certificates of election or other credentials of those claiming seats in this senate by virtue of the election held on the 7th day of November, 1893, together with all protests, petitions, and other communications or papers presented to this senate concerning its membership, be in the first instance referred to a special committee of three, to be appointed by the president, which committee shall report upon the validity of such credentials, and shall make such report concerning such protests, petitions, communications or papers as shall be necessary." After the resolution was offered, Senator-Elect Voorhees, one of the newly elected Republican senators, arose in his seat, and attempted to address the chair, stating that he claimed his rights on the floor of the senate as senator-elect from the county of Union. Senator Adrain refused to recognize him, and ordered him to take his seat. Senator Voorhees declined to be seated, and Senator Adrain thereupon directed the sergeant at arms to seat him. Senator Voorhees still refused to be seated, and, after some further protest, invited the Republican senators and senators-elect to with-

draw to one of the lobbies of the senate chamber, and they all immediately did so. No notice was taken of the withdrawal of the Republican senators by the nine Democratic senators. Soon after such withdrawal, the resolution last offered by Senator Daly was adopted, and a committee on credentials appointed. Immediately after such appointment, Senator Daly arose, and presented the credentials of Christopher S. Staats, a Democratic senator-elect from the county of Warren. These credentials were referred to the said committee, who immediately reported favorably upon them, and Senator Staats was thereupon admitted, sworn in, and took his seat.

Next, a resolution was passed, as follows: "Resolved, that no one shall be admitted to membership of this senate except on motion made for his admission, and its adoption by a majority of the qualified and admitted senators." Senator Daly then offered a resolution "that the officers of the session of 1893 be, and the same are hereby, appointed officers of this session, to hold until further orders shall be made concerning their positions by the vote of a majority of the qualified and admitted members of the senate." After the passage of this resolution, Senator Daly offered the following: "Resolved, that the president *pro tempore* of this senate shall hold said office of president until his successor shall be elected by the votes of a majority of the qualified and admitted members of the senate." This resolution was also adopted. A number of the old officers thereupon took the oath of office. The president, however, does not seem to have done so. This body, thus organized, continued in session some time after the passage of these resolutions, and transacted, or attempted to transact, considerable business. Among other things, it appointed a committee to wait upon the governor, and inform him that the senate had organized. It also directed the secretary of the senate to inform the house of assembly that the senate had organized. It also passed a resolution adopting the rules of the senate of 1893 for its guidance, and received and referred to committees, when appointed, three or four legislative bills. Ever since said organization, or attempted organization, this body has met as a senate, at intervals of not more than three days each. Its presiding officer has always been Robert Adrain. It recognizes him as president of the senate, and he claims to be such, we are informed, not only by virtue of his election as temporary president, and his after election as president until his successor should be elected, but also by virtue of his election as president at the beginning of the session of 1893. He has done no act as president, however, so far as the testimony discloses, except to preside over the deliberations of this body.

Upon the withdrawal of the Republican senators and senators-elect, as aforesaid, they proceeded at once to organize a senate in the lobby of the senate chamber, to which they had withdrawn, as above mentioned. Before proceeding with their organization, Senator Stokes stepped into the door opening from

the lobby upon the floor of the senate chamber, and announced to the Democratic senators there remaining that the senate was about to proceed to organize, and requested them to participate in such organization. No notice was taken of this announcement, and the Republican senators proceeded to organize alone. Senator Stokes assumed the chairmanship of the meeting, and Wilbur A. Mott assumed the position of temporary secretary. The credentials of the newly elected Republican senators were produced and inspected, and handed to the secretary *pro tempore*. Those senators had taken the oath of office before appearing in the senate chamber, and their respective oaths were produced, with their credentials, and handed to the secretary *pro tempore*. The secretary thereupon called a roll of the senators, including those newly elected. The eleven Republican senators all answered to their names. Thereupon Senator Skirm moved that they go into an election of a president. Maurice A. Rogers was nominated, and upon a roll call he received eleven votes. A secretary and the usual number of officers of the senate were next elected by the same vote. After the officers were elected, they were all sworn in, including Maurice A. Rogers. Mr. Rogers thereupon took his seat as president of the senate. A committee was then appointed to wait upon the governor, and inform him that the senate was organized. A message was also received from the house of assembly to the effect that the assembly was duly organized, and had proceeded to business. The body thus organized has also been in session at intervals of not more than three days each ever since its organization. Senator Rogers regularly presides over it, and is recognized by it as president of the senate. It has passed bills, and Senator Rogers has authenticated them as president of the senate. It has also been recognized regularly and continuously by the house of assembly as the true senate, and has met in joint assembly with the house, and such assembly has elected, or attempted to elect, a state treasurer and comptroller.

Upon this state of facts, the attorney-general and the relator ask the court to determine which of these claimants, if either of them, is the true president of the senate of New Jersey.

Mr. R. V. Lindabury, for relator:

By our statute an information, with the leave of this court, lies at the suit of the attorney-general upon the relation of any person desiring to sue or prosecute the same against any person or persons who shall usurp, intrude into, or unlawfully hold or execute any office or franchise within this state.

Under this act any intruder into any office of a public character in this state may be judicially ousted by a proceeding in this court.

State v. Utter, 14 N. J. L. 84; *State v. Meehan*, 45 N. J. L. 190.

Is, then, the office of president of the senate a public office within the meaning of this act as interpreted by the courts?

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The office is recognized in the Constitution in four places.

Art. 4, § 6, par. 7; art. 5, para. 12-14.

The Act of February 14, 1845, vested in the president of the senate the powers, privileges, duties, and remunerations formerly granted to or imposed upon the vice-president of council.

Since the adoption of the constitution, the president of the senate has been made *ex officio* one of "the trustees for the support of public schools."

Rev. p. 1081, § 65; and a member of the "state board of education."

Rev. p. 1071, § 1.

It seems to me there can be no doubt that an office of this character, with these duties, is a public substantive one.

In *State v. Meehan*, *supra*, the court held that the jailor of the workhouse on the county farm of Hudson county is an officer against whom quo warranto would lie.

In *State v. Utter*, *supra*, an information was sustained against the deputy adjutant general of the Essex brigade of militia of Newark.

Maurice A. Rogers has presided over his senate, and has attested legislative bills as president of the senate. In so doing he is clearly guilty of a user of that office unless he has a title thereto. Besides he has taken the official oath to "perform all the duties of the office of president of the senate," according to the constitution, and that, by all the cases, is a sufficient user to support an information.

Rez v. Harwood, 2 East, 177; *Rez v. Tate*, 4 East, 337; *People v. Callaghan*, 83 Ill. 128.

I admit that the court cannot inquire into and determine the titles of these gentlemen without inquiring into and determining the status of the respective senates which elected them, but I deny that the court is without the power to do this for any of the reasons stated or for any other reason. To admit this proposition would be to elevate the legislature above the people; to nullify the provisions of the constitution which limit and control its powers, and to rob this court of its prerogative to pass upon all judicial questions that arise in the state, and are not committed by the constitution to other tribunals.

Nothing can be more obvious, than that power must exist in the judicial department of any constitutional government to pass in some way or other upon the constitutional existence of any body setting itself up as the law-making power.

In 1863 a man named Barstow usurped the governorship of Wisconsin. The attorney-general filed an information against him on the relation of the rightful governor. Barstow came into court and moved to dismiss the information on the ground that it would not lie against a man occupying the office of governor. He was represented by Matthew Carpenter and other distinguished counsel, who pressed the motion with the utmost zeal and ability. The court, however, refused to dismiss the information and finally gave judgment of ouster, holding that although it had no control over the executive department of the government it

did have the power to ascertain and decide whether or not the executive held his office according to the constitution or was a mere usurper.

Atty-Gen. v. Barstow, 4 Wis. 567; *Boyd v. Nebraska*, 148 U. S. 135, 36 L. ed. 108; *State v. Bulkeley*, 14 L. R. A. 657, 61 Conn. 287.

In the fall of 1879 a question arose in the state of Maine as to which of the two great political parties had elected a majority of the legislature.

The court said: "When different bodies of men, each claiming to be and to exercise the functions of, the legislative department of the state, appear, each asserting their titles, to be regarded as the law-givers for the people, it is the obvious duty of the judicial department, who must inevitably, at no distant day, be called to pass upon the validity of the laws that may be enacted by the respective claimants to legislative authority, to inquire and ascertain for themselves, with or without questions presented by the claimants, which of those bodies lawfully represents the people, from whom they derive their power. There can be but one lawful legislature. The court must know for itself whose enactments it will recognize as laws of binding force, whose levies of taxes it will enforce when brought judicially before it, whose choice of a prosecuting officer before the court it will respect. In a thousand ways it becomes essential that the court should forthwith ascertain and take judicial cognizance of the question: Which is the true legislature?"

70 Me. 609; *Prince v. Skillin*, 71 Me. 367, 36 Am. Rep. 325.

When a law passed by one of these legislatures was challenged, the court reaffirmed its former decision upon precisely the same grounds. In January, 1893, two houses of representatives, each claiming to have been elected by the people, met and organized in the state of Kansas.

The court took jurisdiction of the question and held that to be the legal house in which, at the time of the organization, there was a majority of duly certified members.

Re Gunn, 19 L. R. A. 519, 50 Kan. 155; *Burnham v. Morrissey*, 14 Gray, 238, 74 Am. Dec. 676.

But it has been argued, as the constitution makes the senate the judge of the election, qualifications, and returns of its members, and as the title of the defendants, respectively, depends, not so much upon the action of their respective senates, as upon the qualifications of the members of those senates to act, the court cannot try such titles without passing upon the very questions exclusively committed to the judgment of that tribunal.

Suppose that two houses of assembly should convene in this state. That one should be composed of twenty-nine certified members and thirty-one members without certificates. That the other should be composed of thirty-one certified members and twenty-nine members without certificates. That each should immediately organize itself into a court and pass upon the qualifications, election, and returns of all its members, and admit them

to seats. The court could without difficulty, upon a proper case, determine which was the true house by determining which was organized according to the constitution. Trying them by that standard, it would be found that the true house was that body which organized with a quorum of certified members, and that the fact that the other body consisted of sixty members whose election, qualifications, and returns had been regularly passed upon by their fellows, would go for nothing because of the fact that the body which passed upon them was without jurisdiction as a court for want of a quorum.

Re Gunn, *supra*; *State v. Tomlinson*, 20 Kan. 692; *State v. Francis*, 26 Kan. 724.

No question can arise in this case as to the *de facto* existence of either of these bodies. As was pointed out by the judges in both Maine and Kansas cases, there can neither be two *de facto* legislatures, nor a *de facto* and *de jure* legislature at the same time.

McCrary, Elections, § 596.

Lord Brougham said, in *Darley v. Reg.*, 12 Clark & F. 529: "My lords, I have one very material consideration, which inclines my mind, independently of the balance of authority, being, as I think with the learned chief justice it is, in favor of the judgment of the court below,—in favor of the defendant in error. I mean, that if there is not this remedy, there really is no other. It is necessary that there should be this remedy, or else a case like the present would be remediless."

Chief Justice Kinsey said, *State v. Middlesex County Justices & Freeholders*, 1 N. J. L. 244: "The power of this court to give redress is as unlimited and universal as injustice and wrong can be. . . . No government can be properly carried on, unless a power resides somewhere to afford justice to every individual. . . . It is a rule that when you plead to the jurisdiction of the court, you must point out in your plea another court which has jurisdiction, and the reason is obvious,—the subject has a right to protection and redress somewhere. I never have heard it directly contended that injuries may be committed beyond the jurisdiction of every tribunal. If therefore this court has not cognizance of this cause, it was incumbent on the defendants to show where the injury complained of may be redressed; for to assert that a person injured is without redress in any court, is to say what never did exist under our constitution or the common law."

The objection that the question presented is political and not judicial cannot prevail.

McCrary, Elections, § 847; *Cooley, Const. Lim.* 786.

Mr. Cortlandt Parker, for respondent Rogers:

The Constitution declares (art. 8, Distribution of the powers of government): "The powers of the government shall be divided into three distinct departments—the legislative, executive, and judicial; and no person or persons belonging to, or constituting, one of these departments shall exercise any of the powers properly belonging to either of the others, except as herein expressly provided."

And then it says (art. 4, § 4, pl. 2) "Each house shall be the judge of the elections, returns, and qualifications of its own members, and a majority shall constitute a quorum to do business."

The petition against Maurice A. Rogers states that the respondent was elected president of the senate by four men, called hold-over senators, joined with seven more, not denied to have credentials, but appearing to claim through such credentials to be senators elect of the senate. The court will take notice that eleven men are a majority of a legal New Jersey senate. So, upon the petition itself it appears that such a majority has elected the respondent. The only ground taken against him is that the credentials of seven of this majority had not been passed upon by the minority in an "attempt to organize a senate." Do not the members of this court seek to exercise the power belonging to the members of the senate when they review the question whether the respondent, for failure of form, or ceremony, or lack of votes, was or was not elected president of the senate? If they decide that he was not elected, is not that a decision which could be made, under the constitution, only by the majority itself?

The respondent Robert Adrain, was not elected president of the senate, or of a senate. He appears to have been elected president *pro tempore*, of a minority of the senate. So, the inquiry before the court is confined to the status of the respondent Rogers. He received eleven votes of senators, duly certified to be senators, elected, four before 1893, seven in 1893, at a meeting in state house, on the day appointed by law for them to convene. He has since regularly acted in that office. Why is he not president of the senate?

It is said, because, to be a senator, a man must not only be elected to that office, and certificated by legal credentials, but must also be admitted by the vote of those members who had in two former years been such, upon presentation of credentials which they must approve. This, because, say those who support this view, the senate is a continuous body to this:

I. The senate is no continuous body in the sense of one continuing from session to session. The members all continue members "until the second Tuesday in January of each year, at which time of meeting the legislative year begins."

Art. 4, §§ 1, 2.

During the period between their adjournment *sine die*, and the meeting of the new senate, the old subsists, but in a state of suspended animation. The governor, by calling a special meeting of the legislature, can break this suspended condition. The same is true of the house of assembly. It continues to exist—in identically the same way; that is, the members remain members for the year, without power to convene, except at the governor's call. When the time of meeting which begins the legislative year arrives, then the old members of the assembly go out and the new members take their places. And this is true of one third of the number of the senators. They go out and others take their

places. The fact that all do not go out does not make the senators who remain constitute a body. They cannot do so till they meet their new fellows. Then the old and the new make up the senate of that year.

II. If the senate be a continuous body in any sense, its members possess no power to sit upon the right of their fellows in organization.

From 1789 to 1849, the practice year by year was that the record names all senators appearing, then states the new ones, and that they produced their credentials, generally adding that they were read, and then stating that they took their seats and were sworn in. Often men were sworn in and took their seats without producing credentials, sometimes because left at home—oftener, when presented before. All this preceded the resolution for notifying the house and the executive that a quorum was in session. In the 28d Congress, 1833, the journal is noticeable. A full list of members is given, then new ones named in it are mentioned and stated to have produced their credentials, been sworn in, and to have taken their seats.

Then occurs this entry: "The president communicated an act of the general assembly of Rhode Island declaring void the election of Asher Robbins, and a certificate by the governor of that state of the election of Elisha R. Potter." Then a motion was made to administer the oath to Mr. Robbins whose credentials were received at the last session. Mr. Benton then moved to refer the matter to a committee to consider and report. Ayes and nays being called that motion was lost. Then the motion to administer the oath was put and carried. The oath was administered and Mr. Robbins took his seat.

And then came the resolution of notification that a quorum was in session ready for business.

Throughout the long period examined, this is the city case in which action was formally taken upon the right of a member during the process of organization. And the vote of the court indorsed the law that not even the statute of the state represented declaring the election void, and the contesting credentials of a governor authorized considering the members' credentials.

Now when it is considered that there never has been any one legally enacted form for the credentials of a member,—that each state had its own,—the improbability that such credentials should not sometimes differ, and that during sixty years they never were referred, never appeared to have been examined, but were simply read or known or believed to exist, and that the rights of members elect were never affirmed by a vote of their fellows, except in this one case of contest, and never were denied, and that they took their seats, several times voting before their credentials were even read,—what becomes of the idea that the senate of the United States taken as the pattern of that of the state of New Jersey, justifies the assumption, whether it be a continuing body or not, that the hold-over members in our senate had the right to sit in judgment upon the credentials of their newly elected fellows,

and, if they pleased, deny them the seats to which they were certified to have been elected by the people?

III. If any practice has obtained in the New Jersey senate of passing upon credentials of senators elect, it has no warrant of law, and is not obligatory. On the contrary it is a breach of the constitution.

IV. The constitution and the statutes rule, and under these the method of organization pursued by the eleven senators who elected the respondent president is legal and proper.

The Constitution says: "Members of the legislature shall, before they enter on the duties of their respective offices, take and subscribe the following oath or affirmation." Then comes the oath comprising allegiance to the Union, to the state, and faithful discharge of his official duty, and the section proceeds: "And members elect of the senate or general assembly are hereby empowered to administer to each other the said oath or affirmation."

Art. 4, §§ 1, 8.

Now taking this oath or producing it in an assembly of a quorum is the initial act of organization of the body.

Something more is necessary before the body is "ready for business." That the quorum must do. They must elect a president and a secretary. This done, they are ready for business.

The framers of the New Jersey constitution foresaw the possibility of just what has happened and still exists, the refusal of partisans in power to swear in members of the party opposed to them, "members elect," and so they gave these persons the right to administer the official oath to each other.

If a man comes, bearing a certificate that he is a member elect, and an official oath is taken or has been taken by him, administered by a fellow member elect, is not that man a senator, entitled to take his seat and without legal right on the part of any other man to say him nay?

Constitution, article 10, schedule, provides: "It is hereby declared and ordained that the common law and statute laws now in force not repugnant to this constitution shall remain in force until they expire by their own limitation or be altered or repealed by the legislature."

At this time there subsisted a statute which by its 78th section directs the county clerk to certify the result under the county seal, and deliver the certificate to each member, and by section 94, it provides that, "in the organization of each house the certified copies of the statements of determination made under the direction of the 78th section shall be deemed and taken to be prima facie evidence of the right of the persons therein mentioned to seats in the houses respectively, to which they will have been so determined to be elected."

Pub. Laws 1839.

This Act of 1839 was followed in 1846 by an Act to regulate elections, approved April 17, 1846, the 96th section of which re-enacts section 94 of the Act of 1839, with an addition.

Pub. Laws, 222.

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It reads as follows: "96. And be it enacted that the senate and general assembly shall convene and hold their sessions in the state house at Trenton; and in the organization of each house, the certified copies of the statements of determination made under the direction of the 79th section of this Act shall be deemed and taken to be prima facie evidence of the persons therein mentioned to seats in the houses respectively, to which they shall have been so determined to be elected."

How any such practice has sprung up as that alleged to exist in the senate in the face of these enactments, the constitution and the statutes regulating elections is difficult to comprehend.

It did not begin its sessions thus. The senate journals for 1845, 1846, 1847, and the evidence of Mr. Daniel Dodd, the first secretary of the New Jersey senate show this.

In 1849 the new practice seems half begun.

This is the first time when any one as president *pro tempore* administered the oath of office. It would seem probable that some one got hold of a journal of the United States senate, and did not notice the difference between its president *pro tempore*, an officer directed to be created by statute, and one who was a mere chairman of an unauthorized meeting taking the place of president over such members as appeared in their seats to facilitate an orderly organization. And so the use of the word "approved," an entirely incorrect word to express the only fact, to wit, that the credentials as read appeared to come from the right source, a word not found in the early minutes of the United States senate, was a mistake. There was no more right to approve than there is in a judge to approve the record of a judgment put in evidence by its production before him. Yet it could mean nothing more than that it was in form.

The method of organization adopted by the hold-over senators had not the warrant of the constitution of New Jersey or of its statutes, and was besides dissimilar to that with which the New Jersey senate began, and to that which the United States senate has practiced from 1789 to 1849, if not to the present day.

For this reason there was no lawful claim on the four hold-over senators or the seven senators elect to remain with the nine hold-overs who convened and still convene as the senate of New Jersey, and that this convention of the nine or the ten is not only no senate but it is yet acting contrary to their duty in refusing to join the majority.

The proceedings of the eleven in their organization of the senate were sufficient.

The constitution and the law was fully obeyed and by a quorum. Why, is there not a senate of New Jersey?

Even if the action by the four members was secession on their part, still their union with those whose rights to be and act as members the nine denied, transferred the locality of the senate. It created a quorum of that body and its proceedings then and from thence forth made a senate *de facto* and *de jure* acting from and after that moment, lawfully.

They were senators all of them, because certificated. They were the majority. Like conduct was confirmed in *State v. Foster*, 7 N. J. L. 123; *Kendell v. Camden*, 47 N. J. L. 87, 54 Am. Rep. 117, indorsing this decision, confining it to action during the same way, and so approving it. This view of course takes it for granted that members elect are members. But surely this is so. And see *State v. Roe*, 35 N. J. L. 123, where a majority of a board of chosen freeholders, part hold-overs, part members elect, acted without notice to the minority.

Here are two organized assemblies each claiming to be the senate. That body consists of twenty-one members. One of these assemblies consists of ten men—a minority, not a quorum. The other consists of eleven members a number which constitutes a quorum. All these twenty-one have proper certificates of their election. The eleven have enough rightful members to do all that they have done and to legislate authoritatively. Is not this body the senate *de jure*? What does such a senate need? Enough members to make a quorum? It has them. That they should be regularly elected? They are so, and most of them by tremendous majorities. That they should be lawfully sworn in? They are so; who can doubt it, with the constitution in his hand? That the quorum should be organized? Yes, with president, secretary, sergeant-at-arms—all officers. That it should be accepted by the house of assembly? It is. That body will have nothing to do with the ten who, having seized the senate chamber thence arrogate themselves to be the senate. Is it not true that here is a legislature of two houses, *de jure*, even if customary forms have not been observed in the organization? And was not, then, the duty of the governor, by communicating with the quorum, to make the legislative power complete? Should not the court even if not sure as to technical theoretical regularity, advise him to this when he asks it?

Adjudications are but few. But these are corroborative of the line of argument pursued.

The case in Maine (70 Me. 609), that in Kansas, and a late one in Nebraska, are all which I have found exactly touching the points here litigated.

We have two or three which in principle are in unison.

Kearns v. Edwards (N. J.) Jan. 6, 1894; *State v. Frambach*, 47 N. J. L. 85; *State v. Roe*, 35 N. J. L. 123; *Kendell v. Camden*, 47 N. J. L. 67; *State v. Fielder*, 44 N. J. L. 881; *State v. Patterson*, 35 N. J. L. 191; *Re Contested Election of McNeill*, 111 Pa. 235.

Mr. Samuel H. Grey, also for respondent, Rogers:

The proposition that this court may, in a proceeding of this sort, make inquiry by quo warranto into the actual title—that is, the fact of election—of the president of the senate is an absolutely novel one.

The object of the proposed inquiry is to ascertain by what title Rogers holds his office as president. The writ is asked for because he is in possession as officer *de facto*, 38 L. R. A.

for the purpose of determining whether he is entitled to that possession as an officer *de jure*.

Shortt, Informations, p. 122.

Hence, the inquisition can only be made by a tribunal having power to investigate and determine the title challenged. That tribunal is not this court. It is another one which alone can decide. It is one whose jurisdiction is exclusive. It is fixed by the constitution. It is the senate of New Jersey when organized as a "house."

As the office in possession of Mr. Rogers, the title to which is challenged, is that of the president of the senate, we cannot determine who holds title as president of the senate without determining who have been lawfully "elected" as members of the senate—possessing the necessary "qualifications" and exhibiting the proper "returns," because as there can be no president of the senate who is not himself a member and as such chosen by the majority of its "members" so "elected, qualified and returned."

Into this field of investigation this court cannot enter.

Nor can this court make inquisition for the purpose of deciding whether the senate—which, in organizing itself into a constitutional "house" elected Mr. Rogers as its president, was, or was not composed of a majority of the members of that body, unless it accepts the certificate of election as prima facie evidence of right to a seat for organization purposes.

People v. Mahaney, 18 Mich. 481; *Dalton v. State*, 43 Ohio St. 652; *Robertson v. State*, 109 Ind. 79; *Clough v. Curtis*, 134 U. S. 361, 33 L. ed. 946.

Judge Story, in his Commentaries upon the Constitution, section 874, uses this language: "In measures exclusively of a political, legislative, or executive character, it is plain that as the supreme authority as to these questions belongs to the legislative and executive departments they cannot be re-examined elsewhere."

To the same effect is Chancellor Kent's view. 1 Kent, Com. pp. 221-235; Cooley, Const. Lim. pp. 50, 51.

The principle which controls and which the authorities quoted recognize, was declared in the supreme court of New Jersey by Chief Justice Green in the case of the *State v. The Governor*, 25 N. J. L. 331.

See also *State v. Young*, 32 N. J. L. 29; *State v. Pritchard*, 36 N. J. L. 101; Throop, Officers, § 793; *Ex parte Echols*, 39 Ala. 698, 38 Am. Dec. 749.

Is the office of "president of the senate" an office of the state of New Jersey as an organized government, one of the "civil offices" spoken of in the constitution, or is it an office of the legislature only, one of the co-ordinate branches of the state government?

We have under the provisions of the fundamental law an office created by the constitution, for the express purpose of making the legislative power effective, whose incumbent must possess as his sole qualification the character of a legislator, whose title rests entirely upon that of his fellow members, who is chosen from and exercises his official

function wholly among them, whose compensation is based upon theirs, whose official oath defines his functions and duties, as those appertaining to the exercise of legislative power, and whose term is limited by that of the legislature of which he is a member. Can it be said that such an officer holds an office of the state of New Jersey as an organized government? He is but the "mouth of the house," which elects him.

May's History of Parliament, 195.

His duties are all associated with and inseparable from that house.

See them defined in Cushing, § 291.

The president of the senate holds his office by the warrant, not of the state government, but of the people who organized that government.

Says Judge Cooley, in his work on Constitutional Limitations, p. 133: "There are certain matters which each house determines for itself, and in respect to which its decisions are conclusive. It chooses its own officers except where by the constitution or statute it is otherwise provided; it determines its own rules of proceeding, it decides upon the election and qualifications of its own members." Here it will be seen that the choice of officers is put upon the same plane with the unquestionable legislative powers possessed and used exclusively by the legislature of judging of the "title" of members and adopting "rules."

How, then, can it be said that such an office as this is an office the title to which may be inquired into as if it were one of the "civil offices" of the organized state government.

Another evidence that the presidency of the senate is a purely legislative office, and not an office under the organized government of the state, described in the constitution as a "civil office," is found in the fact that no commission from the governor is necessary to its full investiture, as is the case with "all officers elected or appointed pursuant to the provisions of the constitution."

This court cannot take jurisdiction over this matter by a writ of quo warranto because the question presented is a purely political one, and not in any sense judicial.

This cursory presentation of the principles which distinguish legislative from judicial action seems to me to indicate that within the field of legislation, law-making, in the exercise of all the functions of a legislator as a law giver, in the organization of a legislative body, in the selection of a legislative officer, in the action of the officer in his relation to the house whose servant he is, of which he is a member, for which he speaks and by which he is controlled, are all purely political and none in any sense judicial.

The following cases all show the recognition by the judiciary of the exclusiveness of legislative and executive control over purely political questions, whether affecting the intercourse between nations, the national boundaries, the laws which are to control the citizen, or the organization of legislative assemblies:

Penn. v. Lord Baltimore, 1 Ves. Sr. 444; *Nabob of the Carnatic v. East India Co.* 1 Ves. 33 L. R. A.

Jr. 371, 2 Ves. Jr. 56; *Master v. Neilson*, 27 U. S. 2 Pet. 306, 7 L. ed. 433; *Kendall v. United States*, 37 U. S. 12 Pet. 524, 9 L. ed. 1181; *Georgia v. Stanton*, 73 U. S. 6 Wall. 50, 18 L. ed. 721; *Gelston v. Hoyt*, 16 U. S. 3 Wheat. 246, 4 L. ed. 381; *United States v. Palmer*, 16 U. S. 3 Wheat. 610, 4 L. ed. 471; *The Divina Pastora*, 17 U. S. 4 Wheat. 52, 4 L. ed. 512; *Garcia v. Les*, 37 U. S. 12 Pet. 511, 9 L. ed. 1176; *Williams v. Suffolk Ins. Co.* 38 U. S. 13 Pet. 415, 420, 10 L. ed. 226, 228; *United States v. Yorba*, 68 U. S. 1 Wall. 412, 17 L. ed. 635; *United States v. Lynde*, 78 U. S. 11 Wall. 632, 20 L. ed. 230; *Ro Cooper*, 148 U. S. 472, 36 L. ed. 232.

Perhaps no clearer exposition of the rule of law now under consideration and of the reasons for its existence and recognition by the courts is to be found than that given by Judge Woodbury in the great case of *Luther v. Borden*, 48 U. S. 7 How. 1, 13 L. ed. 531.

Assuming that the court desires to have the views of counsel upon the situation, deplorable as it is, which the facts present, our claim is that Mr. Rogers is the president of the senate lawfully elected by its duly qualified, elected, and returned members. The senate of New Jersey is one of the houses into which the legislature is divided. It is not a continuous perpetual entity but a body of limited vitality. Its constitution changes yearly, and oftentimes its political character; indeed, it is because of this latter feature that we find the *raison d'être* of the present condition of things.

The omission in the new constitution of any provisions for a continuous organization of the upper house or senate is to me conclusive that a new organization should be annually made, and that no power existed in the body, which was transmitted from one year to another, of any sort. There could be no power in the senate as a legislative house until it had, by its organization, become a house, as distinguished from a collection of "members" qualified to act in effecting an organization of themselves into a "house." Hence, until there was an organization there was no "house" which alone was empowered to "judge of the elections, returns, and qualifications," of its "members." (art. 5 § 4.) And, consequently as all stood upon a plane as to the source of their title as "members" all were equally qualified to act in accomplishing an organization.

Hurale v. Waring, L. R. 9 C. P. 435, 43 L. J. C. P. 209.

The provision for the division of the original senate into three classes was designed to secure annually the election of one third of the whole body by the people. The title to the office must necessarily be drawn from the people, who, as the "legal voters of the counties respectively," elect the senator from that county. The evidence of that title is the election, and the evidence of that election is the return which the law requires to be made, and which is described as a "statement of the determination" of the "board of the county canvassers" (Rev. p. 34, chaps. 347, 348); and "on the organization of each house" certified copies of these "statements of deter-

mination" shall be deemed and taken to be prima facie evidence of the right of the persons therein mentioned to seats in the houses respectively to which they shall have been so determined to be elected.

Rev. 353, § 85.

So that we seem to have provided by the constitution a method of determining the fact of that election for the purpose of "the organization of each house" of the legislature, and thus it seems that we find in the constitution and law, as they now are, and for more than fifty years have been, a sufficient and clear explanation of the invariable rule heretofore pursued in organizing the senate.

The newly elected senators would have the right to participate in the organization of the senate upon the exhibition of "certified copies of statements of the determination" of their election.

The power to organize the senate is in all those who are elected to its membership and who present the statutory credentials.

The power "to judge of election returns and qualifications of its own members" is not conferred on individual senators, but upon the collective body. It is given by the constitution to "each house" and as already shown there is no "house" until an organization of that house, which is the act welding its elements, its members, into a homogeneous body, has been effected. Then only, and not before, there is given to the "house" the power to judge of the "election returns and qualifications of its members." Who are its members? Are they those only whose title is more than one year old? This cannot be if "certified copies of statements of determination" of election are valid, prima facie evidence of membership for purposes of organization. The "members" who participate in organizing are those who produce, or who have before produced, certificates of election. These are the "members" whose title after organization may be inquired into by the organized body, the "house." If they were not such "members" there would be nothing for the organized "house" to investigate. The power given is to "judge of the election returns and qualifications" of these very "members" who, with prima facie evidence of title only, are subject to have that title challenged by a claimant, and "judged" by the "house."

The character and value of certificates of election as prima facie evidence of the fact of election is universally recognized by legislative bodies and by courts.

McCrary, Elections, §§ 509-586; *State v. Van Camp*, 36 Neb. 9, 91; *Re Gunn*, 19 L. R. A. 519, 50 Kan. 155.

Mr. Rogers, as the proofs show, was elected as president by the majority of all the members of the senate certified and sworn, and so is entitled to his office. This fact appearing incontrovertibly there is no occasion for the writ, for as the senators, in organizing themselves into a house, could not look beyond the "statement of the determination" of election to ascertain who were entitled, for purposes of "organization," to seats in the senate to which it had been "determined" they were elected, and as Mr. Rogers' title

to his office rests upon his election by the members of a body composed of those whose prima facie right to vote is not challenged, the judgment of the court must necessarily be that looking at the evidence which those who elected Mr. Rogers were bound to consider and be controlled by, and which on this rule controls this action of this court, he was lawfully elected to the legislative office which he fills.

The action of the minority of the members of the senate here under inspection was to select a president *pro tempore* in the process of organization. This selection was made before a majority of the senators, old or new, had arrived. It was made by nine men, none of whom were members elect; all had been elected one or two years before, and who collectively were two less than a quorum of the whole body. They completed a temporary organization, if there can be such a thing as a temporary condition of a thing which is essentially permanent in its character, which I deny. Having thus sought to create themselves into a body, if they had succeeded they would not have organized "the house" to which the constitution gives the power to judge of election returns and qualifications of its members. It is impossible for a house to organize until it has enough members present to give it the character and potentiality of a house. It must have a "majority" to make a constitutional "quorum to do business," and certainly the creation of itself by organization into a house capable of doing business could not be effected by any number less than that which upon the completion of the organizing process, and the consequent creation of the house, were alone empowered to do business. Hence, as the action criticised was not that of a quorum it was absolutely ineffective to make the position of temporary president or to fill it if made.

A president, temporary or permanent, must have a body to preside over. If the body be one which is created by a law which defines its composition, its character, and its duties, as the constitution does, then the elements which are constitutionally necessary to give vitality to the body, *i. e.*, a majority of its members who make a quorum, must be present participating, affirmatively or negatively, in the action of the body. Here there were none such, and therefore there was no body capable of even temporary organization. This being so, Mr. Adrain never occupied any official relation even to the minority of the members of the senate.

Mr. Allan L. McDermott, for respondent Adrain:

At midnight of the eighth day of January, 1894, the terms of eight members of the senate expired and there became eight vacancies in that body. The body did not go out of existence. At the first moment of the ninth of January there was a senate in New Jersey, composed of thirteen members. At that moment the governor of this state could have called that senate together and submitted to it nominations for the vacancies to be created two months later, by the expiration of the terms of two justices of this court, and the

confirmatory action of that body of thirteen senators would have lacked nothing of entire validity. This proposition continued good during the entire day, until the senate met.

The legislative scheme of the constitution contemplates a continuous body, composed of three classes of senators, with their terms so arranged "that one class may be elected every year."

But the senate remains, that there may not be an interruption in the life of the senate—that there may always be two classes remaining, it is provided that the persons elected to fill vacancies shall be elected for the unexpired terms only. These two ever-existing classes form a senate. No one can become a member of the body except by its action.

The constitution provides that "each house" shall be the judge of the elections, returns, and qualifications of its own members. The argument that the senate which is to judge of its own membership must be composed of one member from each county in the state is fallacious, because article 4, section 2, paragraph 1, provides that it shall be composed of such senators "elected by the legal voters of the counties" and it is the decision of this very question, of whether an applicant for membership was elected by the legal voters of the county he seeks to represent, that is committed to the senate. It may judge first, of the elections of its members. No man is entitled to a seat in the senate unless he is elected to that body. No one can finally say that a senator has been elected except the senate itself.

If the statute said that the presenter of a certificate shall be admitted to membership it would be clearly an unconstitutional substitution of the declaration of an election board for the judicial function reposed in the senate.

The certificate is *prima facie* evidence that the person named therein received the highest number of votes cast at the election. It is made legal evidence and as it is the law that the qualified person who legally received the highest number of votes shall hold the office, the senate may receive the certificate as evidence.

Section 25 of the Crimes Act provides that, a successful candidate being convicted of bribery, he "shall be disqualified to hold any office to which he was elected at any such election." The constitution provides that "no person shall be a member of the senate who shall not have attained the age of thirty years," etc. If the candidate receiving the certificate is convicted of bribery between the election and the assembly of the legislature or it is discovered within such time that he is under the age of thirty years, can he, in virtue of his certificate, become a senator, "for a little while?" A person applying for admission must have certain qualifications. If he has them not, the constitutional proposition is plain and unequivocal. It is not that he may be expelled but that without those qualifications "no person shall be a member of the senate." The attitude of Mr. Rogers is that, having obtained a certificate of election and taken an oath of office, he is a senator. If this is true, it would be equally

so if he did not possess a single constitutional qualification.

The framers of our state constitution designed the state senate as a continuous body: its prototype, in this particular, being the United States senate.

The absence of the vice-president and the president *pro tempore* would not affect the senate of the United States. It is always an organized body, as is the senate of New Jersey. The organization of the state senate does not depend upon its having a president or a secretary. Its organic structure is found in its membership. The governor is authorized to call the senate together in special session. Would there not be a senate if its president had resigned his membership?

Not only was the provision of our constitution suggested by the Federal Constitution, but the mode of determining the classes adopted by the first United States senate was adopted by the senate of New Jersey. (See, 1 Benton, pp. 14, 15; Senate Journal 1845, p. 169.)

The expression of the constitution is not that the terms of senators shall end agreeable to the division but that their seats shall be vacated. Vacated in what, pray, if not in a continuous body? This provision is in the Federal Constitution, "so that one third may be chosen every year." It is in the state constitution so that "one class may be elected every year." One class of what if not of a continuous senate?

Are not the two remaining classes the senate? To answer negatively is to say that the senate may die although two thirds of its members exist. This cannot be. Those whose seats are not vacated remain the senate; they are the organization; they are the judges of the elections, the returns and qualifications of their membership.

Robertson v. State, 109 Ind. 97.

The senators-elect claim that their certificates of election are *prima facie* evidence of their rights to seats. Evidence to whom? In what tribunal are they to present this evidence? Not in this court, because it cannot pass upon their titles. Where, indeed, but in the senate, which is the only judge of the weight of that evidence. And when this *prima facie* evidence is submitted, its probative force is neither more nor less than is accorded by the tribunal, which is to pass upon the evidence.

State v. Frambach, 47 N. J. L. 87.

Section 85 of the Election Law was enacted in 1839 (Harrison's Laws, 1834-43, p. 368), and was intended to apply to the conditions as they were found under the Constitution of 1776.

The act was induced by the fact that there was not any authority given to the council or assembly to pass upon the returns of their members.

The Constitution of 1846 added to the judicial power of the houses. It provides that they shall be the judges, not only of the elections and qualifications of their members, but of their returns—of the certificates of their election and I submit that the adoption of that constitution repealed this provision of the Act of 1839

Its re-enactment under the new constitution if it was intended to serve the purpose claimed, was unconstitutional.

If there was a senate in existence on the ninth of January, the orderly, only way to obtain admission was to apply for and receive its adjunction. It is a trifling answer to say that the admission would be refused because that answer cannot be considered in this court.

The court's jurisdiction is unassailable, because the question involved is not of or concerning the right of the senate to choose its own officers, but whether, in law, it has exercised that right to the extent of electing a president to act until another president is chosen. The question does not affect the election returns or qualifications of the members of the senate; it does not touch the right of the senate to elect its officers. Mr. Adrain is asked, "Why do you act as president?" He answers, "Because I was elected by the senate." Is this answer true?

I submit that it is, even if the four hold-over Republican senators had not entered the senate on the ninth of January. At the first moment of that day the membership of the senate was reduced to thirteen members. A majority of these constituted a "quorum to do business." Seven members constituted that majority.

Nine of these thirteen members met at, or within two or three minutes of, three o'clock, in the senate chamber, and elected a president. They were not bound to wait for the four other members. They were a majority of the then existing senate.

The membership of that senate could not be increased by the action of the gentlemen who were swearing themselves in at the Windsor Hotel. The oath of office should not be administered until the right to a seat has been decided. To give assent to the proposition that a senator-elect becomes a senator by taking the oath of office might result in grave complications. A candidate becomes a senator-elect by the declaration of a county board of canvassers; learning that his election will be contested he takes an oath before another senator-elect; the contest results in a revocation of the canvasser's certificate by a justice of this court; what efficacy remains in his oath of office? The taking of the oath can have no effect upon the powers of the senate to determine its membership.

From 1848 to 1894, the record shows that only inducted senators participated in the temporary organization of the senate.

Every body that is a judge of its own membership has the right to determine whom it will admit.

Those who attack the title of Mr. Adrain contend that the constitution requires the presence of eleven senators to organize the senate. But there is not such a constitutional requirement. Suppose that two senators-elect decline to take the oath of office, and nineteen are inducted. It becomes the duty of those nineteen to direct writs of election for supplying vacancies. By whom is this direction made? Surely by the senate, composed of nineteen members. How many votes would it require? The constitution says that

"a majority of each house, shall constitute a quorum." Now if the nineteen members were a house capable of directing writs of election, a majority of that house would be a quorum, and five of ten senators could direct that the writs should issue; for the constitution expresses that "a majority of each house shall constitute a quorum to do business" and it is an accepted rule that a majority of a quorum may, in the absence of prohibition, do all that the quorum can do.

If it takes twenty-one members to constitute a senate, how can a senate issue writs to fill vacancies? The constitution desires a senate of twenty-one members, and the duty to fill vacancies is imperative. In vacation the governor may issue a writ of election to fill a vacancy; during its session the senate must issue such writs. But the senate does not go out of existence pending the return to such writs. In the case stated the senate would continue. The "house" of nineteen continues its existence and a majority of it constitutes "a quorum to do business." Put in this way: Two members have resigned; nineteen remain; these are the house commanded to issue writs of election; how many votes will it require to issue the writs if all the members are present when the matter is decided? Surely not more than ten. Why can ten issue the writ? Because they are a majority of the house. Now, if this is true here, it is true as to all other transactions of legislative business, with the possible exception of the passage of bills and joint resolutions.

If the four Republicans had remained with the nine Democrats to this day, would the thirteen have constituted a senate? And if so, what would be a quorum of that senate? Could not the thirteen hold-over members meet this day and legislate? And if they did, would they not be the senate? And if they are the senate, or were the senate on the ninth of January, are not nine a quorum of that senate.

State v. Farr, 47 N. J. L. 208; *State v. Egg Harbor City*, 55 N. J. L. 247.

The senate at three o'clock on the ninth of January being composed of thirteen members, a majority of that body was competent to elect a president.

There were thirteen inducted senators on the ninth of January; they constituted the senate; they were in office by adjudication upon their elections, returns, and qualifications. Why, then, could not nine—over two-thirds—of this body form a temporary organization. The absence or presence of the four Republican senators could not be a determining factor.

To what record shall we look for the induction of Mr. Rogers. What tribunal passed upon his election return and qualifications and those of his newly elected associates. He answers: "We approved ourselves. We said we were elected, we passed upon our returns and we adjudged that we were qualified."

The body which elects a president *pro tempore*, which receives, examines, and approves, or rejects applicants for membership, is the senate. It is the senate before a newly

selected senator is inducted. The unbroken record shows that the oath having been administered the person thus qualifying "took his seat in the senate."

The argument that induction is a condition precedent to the exercise of the judicial powers of the senate is absurd. It amounts to saying that the senate can put the holder of a certificate of election out, but cannot prevent him from getting in. The time for judgment upon the qualifications of a senator-elect is when he presents his credentials, for the constitution expressly declares that "no person shall be a member of the senate" who has not certain qualifications.

The court having before it the undisputed fact that there existed in this state on the ninth of January, a senate of thirteen members, can say how the numbers of that senate may be increased; it can say whether the number was increased by the adjudication of a majority of a quorum of that senate; it can say whether the action of the two classes remaining upon the vacation of the seats of the third class is necessary to the admission of new members.

The court cannot say that A is entitled to membership in the senate; but it can say what will constitute an adjudication upon his claims to membership.

The legislature cannot pass any statute making a return evidence of anything whatever; each house has the absolute and unqualified right to receive or to reject a return; the right to judge the elections, returns, and qualifications of those who apply for admission to the senate cannot be controlled, interfered with, or legislated upon by any action of the house of assembly, whether that action is in the shape of a statute or a resolution.

In a legal sense *prima facie* evidence, in the absence of all controlling evidence, or discrediting circumstances, becomes conclusive; in other words, it should operate in the minds of the jury as decisive to found their verdict as to fact.

Rice, Evidence, § 61, and authorities cited.

If the legislature had the right to enact this law and the governor to approve it, why could they not have added "and the supreme court shall give legal effect to the *prima facie* evidence thus provided for?" If this statute is sound, the *onus probandi* is shifted, and the duty is imposed upon the senate of proving, before they can deny an applicant admission, that he was not elected. If it is *prima facie* evidence, it is conclusive until disproved.

I am asked, "Can the senate seat one who was not a candidate for the office?" May I not answer the question after the manner of the descendants of the Pilgrim fathers and ask, "Who can question it if they do?" May I not ask, "Cannot the court of errors and appeals in the last resort in all causes decide that not to be the law which that same court formerly adjudicated to be the law?" The senate has the right to oust a senator whom it knows to have been elected by thousands of majority, and to induct one whom not a member voting for the admission believes to have the slightest claim to a seat, and the 33 L. R. A.

next senate has the right to undo the wrong. What is the difference between inducting one who was not a candidate and inducting one whom you know has not the shadow of a title to the seat? And if a candidate receives one vote and his opponent receives ten thousand, and the senate inducts the candidate who received the single vote, is it within the province of this court to even comment upon the action of the senate?

There was a quorum present, however, even if it is held that eleven members were necessary to constitute that quorum. The senate journal shows this, and the question of whether they answered to their names or not is wholly immaterial.

Can the four hold-over Republicans prevent themselves at every meeting, and prevent business by refusing to answer to their names.

In *Rushville Gas Co. v. Rushville*, 6 L. R. A. 815, 121 Ind. 206, the common council of a town in Indiana consisted of six members, who were present, with the mayor who presided *ex officio*, with the power to give a casting vote in case of a tie, awarded a contract. The six councilmen were present; three voted for the resolution and three remained silent. The mayor declared the resolution carried, and his course was sustained by the court.

The thirteen members of the senate were present, and they continued present until the senate adjourned. There is not any better established rule of parliamentary law than that if a quorum is once shown to be present, a quorum is thereafter presumably present and parliamentary proceedings have a provision for those who desire to assail this presumption. The evidence in this case has not been read, but the court must read it to learn the situation as it existed. There is not a disputed question. It is shown that the four Republican senators went into one of the lobbies. The testimony of Mr. Voorhees shows this. They were, in law, present with the Democratic nine.

Cushing, § 869.

The thirteen hold-over senators remained in the senate chamber during all the proceedings taken after the four Republicans had gone into one of the lobbies. It does not matter how Mr. Adrain was elected president in the first instance. He was the president *pro tempore*.

State v. Farrier, 47 N. J. L. 888.

Mr. Frederic W. Stevens, also for relator:

Neither Mr. Adrain nor Mr. Rogers has been elected to the constitutional office of president of the senate.

Mr. Rogers has not: (1) because the senate of New Jersey is a continuous body and it is to that body that the senators elect must come and present their credentials. They cannot, with a minority of hold-over senators, leave the body and go off and organize by themselves; (2) because whether the senate is or is not a continuous body, the hold-over senators remain as an organized nucleus which receives and which alone is competent to receive, the new members who must come and attach themselves to it.

Mr. Adrain has not been so elected, be

cause a minority of the whole number of members is without power to elect a president of the senate. The constitution provides that the senate shall be composed of one senator from each county in the state (art. 4, § 2) and that a majority of the senate—i. e., a majority of the senate so composed—shall constitute a quorum to do business (art. 4, § 4). In the case in hand four hold-over senators left the lawful body then consisting of thirteen, before it was permanently organized. The part that remained was, therefore, without power to pass the resolution which declared that the president *pro tempore* should hold the office of president until the election of his successor. We are met at the outset with an objection to the jurisdiction of the court.

The quo warranto act which was in force long before the constitution was adopted provides "that in case any person or persons shall usurp, intrude into, or unlawfully hold or execute, any office or franchise within this state, it shall and may be lawful to and for the attorney-general, with the leave of the supreme court, to exhibit one or more information or informations in the nature of a quo warranto at the relation of any person or persons desiring to sue or to prosecute the same against such person or persons for usurping," etc., and the statute goes on to provide that if it shall appear to the court that the several rights of diverse persons to the same office may properly be determined on one information the court may give leave to exhibit one information against several persons in order to try their respective rights to such office. The language of the statute is general. It extends in terms to every office.

At common law says Blackstone a writ of quo warranto was "in the nature of a writ of right for the king against him who claims or usurps any office, franchise, or liberty, to inquire by what authority he supports his claim, in order to determine the right." The remedy was purely a civil one but it was attended with delays and fell into disuse perhaps as early as 10 Edw. III; an information in nature of a quo warranto had taken its place.

Shortt, Informations, 110.

Informations criminal in their nature (being exhibited for every species of common-law offense except treason and felony) were of great antiquity being coeval with the origin of the common law as was shown by the elaborate argument in *Re v. Berchet*, 1 Show. 106. They were filed by the attorney-general *ex officio*, or by the master of the crown office on the relation of some private individual. They were a substitute for an indictment by a grand jury. In the one case the grand jury informed the king that a crime had been committed, in the other his chief law officers. By analogy to this criminal information, when it was found that the proceedings under the old writ of quo warranto were too dilatory, the attorney-general as the attorney of the king, began to exhibit informations, in the nature of a quo warranto, with the object of enabling the king to seize the forfeited office or franchise into his own

hands, or if from its nature it could not be seized, then to oust the incumbent. As soon as the proceeding had assumed this form it was deemed to partake of both a civil and a criminal nature: criminal because a proceeding by information was always deemed criminal; civil because the old writ afforded a civil remedy. Its principal character was that of a civil remedy for the king of the same nature as the more ancient writ.

14 Petersdorff's Abr. title, *Quo Warranto*, p. 97; 7 Comyn's Dig. 190.

Both the writ and its substitute lay for all kinds of offices.

Anonymous, 11 Mod. 888; *Re v. Nicholson*, 1 Strange, 299; *Re v. Boyles*, 2 Strange, 896; *Re v. Goudge*, Id. 1218; *Re v. Bingham*, 2 East, 308; *Re v. Mein*, 8 T. R. 596; *Re v. Brown*, Id. 574, note; *Re v. Whitwell*, 5 T. R. 85; *Re v. Symmons*, 4 T. R. 228; *Reg. v. Parham*, 13 Q. B. 858.

It was long a matter of doubt whether an information lay against one who held an office constituted by act of parliament the objection being that such an office did not proceed from the crown, but in *Darley v. Reg.*, 13 Clark & F. 529, it was resolved by the house of lords that it did.

When, in the year 1795, Judge Patterson drew our quo warranto act he probably had in mind the fact that it was at that time doubtful whether quo warranto would lie in the case of offices not proceeding from the crown. In 1791, in the case of *Re v. Shepherd*, 4 T. R. 381, where an information was moved for calling on defendants to show by what authority they claimed the office of church wardens, Lord Kenyon had said that had it not been for the case cited, he would not have been disposed to grant a rule even to show cause, for that this was not an usurpation on the rights or prerogatives of the crown, for which only writ of quo warranto lay, and that an information in the nature of a quo warranto could only be granted in such cases, and the rule was refused. The same point had been ruled before in *Re v. Davobny*, 2 Strange, 1196. See also *Re v. Hanley*, 8 Ad. & El. 462, note; *Re v. Ramsden*, Id. 456.

Darley v. Reg., *supra*, authoritatively established the contrary principle, was not decided until 1845.

While, therefore, our act is in most other respects a copy of the Statute of Anne it differs from it altogether in respect of the extent of its application. The Statute of Anne extends only to corporate offices. Our act extends to all offices. The course of decision is uniform on this point.

State v. Parkhurst, 9 N. J. L. 587; *State v. Utter*, 14 N. J. L. 84; *State v. Cronell*, 9 N. J. L. 490; *State v. Paterson & H. Turnp. Co.* 21 N. J. L. 10; *State v. Gummersall*, 24 N. J. L. 529; *State v. Tolan*, 33 N. J. L. 198; *State v. Meehan*, 45 N. J. L. 196.

There can then be no doubt that the statute in terms covers the case of all offices.

It certainly cannot be denied that the president of the senate is an officer.

Each of the defendants not only claims but has entered upon the performance of the duties of the office. Mr. Rogers has taken the

oath of office prescribed by the Constitution, article 4, section 8, and such an oath without user is a sufficient foundation for the information.

Rex v. Tate, 4 East, 337; High, Extr. Legal Rem. § 627.

Do the constitutional provisions, relating to the senate or the president of the senate, deprive the court of its jurisdiction to try the title to that office. As the president of the senate holds an office, and as the quo warranto act applies in terms to all offices, this court must have jurisdiction, unless some constitutional provision takes it away, or unless the court declines to take jurisdiction on some ground of political expediency.

The court is not asked, in this case, to interfere with the action of the senate of New Jersey.

If either of these bodies is found to be the senate their president is beyond all question the president of the senate mentioned in the constitution.

There is no express provision of the constitution which debars the court from considering the question.

We do not attack the title of any senator. There is not the slightest pretense of an effort to interfere with the seating of any senator in any body. All we assert is that one group of senators have attempted to elect Mr. Rogers to the presidency of the senate and another group of senators have attempted to elect Mr. Adrain to the same office, and that both groups have failed because neither is in fact the senate.

The same result is reached when we review the matter historically.

See 1 Anson, English Constitution, Parliament.

The provision that "each house shall choose its own officers" certainly does not, in terms, take from the courts the power to pass upon the title of president of the senate.

It is said that the dignity and independence of this co-ordinate branch of the government requires that it should be exempt from judicial control in the choice of all its officers.

If the president of the true senate had no duty to perform other than that of presiding over its deliberations, it might be urged with force that the court ought not to look into or interfere with its internal organization.

Bradlaugh v. Gossett, L. R. 12 Q. B. Div. 283.

Nothing is better settled than that when the legislative body, or an officer of that body, goes beyond its own walls, the ordinary jurisdiction of the law courts attaches. Beyond those walls its adjudication of its powers or prerogatives binds no one.

Ashby v. White, 2 Ld. Raym. 938, Smith, Lead Cas. 281; *Stockdale v. Hansard*, 9 Ad. & El. 1; *Bradlaugh v. Gossett*, *supra*; *Kilbourn v. Thompson*, 103 U. S. 168, 26 L. ed. 377; *United States v. Ballin*, 144 U. S. 1, 36 L. ed. 321; *State v. Young*, 32 N. J. L. 29.

The privilege springs, not from any express provision of the constitution depriving the court of jurisdiction to interfere, but from the fact that it is attached to a co-ordinate branch of the government as one of its incidents. As soon as it is demonstrated

that the body claiming the privilege is not such co-ordinate branch of course it is shown no such incident attaches.

I admit that the court cannot pass upon a class of political questions and if this were one of the classes then the court could not pass upon it; but it is not.

Questions involving the title conferred upon an officer by an election or appointment, questions concerning the legality of the acts of municipal boards or other public bodies or officers, questions concerning the constitutionality of laws, are political questions, because they are concerned, not so much with private right as with the constitution of the body politic, the binding force of laws and the acts or titles of its officers. The court deals with questions like these every day. On the other hand, the case of *Luther v. Borden*, 48 U. S. 7 How. 1, 12 L. ed. 581, which involved the question of which was the true government in Rhode Island, during the time of the Dorr rebellion; the case of *Georgia v. Stanton*, 73 U. S. 6 Wall. 50, 18 L. ed. 721, which involved the status of the state of Georgia under the reconstruction acts; and the case of *Jones v. United States*, 137 U. S. 212, 34 L. ed. 696, which involved the inquiry whether the jurisdiction of the United States extended over one of the Guano islands,—are illustrations of a class of political questions which the court will not undertake to decide in opposition to the decision of the president.

I freely concede that if the court were asked to do nothing but to make a declaration as to which senate was the true senate it would be obliged to decline. But it by no means follows that because the court cannot pass directly upon the status of the legislature, or either of its branches, it cannot do so at all. It is the duty of the court to expound and enforce legislative acts, and, in so doing, it must necessarily determine whether what purport to be laws are so in fact. If two bodies, sitting at the same time, both claim to be the legislature, and pass acts, the court must determine which of those bodies is the legislature, in order that it may ascertain whose acts it shall enforce. In doing so it necessarily reviews the claims of the contending bodies and decides between them, *i. e.* decides the question which is called political.

So if one of those bodies orders its speaker to assert a citizen and detain him within or without its walls, if it be not the true legislature, its order is void and on a *habeas corpus* proceeding the court must inquire into the validity of the arrest and the jurisdiction of the body which ordered it, and, if the arrest be invalid, discharge him from custody wherever he may be found.

So, too, if each legislature should, under our constitution, proceed to elect a comptroller and treasurer, the court would necessarily be compelled to decide which of the persons elected were really comptroller and treasurer.

Prince v. Skillin, 71 Me. 367, 36 Am. Rep. 325; *Re Gunn*, 19 L. R. A. 519, 50 Kan. 155; *Burnham v. Morrissey*, 14 Gray, 226, 74 Am. Dec. 676; *Atty-Gen. v. Barstow*, 4 Wis. 567;

Boyd v. Nebraska, 143 U. S. 135, 36 L. ed. 104; *State v. Bulkeley*, 14 L. R. A. 657, 61 Conn. 287; High, Extr. Legal Rem. § 634; McCrary, Elections, § 347; Cooley, Const. Lim. p. 796.

Mr. Thomas N. McCarter, also for respondent Rogers:

This is not the case of a writ filed *ex officio* by the attorney-general without leave, but is a petition by a private relator for leave for the attorney-general to file such information. The cases are different, and the proceedings thereon differ.

Vanatta v. Delaware & B. B. R. Co. 38 N. J. L. 282; *State v. Tolun*, 33 N. J. L. 195; High, Extr. Legal Rem. § 605.

That the relator styles himself governor, does not change the nature of the proceeding.

The writ is asked for against two persons, alleging that each claims to exercise the office of president of the senate of New Jersey, and it is under our statute *quo warranto*.

Rev. 905, § 1.

In one aspect of this case, to reach a complete determination of the questions affecting Mr. Rogers' claim of title, it would be incumbent on the court to decide whether the body which elected him as president was a lawful senate of the state of New Jersey; whether its members were duly elected and qualified; and whether being so elected and qualified, they were lawfully organized, and being organized lawfully elected Mr. Rogers their president.

This court has no power or jurisdiction to enter upon an inquiry which involves a determination of any of those questions.

Const. art. 3, § 2, par. 1; § 4, pars. 2, 3; § 8, pars. 1, 2; art. 5, par. 12; art. 10, par. 1; Revision, p. 853, § 85.

It is an undisputed fact that Mr. Rogers was elected to the office of president by a majority of the members of the senate, who met at the state house on the day fixed for the meeting of the legislature, whose certificates of election were in due form. That having been elected he took the constitutional oath and assumed and continues to preside over the body that elected him. This court is asked to institute a proceeding the result of which will be that if it decides against Mr. Rogers it must pass judgment of ouster and remove from his unlawful intrusion and subject him to the costs of the prosecution and possibility to a fine. It is respectfully contended that it is not within the power of this court to enter upon any such inquiry or pass any such judgment. The proceedings which resulted in his election were of a purely legislative character, with which this court cannot interfere.

State v. The Governor, 25 N. J. L. 381; *Thompson v. German Valley R. Co.* 22 N. J. Eq. 111; *Kendall v. Camden*, 47 N. J. L. 64; *State v. Young*, 33 N. J. L. 40; *State v. Frambach*, 47 N. J. L. 85; *Keorns v. Edwards* (N. J.) Jan. 6, 1894; *People v. Hall*, 80 N. Y. 117; *State v. Marlow*, 15 Ohio St. 114; *Hiss v. Bartlett*, 3 Gray, 468, 63 Am. Dec. 768; *People v. Bisell*, 19 Ill. 229, 68 Am. Dec. 591; McCrary, Elections, § 598, also § 350; *State v. Berry*, 47 Ohio St. 382; 6 Am. & Eng. Encyclop. Law, p. 387, under head of *Elec-*

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tions; State v. Tomlinson, 20 Kan. 692; *Selleck v. South Norwalk*, 40 Conn. 359; *Kerr v. Trego*, 47 Pa. 295; *Hartranft's App.* 85 Pa. 438, 26 Am. Rep. 667; *State v. Towns*, 8 Ga. 360; *State v. Jarrett*, 17 Md. 809; Cooley, Const. Lim. 131; *Moses*, Mandamus, 80; *People v. Mahaney*, 13 Mich. 481.

The next question involved in the supposed proceeding would be the legality of the organization of the body and of the election by such body of Mr. Rogers. This, also, is subject to the same rule; it is a legislative question which has been decided by the legislature itself, and from which decision there is no appeal to the supreme court.

When we find a quorum of the senate meeting at the place and on the day required by the constitution and laws of the state, and perfecting an organization, and taking the oaths of office and electing their presiding officer and other officers, and the house has recognized it and acted with it, it becomes by those facts a complete legislature, requiring for its legality the recognition of no other person, and subject to review by no other department of the government. Such recognition was within the designation of legislative or political acts over which, by well-settled principles, the court can have no jurisdiction.

Luther v. Borden, 48 U. S. 7 How. 1, 12 L. ed. 581; *Decatur v. Paulding*, 39 U. S. 14 Pet. 515, 10 L. ed. 568; *Kendall v. United States*, 37 U. S. 12 Pet. 524, 9 L. ed. 1181; *Georgia v. Stanton*, 78 U. S. 6 Wall. 50, 18 L. ed. 721; *People v. Hatch*, 33 Ill. 9; *Com. v. Allen*, 70 Pa. 465; *Hartranft's App. supra*; *Burnham v. Morrison*, 14 Gray, 226, 74 Am. Dec. 676; *State v. Jarrett, supra*; dissenting opinion of Judge Allen, in the late and well-known case, *Re Gunn*, 19 L. R. A. 519, 50 Kan. 155.

If Mr. Rogers is called upon to show by what warrant he claims to act as president of the senate, the result must be to establish either one of two propositions:

First. That he has been legally elected president of the senate of New Jersey, and now lawfully exercises the functions of his office; or

Second. That he is at least president *de facto* of the senate acting with the house in the discharge of their ordinary legislative duties, with no other person in existence authorized or qualified to assume his place if he should be removed from it.

What is his warrant?

1. That he was duly elected senator from the county of Camden at the election held in last November.

2. That of his ten associates who elected him, seven were duly elected from their respective counties at the same election, and the remaining four were members of the senate last year, or what the attorney-general calls "the existing senate."

3. That as there can only be twenty-one senators, and as eleven is a majority of twenty-one, the body which elected him constitutes a lawful quorum to do business. That these eleven members met in Trenton on the ninth day of January, being the day fixed by the constitution and took the oaths of office

prescribed by the constitution in the manner therein provided.

4. They repaired to the state house in compliance with section 85 of the Election Act, and produced the certificates of their election which are produced here and in evidence and are in due form.

5. They filed their credentials and oaths of office with the secretary of state and organized themselves into a body, and elected Mr. Rogers president by a unanimous vote.

6. That he took the oath of office prescribed by the constitution and thereupon the senate proceeded to do business with him as its presiding officer.

7. That the body over which he presides has been recognized by the house of assembly; that together they have passed many acts.

8. That the senators have met with the other house in joint meeting, and have elected important state officers, namely, comptroller and state treasurer, and that by virtue of all such proceedings he exercises the powers in question.

According to the opposite contention although the constitution says the senate shall be composed of one member from each county yet, every year when the senate meets it shall only be composed of one member from each county that has not elected a new one and whether it will ever be composed of more, or not, will depend, not on the constitution, but on the will of the members from the fourteen counties holding over. If such choose to admit the new ones, all well. If not, their judgment is final and conclusive.

The newly elected members may have been duly elected; may possess every constitutional qualification; may, as in this case, produce the certificates of election, which the law makes *prima facie* evidence of their right to seats in the house in the organization and yet a majority of the hold-overs, though less than a quorum of the whole number, may finally and conclusively determine, in spite of law and the constitution, that the newly elected men are not and cannot be members of the senate. Pursue this logic to its legitimate conclusion. The seven hold-over senators are disfranchised. The year goes on with the senate composed of fourteen members. At the end of the year seven more go out, and others may be elected in their places, but there are seven hold-overs composing the existing senate: four is a majority and these four may exclude the newly elected, as they did before, and then the existing senate, consisting of seven for another year, and then it goes out like the snuff of a candle.

If the senate was an existing body, the journal of the senate would be a continuous volume, having no interruptions or breaks occasioned by the adjournments. If it was a continuous body, why would not the business left unfinished at a previous session continue to be on the calendar and business of the new session in the same condition of progress which it had at the adjournment? Yet everybody knows that unfinished business, left so at the expiration of a session, dies with the session and cannot come up in the new session in the same stage of progress

which it had when the senate adjourned. Will it be pretended that after the adjournment of the senate of 1893, any of its powers continued during the recess in the legislature? Had it imprisoned a man for contempt, would its existence and continued power operate to hold him in custody during the recess, when every one knows that the right to hold and punish for contempt ceases with the adjournment of the house in which the proceedings for contempt were taken?

Anderson v. Dunn, 19 U. S. 6 Wheat. 204, 5 L. ed. 242.

There can be no stronger assertion of the right of those newly elected members to participate in the organization of this senate than that found in *McCrary on Elections*, §§ 280, 282, 288; *Cushing*, §§ 228, 229, 240.

There is enough in this case to justify the court in denying this writ, and refusing to interfere with the title of Mr. Rogers without exercising the jurisdiction to try his title, or the election and qualifications of those who elected him, and that is, that Mr. Rogers is the president *de facto*.

People v. Hatch, 33 Ill. 164; *State v. Farrier*, 47 N. J. L. 383.

The court, in the exercise of its discretion, ought not to allow the filing of this information. This is a discretionary power and *State v. Tolan*, 58 N. J. L. 195, lays down rules regulating the exercise of such discretion.

The application is not made in good faith. The governor and attorney-general are estopped from asking for this relief.

If Adrain was in a situation to be called on to answer as to his warrant for exercising the duties of the office of president what could he set up? Nothing but his recognition by the governor sustained by the attorney-general's opinion. The pretense that he was elected to anything by the senate, or a quorum of it, is completely overthrown by the evidence.

State v. Tolan, *supra*; *Rea v. Davies*, and *Rea v. Marten*, 4 Burr. 2122; *Rea v. Parry*, 6 Ad. & El. 810; *Cole*, Criminal Information, 165; *Grant, Corp.* 253; *Willcock*, Mun. Corp. 476; *State v. Utter*, 14 N. J. L. 84.

The public interest will not be served by continuing this prosecution.

The court is asked to become a party to a most nefarious political conspiracy having for its object the reversal of the popular will, and to keep on the statute book laws for the legalizing and encouragement of racing and gambling, which the people have condemned.

Mr. John P. Stockton, Atty-Gen., also for relator:

The question is simply this: Which of these two senates is organized according to the constitution? Manifestly they cannot both be so organized, and that one only can be which has complied with the constitutional forms and requirements. To decide this question there must be determined, first, what the constitution requires, and second, which body, if either, has conformed to such requirements. What is there in these inquiries that is not judicial?

Political questions may be raised in a

state, but they can only be raised by the supreme power, not by one of its creatures.

Luther v. Borden, 48 U. S. 7 How. 1, 12 L. ed. 581.

The senate has the undoubted right to choose its own officers but it does not follow that it has the right to elect a person to the office of president of the senate who is constitutionally disqualified from holding that position.

There is really but one question in this case. It is simply a construction of those provisions of the constitution which created the senate of New Jersey.

Constitutions are made in periods of tranquillity and public order that they may guide and control in times of popular excitement and disorder. To construe them to suit popular clamor contrary to their plain and settled import, is to destroy the constitution by construction, and is as great a crime and almost as bad in its results as to destroy it by open rebellion.

There is no doubt of the jurisdiction of the supreme court in a case where there are two conflicting senates each claiming a right to exercise legislative functions, to determine by which body legislative authority can be lawfully exercised.

Prince v. Skillin, 71 Me. 387, 36 Am. Rep. 325; *McCrary, Elections*, p. 396; *Atty-Gen. v. Barton*, 4 Wis. 587; *Re Gunn*, 19 L. R. A. 519, 50 Kan. 155.

In case of a division of a legislative body that ought to be a unit, that is the legal organization which has maintained the regular forms of organization according to the laws and usages of the body; or in the absence of these, according to the laws, customs, and usages of similar bodies in like cases, or in analogy to them. The new members though they be in the majority, must meet with the old at the time and place fixed by law, and proceed regularly with the organization of the body. They must join themselves to the existing body, for the members holding over, though they may be in the minority, and not sufficiently numerous to constitute a quorum, are yet the body, for the purpose of receiving the new members and acting as the organs of reorganizing the body.

McCrary, Elections, §§ 592, 593.

The senate of New Jersey is a continuous body with hold-over members, as is clearly demonstrated by reference to the constitution.

Art. 4, § 1, par. 3, §§ 2, 4, 6; art. 5, cl. 12.

The provisions of the Constitution of 1844, so far as they concern the creation, organization, and powers of the senate, are manifestly copied from the Constitution of the United States.

This creates a continuous body, and there always exists a senate capable of doing business, because there is always two thirds of the entire senate in existence, and, moreover, there is always more than the constitutional number required to pass a bill.

There can be no doubt of the constitutional duty of the senate to assemble, at the time named by the constitution and to proceed to do all those acts which the number of mem-

bers present make it competent for it to perform.

Cushing, Law & Practice, § 272.

The continuity of both the senate of the United States and the senate of New Jersey is created by the mode of election and term of the members and not by the manner of providing for a temporary presiding officer.

The New Jersey law and practice has been to provide for a presiding officer of the senate during the entire existence of the senate not as in the case of the United States senate, in advance, but contemporaneously and with ample power to meet any contingency as it may arise.

While the Constitution of 1845 did not say so, the legislature of 1845 took care to supply the omission by providing that "the powers, privileges, duties, and remunerations granted to or imposed upon the vice-president by law, at and immediately before the time when the present constitution of the state took effect, shall hereafter be exercised, enjoyed, and performed by the president of the senate, so far as the same are not inconsistent with the present constitution; and all such powers or duties heretofore exercised or performed by the president of the senate are hereby ratified and confirmed and shall have the same force and effect as if exercised and performed after the passage of this act.

This provision of a permanent officer, with great general and continuing power, seems to be as ample a provision for the proper and timely organization of the senate as does that of the Federal Constitution and custom.

This provision has been further fortified by a custom of fifty years' existence.

It is a question that does not admit of dispute that the senate of the United States is a continuous body with organized hold-over members, and that there was a construction of the constitutional clause creating the senate before the constitution of New Jersey was framed; that this was well known to the learned lawyers who were engaged in framing that constitution and that the arguments used in the state convention were the same as used in the national convention.

The rule is well settled that where a statute or a constitutional provision of doubtful import has been adopted in one state from the statutes or constitution of another state, after a practical construction has been given to the language by judicial decision, it will be presumed that the interpretation adopted in the state from which it is taken has been accepted as well as the words.

State v. Kuhl, 51 N. J. L. 191; *Gray v. Askew*, 3 Ohio, 486; *Langdon v. Applegate*, 5 Ind. 327; *Rigg v. Wilton*, 13 Ill. 15; *Adams v. Field*, 21 Vt. 256; *Rutland v. Mendon*, 1 Pick. 154.

It is not provided that a member shall be entitled to take his seat on the presentation of the certified copy of the statement of determination of his election. The act could not do this because the constitution provided that each body should be the judge of the returns of the members; so the act simply confines itself to making this certificate prima facie evidence; evidence to be submitted to

the tribunal which by the constitution could alone make the determination: evidence, which if uncontradicted, is sufficient to establish the right to the seat.

The provision of statutes the ruling of the courts and the custom of the body all recognize the power of each body to render judgment on the presentation of the evidence.

It is manifest that the provision permitting the members-elect to take the oath before one another was a necessity in the first organization of the senate.

In reference to the house, which was not made a continuous body, whose speaker is spoken of in the constitution as speaker for the time being, it is always a convenient method of organizing. In the senate it was only necessary for the purposes of the first organization, and, therefore, it appears that from the time the senate was organized as a continuous body to the present time the members-elect have been sworn in by the president *pro tempore* of the senate in the presence of the senate.

Under the clauses which provided that "members of the legislature shall, before they enter upon the duties of their respective offices, take and subscribe the following oath or affirmation:" and "members-elect of the senate or general assembly are hereby empowered to administer to each other the said oath or affirmation,"—senators-elect could take an oath or affirmation in private, then appear with an attested certificate and insist upon taking their seats without permitting the existing senate, even if they were all present, to pass upon their returns. Such a proposition can find no support either from principle or authority, and is inconsistent with the free exercise by the senate of its power as judges of the returns of its members.

If such a course could be pursued the senate could be destroyed by usurpers, and on their presentation a majority might immediately exist in the senate, which would have power to decide on their own elections and control legislation; and the testimony shows that this was the purpose of the insistence that the senate should bind itself to seat the members-elect, as a condition precedent to their presentation.

When it is determined to admit a senator to his seat because his credentials are regular he is then admitted to take the oath of office, but he does not become a member of the body by virtue of the oath of office, but by virtue of the judgment of the senators upon his credentials, and their determination that he is entitled to admission. While the official oath may be a necessary part of his induction into office, it does not make him a member of the body until his credentials have been approved by the body, who are the constitutional judges.

The power of a legislative body to judge of the election of its own members is an absolute power, controlled by no other tribunal. In this country it was adopted from the English system and it was embodied in the unwritten constitution of Great Britain as the result of one of the earliest of the conflicts of the house of commons on the one hand, and

the sovereign or the lords, or both, on the other, and has ever since been admitted to belong exclusively to the house itself as "its ancient natural and undoubted privilege."

The record of the forty-eight senates between 1845 and 1894, show that no senator-elect was ever admitted to his seat as a senator, save after judgment upon, and approval of his credentials by the senate, and the taking of the official oath by the senator-elect. In two instances wherein a statement was made that the credentials had been forgotten, a resolution of the senate was required to waive the presentation of the credentials at that time and to accept them as if they had been presented and judged.

No instance can be found in the history of this state or of the federal government in which a senator-elect ever voted on the approval of his own certificate of election.

It is a notable fact that of all the senators-elect who are recorded as "appearing in their seats," before they were admitted to their seats not one was ever selected for president *pro tempore* nor ever nominated a senator for the temporary presidency; nor ever presented the credentials of a senator-elect, nor ever performed any recordable act in the organization. The grouping of the senators-elect with the existing senators was evidently a blunder by the secretary, committed through the then seeming unimportance of the form of the record, which he has since endeavored to fortify by vague recollections, and which is exposed by the fact that in 1849, when Mr. Dodd had ceased to be the secretary of the senate, and his place had been taken by Phillip J. Grey of Camden, the journal ceased showing that the senators-elect "appeared in their seats," and were subsequently "admitted to their seats," after the important intermediary processes of the presentation of their credentials, the judgment and approval of the senate upon them, and the taking of their official oath.

The precedent set by Mr. Grey in 1849, in recording the participation in the formation of the senate of only those who did in fact participate, has been followed to the present day.

It is urged that the rule which requires the judgment of the existing body on the returns of its members is unreasonable; that members elect may be deprived of their seats and of taking proper part in the organization by the unjust action of those whom the constitution has made the judges. This is an argument from inconvenience, which goes a very little distance in the consideration of a constitutional question.

There is an argument from inconvenience against almost every provision of the constitution.

In this case the constitution has adopted the provision which was considered the least objectionable. Suppose they had selected some other plan. Suppose they had provided that the action of the election officers in taking the votes, in estimating them hastily late at night; the action of the county canvassers (often men without the slightest responsibility for the proper performance of their duties, and yet the men who make up these

credentials which these members bear to the senate), should be final; suppose the senate of New Jersey and the house of assembly were bound conclusively by this action, which would constitute the greater inconvenience? Were not the framers of our constitution wise, when recognizing the possibility of these errors by minor officials; when realizing that neither the election officers nor the canvasser officers had the slightest power or right to inquire into the qualification of the members or the conduct of the elections,—they said that when that member, with the certificate of the county canvassers, came to the senate, the senate should have the power then or at any other time, at their convenience, and in their own way, to examine fully, not only into the returns which has been brought, to them, but into the qualifications of the man who had brought them, and the election by which he had been sent there, and should be unrestricted in that power? has not the history of this state shown that the aid of our highest judicial officers has been summoned to revise and perfect these returns and credentials, because they were found to be so defective as to be unworthy of presentation to the house itself? Is this not the reason why the certificates of election, which, after all, are but the returns of the boards of county canvassers, were not made conclusive, but by subsequent legislative action were declared to be only *prima facie* evidence, before the body, which was wisely empowered to render judgment upon them?

If the constitution had provided that without the examination of any certificates or the judgment of the body, one claiming to have been elected a member of the body could take his seat and act with the body, the legislature, with all its great inherent powers, would be destroyed by intruders.

The inconvenience that would then follow would be that the scenes that have occurred this year would occur after each succeeding election.

It is not a matter of any importance whatever, so far as the question of organization is concerned, how many members joined the Rogers senate. Unless organized according to law and constitutional provisions if every member of both bodies were assembled, they, would be nothing but a mob, and incapable of making laws or electing United States senators or state officers.

It is impossible to overestimate the importance of observing the distinction between the members of the body individually and the body itself as an organized political body.

Mr. Gilbert Collins, also for respondent Rogers:

By the Constitution, art. 4, § 4, pl. 2, a majority of the senate is necessary to "constitute a quorum and do business." Nine senators attempted to elect Mr. Adrain president *pro tempore*, but it is only by the false assertion that four others afterwards entered the senate chamber and answered to their names while he was in the chair, thus (as claimed) participating in the proceedings

and recognizing him as president, that it can even be argued that he became president *pro tempore*. The slightest consideration is convincing that this argument is a *non sequitur*. It is the uniform usage that the secretary of the last senate shall call the roll, and a senator may well answer to his name for the express purpose of being heard in the matter of a temporary organization. The fact that Mr. Adrain happened to be seated in the president's chair gave him no greater right than if he had occupied another place in the senate chamber. It is impossible that the mere coming to the proper place at the proper time to organize the senate, and then and there answering to one's name, can bind a senator to a previous unlawful and unconstitutional temporary organization, effected in his absence.

Where the thing in issue is the fact of organization, that fact must be independently proved before any journal or minutes of the organization can possibly be evidence.

State v. Young, 32 N. J. L. 29.

It is unfortunate that the learned attorney-general in his opinion to the governor which seems to be the foundation of the present conflict between the executive and legislative branches of the government, should have wandered into such a circuitous course of logic as that in which he argues that a body of men constitutes the senate because their journal proves it to be such, and that that journal is competent to prove it because it is the journal of the senate. Was there ever a plainer illustration of "reasoning in a circle?"

Mr. Adrain cannot claim that he continues to be "president of the senate" by virtue of his election and qualification in 1893. There cannot be two kinds of "president of the senate" one with the right to hold over and the other not, according to the chance of the continuance or noncontinuance of senatorial term of office.

Either there is no "president of the senate" or Mr. Rogers holds that office.

As to Maurice A. Rogers leave to file an information should be denied because the proofs establish his absolute title to the office of "president of the senate."

It may be argued that the senate is a continuous body, and that the hold-over members form a nucleus to which the new members must be added. Granted that it is a continuous body; so is the assembly. The attorney-general quoted Henry Clay to the governor; but Mr. Clay said that the senate, and house too, were continuous bodies. On the instant when the term of office of members of one assembly expires, the term of those of the next begins. There is always a house of assembly ready to respond to a summons to meet. The senate is continuous in the same sense and in no other. Certain senators hold over without the election, but a new organization must be made each year under the constitution. The title of a senator chosen in 1893 consists in his election, proven by his certificate and in his official oath which any senator elect can administer (Const. art. 4, § 8 pl. 1). The title of a senator chosen in 1891 is precisely the same,

and no sound reason appears why the election in one year should confer any greater power than the election in another.

Doubtless good order and decorum naturally suggest that on a new organization of a deliberative body where there are members holding over, they should convene and receive the incoming members but they are bound to receive them if they hold regular credentials. Suppose the hold-over members arbitrarily refuse to receive the credentials or admit the new members, is there no remedy, even though with a minority of the hold-over members willing to admit them they constitute a quorum of the entire body? It is preposterous to so contend, and the remedy must be for such quorum itself to effect an organization.

The election laws of the state declare that in the organization of each house a certificate of the nation shall be deemed and taken to be prima facie evidence of the right of the persons therein mentioned to seats in the house respectively to which they shall have been so determined to be elected (Rev. 353, § 85), and neither the statutes nor the constitution of the state require any "admission" by members holding over. The contention is that the hold-over members are the senate. The constitution says the "senate shall be composed of one senator from each county in the state" (Const. art. 4, § 2, pl. 1).

The principle of organization contended for by the attorney-general is precisely that of a close corporation, where vacancies are filled by those who hold over. It is repugnant to the theory of representation, through a popular election. The vote of the people gives the title, the regular certificate of election is the conclusive evidence of it for the purpose of organization, and the oath, which any senator elect may administer, is the qualification. The attorney-general prescribes a second election by a majority of the old members, less than a quorum, of the senate. He holds a doctrine of apostolic succession whereby legislative power is not conferred by the people, but has been transmitted ever since 1848, by the laying on of the consecrated hands of the senators holding over.

Neither the statutes nor the constitution of the state warrant any such doctrine.

The majority of the senators holding over, upon whom the attorney-general would confer the whole judicial power of the senate over the elections of its members, is a body unknown to the constitution and laws of the state.

It is urged that it is necessary that the senators holding over should examine the certificates as a protection against forgery and fraud, to which the answer seems fair that no such necessity has been observed in the organization of the assembly; that the protection is found in the statutes providing for certificates and that more imminent risk is encountered by the placing of power contended for in the hands of a partisan minority, smarting under the lash of popular disapproval.

If the hold-over senators must pass on the credentials of new senators, and if new senators cannot become such until they are "ad-

mitted" by the hold-over senate, see where we are led. There is no power whatever to coerce the acceptance of credentials, and the "admission" of new senators, and seven men can at any time completely block legislation.

A body of eleven senators is a quorum. Public policy will incline the court to recognize as valid the organization which possesses a quorum and is able to perform the urgent public duties of the senate; respect for the constitutional rights of the electors will lead to the recognition of the body which represents the majority; self respect will lead to the repudiation of a scheme of trickery and fraud.

Mr. Richard Wayne Parker, also for respondent Rogers:

1. Upon the evidence it is clear that no writ of quo warranto can issue against Robert Adrain. He certainly never is, nor ever pretended to be, president of the senate. Upon the papers and upon the facts, he holds merely the place of temporary chairman of a minority of senators. There is no controversy, no place for litigation on this subject.

2. It is equally clear that no writ can issue against Maurice A. Rogers. He is president of the senate, elected by a majority of that body, duly assembled according to the constitution. No court will challenge his right as such, or interfere with the legislative department of the government. But outside of that his right is clear. There is no reason to file any information against him.

Beasley, Ch. J., delivered the opinion of the court:

This case has been placed before the court on a rule to show cause why an information in the nature of a quo warranto should not be issued against these respondents, each of whom claims, and to some extent has exercised, the office of president of the senate of New Jersey. Under this procedure, evidence has been taken, and it thus appears that the twenty-one senators of the state have divided themselves into two bodies; that is to say, nine of the old members, who were styled in the argument "hold-over members," constitute one of such bodies, and four hold-over members, with seven newly chosen senators, constitute the other body. Subsequently, a newly chosen senator joined himself to the body made up of hold-over senators, making that body to consist of ten senators; the other consists, as just shown, of eleven. The former of these bodies will be referred to, in order to avoid periphrase, as the "Adrain Senate," the latter as the "Rogers Senate." The Adrain (so called) senate, has been recognized officially by the governor, and remains in session. The Rogers (so called) senate, is recognized officially by the house assembly, but has been refused official recognition by the executive. It has passed various laws, and, with the co-operation of the lower house, has appointed a treasurer and comptroller of this state. The above is a description of the general aspect of the case, and it will be sufficient for immediate purposes.

The object of the present course of law is to establish by a judicial judgment which

of these contestants is the genuine, and which the spurious, state senate, for they cannot both be genuine. But, before proceeding to dispose of that important question, the counsel of Mr. Rogers' senate have interposed a preliminary one; that is, whether this court can take cognizance of such a litigation. It is inferred that the argument on this subject, denying the existence of the judicial power in this position, has not been impressive. In my judgment, it is founded in all its parts on a sheer *petitio principii*, as on a denial of a legal principle so entirely established as not to be debatable; for it proceeds on the assumption that the senate it advocates is a constitutional senate, in that the judgment of a majority of the senators elected with respect to this position, whether or not they have organized in conformity to, or in violation of, the constitution of the state, is conclusive and final. It will be observed that the contention of the applicants for this writ is that the Rogers' senate has no legal existence, inasmuch as it was organized in a manner contrary to this fundamental law; and the proposition, therefore, would seem very evident that, as no power is vested by the constitution in this majority of senators to construe such law in this respect, the power to expound and enforce it is lodged in the ordinary legal tribunals. Referring to this judicial prerogative, Mr. Cooley, in his work on Constitutional Limitations (page 46), says: "This right and power of the court to do this are so plain, and the duty is so generally, we may almost say universally, conceded, that we should not be justified in wearying the patience of the reader in quoting from the very numerous authorities on this subject." It was certainly, therefore, the unexpected that happened when learned counsel, in reply to the contention that the senatorial organization in question was inconsistent with constitutional prescriptions, assumed the position that this court could not entertain jurisdiction in the case, as the interpretation of the constitution was a matter, in the language of the brief before us, of a purely legislative character. It is believed that no decision has been made for a century past that does not antagonize such a proposition.

It will be understood that, in the vindication of what is esteemed to be the undeniable prerogative of this court, there is not the slightest suggestion of the existence of a judicial capacity to control the legislative authority when exercised within its appropriate sphere. If the question here prescribed had been whether this senatorial body had been organized in the accustomed mode, or in open violation of its own practice and rules, a totally different subject of inquiry would have been *sub judice*; and it may well be that the decision of such senatorial body itself would have been received as conclusive, and entirely beyond the power of this tribunal to review. This court does not claim the slightest legal faculty to supervise or interfere with such transaction. All that is asserted is that when the inquiry is whether the legislature, or any state body or officer, has violated the regulations of the constitution, it is entirely plain that the

decision of that subject must rest exclusively with the judicial department of the government. Nor can we for a moment forget that, in entering upon the inquiry that is now imposed upon us as a duty, we have to do with a subject of great importance and delicacy, and that, before the respective powers of this court can be exerted to interfere with the action of a co-ordinate branch of the state government, we must be as certain as care and diligence can make us that the foundation on which we place ourselves is sure and stable. That this court has the legal right to entertain jurisdiction in this case, displayed by this record, we have no doubt; and we are further of opinion that it is scarcely possible to conceive of any crisis in public affairs that would more imperatively than the present one call for the intervention of such judicial authority.

With respect to the further contention that the presidency of the senate does not belong to that class of officers whose legality can be put to the test by force of a proceeding in the nature of a quo warranto, our conclusion is that such contention cannot prevail. The language of the statute of this state, being broader than its English prototype, describes, in terms of the utmost generality, the scope of this remedy; for it declares that it shall be applicable to every case in which "any person or persons shall usurp, intrude into, or unlawfully hold or execute, any office or franchise within this state." Consequently, it does not seem deniable that all offices, as well those derived from the legislature as those derived from other sources, are comprehended by this definition; and the consequence must be, therefore, that the statutory provision just cited justifies the present proceeding unless it can be shown that such action would be inconsistent with the constitution or privileges of the senate, as an independent department of the government. And, indeed, this was one of the positions of counsel on the argument before us; but we think it is obvious that whatever seeming force an argument has is derived from the *petitio principii* before alluded to, for it assumes as its basis that the court is taking proceedings against the officer of a genuine senate. But this assumption is unfounded, as the process that we are now asked to order is to be directed against the appointee of a senate that, it is alleged, is spurious. It seems to be plain that such action cannot be an infringement of the prerogatives of the real senate of this state; and, in disposing of this part of the case, no stress is laid on the fact that each of the respondents, if legally in power, is entitled to hold *ex officio* certain high offices, by virtue of the constitution and the laws of this state, for it seems to be well to place the right of the court to authorize the use of the present procedure on the distinct ground that it is the appropriate and legal remedy whenever it shall be made to appear that any person is holding himself out as a public officer by senatorial appointment, when, in point of fact, such appointing body has no existence, in view of constitutional provisions and regulations. As at present advised, I do not

perceive how in any case there can be any judicial interference with the actions, appointments, or proceedings of a true senate of the state, unless the same shall be shown to be out of harmony with the constitution itself. We wish to be understood that we do not intend to, and do not decide anything further than the case now before us. When, by judicial action, it becomes necessary to demark the constitutional lines which separate the jurisdiction and powers of the several independent departments of government, each from the others, we are deeply conscious that in such momentous matters we should be always on our guard, and that our judgment with respect to them should be invariably in the concrete; for experience has demonstrated that theorizing and speculation on such occasions are dangerous in the extreme, and are inventions that have severally returned "to plague the inventor."

Having thus briefly disposed of the preliminary question in favor of the jurisdiction of this court, it becomes necessary to proceed to an examination of the legal aspect of the case, as presented in the issue upon the record. That issue has been framed in this wise: In order to expedite the determination of the case, counsel of these litigants agreed that, if cognizance should be taken by the court of their controversy, it should be assumed that an information had been filed, and that each of the contending parties had interposed his answer, stating the facts which appear in the evidence and which are not in dispute, by force of which he seeks to vindicate his title, and that reciprocal demurrers should then be put in, thus exhibiting to the court the litigated points to be determined. The facts contained in the answers alluded to are somewhat voluminous, and will be found contained in the statement which prefaces this opinion. Upon looking into the presentation of the facts thus indicated, it will be at once apparent that the central ground of controversy between these rival organizations is with respect to the right of the Adrain senate, or what is called the "Hold-Over Senate," to dominate on the occasion of the introduction of newly elected members into the senate. In the very able and carefully considered briefs of the attorney-general and his associates, this dominance is claimed to exist on the ground that, by the proper construction of the constitution of the state, the state senate is a continuous body,—that is, that it has perpetual life,—and that, consequently, a member elected to one of its seats cannot enter it until his title has been passed upon by the ever-existing body. It has not and cannot be pretended that this doctrine has its root in the actual expressions of the constitution, and it, therefore, is admittedly the creature of construction. The only provisions of the constitution pertinent to this subject are the following: Article 4, § 1, provides that the legislative power shall be vested in a senate and general assembly; and in paragraph 8 of the same section it is provided that "members of the senate and general assembly shall be elected yearly and every year, on the first Tuesday after the first Monday in November;

and the two houses shall meet separately on the second Tuesday of January next after the said day of election, at which time of meeting the legislative year shall commence," etc. Section 2 provides that the senate shall be composed of one senator from each county in the state, elected by the legal voters of the counties, respectively, for three years. By the second paragraph of section 2 of article 4 it is provided "that as soon as the senate shall meet after the first election to be held in pursuance of this constitution, they shall be divided as equally as may be into three classes. The seats of the senators of the first class shall be vacated at the expiration of the first year; of the second class at the expiration of the second year; and of the third class at the expiration of the third year, so that one class may be elected every year," etc. It is apparent that these recitals fully justify the remark first made,—that the constitution does not attempt to define the life of the senate; yet, notwithstanding such silence, the attorney-general and the counsel of President Adrain raise the contention that the state senate, like the senate of the United States, has a continuous existence; that there can be no such things as an old senate and a new senate; and that there has been an unbroken continuity of existence of this body from its birth to this hour. And, as a corollary of this doctrine, it is further insisted that this self-sustaining body is the sole judge of the right of newly elected senators, when they apply for admission to its seats, and that it can, on such occasions, receive or reject them at its will. In the application of this theory to this case, it was claimed that the body presided over by Mr. Adrain had the right to require that the credentials of senators-elect should be placed before it to be retained, and to be adjudicated upon at such time and in such mode as itself might deem proper. If the state senate has the inherent vitality thus asserted, it seems to be undeniable that it had the power to act as it did on the occasion that has given rise to this litigation; for, by the plain language of the constitution itself, it is declared that "each house shall be the judge of the elections, returns, and qualifications of its own members." It will be perceived, therefore, that the question now to be considered and decided by this court is, Has the senate of the state the perpetuity thus claimed?

The first and most elaborate argument, pressed with such force and earnestness upon the attention of the court by the learned attorney-general and his able associate, Mr. McDermott, was grounded almost entirely upon the fact that the clause in the constitution of this state that gives to the membership of the senate a continuity of life by a succession of members, in such a way that provides for the continual presence of a quorum of the body, was a transcript of a similar provision in the Federal Constitution; and it was thereupon further insisted that the language of the regulation, so adopted, had, before its adoption, a settled meaning, denoting the permanent existence of the body regulated by it. If we were to assume the truth of the foregoing statement, in all its

parts, no one could doubt that the reasoning founded upon it would be entitled to great weight. It cannot be denied that the section is, in substance, a copy of a clause of the same import in the Constitution of the United States; and if the clause, so imported, had antecedently received an authoritative interpretation, it would be but reasonable to infer that the framers of our organic laws, many of whom were justly of great learning and experience, understood the provision in the sense thus impressed upon it. Under such circumstances, no other conclusion would be at all rational. The rule is well settled, says this court in the case of *State v. Kuhl*, 51 N. J. L. 191, "that where a statute or constitutional provision of doubtful import has been adopted in one state from the statutes or constitution of another state, after a practical construction has been given to the language by judicial decision, it will be presumed that the interpretation adopted in the state from which it is taken has been adopted, as well as its words." If, therefore, counsel, on this occasion, are justified in predicating that the clause under criticism had acquired, in the manner indicated, a settled signification at the time in question, it must be admitted that this would be the sense in which it should be now read and understood. But, upon careful examination of the subject, I am satisfied that the assumption in question is wholly without basis. So far as I have ascertained, no person, whether text-writer, jurist, or statesman, has ever asserted that the clause under discussion bears the force and meaning now for the first time imputed to it; and it would have been singular, indeed, if any critic had ventured to express such an opinion, for the constitutional provision obviously would refuse to bear such treatment. The expressions employed do not, in any degree, import the continuance of the senate itself, but simply provide for the succession and length of the terms of the members of that body. It is true that, by providing an always-existent membership, the clause imparts to the body the potentiality of a permanent existence, but it does not impart to the body such continuous vitality. I think it is safe to say that never, on any occasion, has it been suggested that the clause has any further reach than this. The senate of the United States has been declared to be a permanent body, and, when the subject was under discussion, it was on all sides assumed that the section in the Federal Constitution (from which, as has been stated, our own has been copied) gave to the senate an aptitude for a continuous existence, but it was never alleged that it was possessed of any further effect. The vivifying force that was infused into the body thus made capable of receiving it was looked for and discovered in other constitutional adjustments, and especially in the provision that gave to the senate an always existent presiding officer. This is a factor mentioned and relied on by every one who has written upon the subject, and similarly it has been the principal argument in all debates relating to the longevity of the senate. It was deemed that the permanency of the presiding officer constituted the per-

manency of the body itself, as, by such a constitution, there was no necessity for periodical reorganization. It is obvious, therefore, that the construction put upon the national constitution can have but little effect in an effort to construe our own. The problems are differently conditioned, so that the solution of one of them will afford but slender assistance in the solution of the other. We must construe our own constitution exclusively by its own lights. Adopting this method, I will now turn to the several provisions of the constitution of this state that appear to me in any degree to elucidate the question under consideration.

Upon opening this instrument, the first feature of it that, in connection with the subject in hand, strikes our attention, is the declaration that "the senate shall be composed of one senator from each county in the state, elected by the legal voters of the counties," etc. In looking at this constitutional mandate, the inquiry at once arises, Does it mean that at all times, within the range of human possibility, such shall be the composition of the body in question, or that it shall have such composition only sometimes? Does it mean that on some occasions the senate shall be composed of one senator from each county, and on other occasions, in the orderly working of the system established, it shall be composed of only two thirds of such members? It is difficult to see how it can be plausibly argued that the clause cited is not designed to establish, as far as possible, a permanent composition of the senate; and this view, it must be admitted, is much strengthened when we look at the purpose of this provision. That purpose obviously is to provide that each county shall be perpetually represented and have a voice in this body on every measure that comes before it, whatever its nature may be. To deprive a county of such a prerogative is plainly unjust and therefore it is clear that any construction that tends to the production of such wrong should be viewed with distrust, and should not be sanctioned, unless upon considerations that amount to a demonstration of its correctness. And, adopting this as the sound principle, it becomes at once manifest that it is scarcely possible to maintain successfully the proposition that it is not the entire body of senators, but only a class of them, who are to take part in the organization of the senatorial body. The importance of that function strongly repels such a theory.

Organization involves the composition of the body organized, and consequently it involves the right of the counties to participate in the decision of the all-important question which of them shall be represented in the body, and which of them shall be unrepresented. It seems to me that the mandate of the constitution that the senate shall be composed of one senator from each county cannot be reasonably enforced except by the adoption of the hypothesis that each senator shall have a voice in all the proceedings that result in the composition of the body itself. When, therefore, on the occasion that gave rise to the present controversy, it was asserted that one third of all the counties of the state

should be excluded from all participation in a transaction so vital to their rights, and affecting so intimately the interests of the entire commonwealth, a doctrine was asserted that must be considered as devoid of all reasonable foundation, unless it can be made plainly manifest from the provisions of the primary law of our state. The principle that two thirds or even a lesser number of the senators chosen by the counties shall have absolute ascendancy in the organization of the senate is, it should be noticed in passing, not only antagonistic to the language and spirit of the constitutional clause just cited, but is likewise in conspicuous violation of that great and fundamental law underlying all our institutions,—that it is the will of the majority of the people that is supreme. He who asserts that this axiom, which may be called “national” in its character, does not prevail on any occasion, must prove his proposition, and must prove it conclusively, for every legal intendment will, *a priori*, be against its truth. It is not too much to say that with regard to the transaction before us this cannot be done, except by putting a finger on the very section or sections of the constitution in which the alleged heterodoxy is to be found unambiguously written. That this was not done by the counsel arguing before us in favor of the doctrine that in the all-important affair of organizing the state senate it is the minority, and not the majority, that shall rule, is conspicuously manifest from the fact that the only constitutional clause that was relied upon was the one that distributes senators into classes; but, as it has appeared that such clause is just as applicable to the supposition of an annual senate as it is to that of a perpetual senate, it is manifest that a reference to that section is altogether futile. But, while this was the only citation relied on for the purpose of proving the existence in this state of an ever-living senate, my examination has led me to the discovery that others exist that cannot in my opinion, be reconciled with the doctrine contended for. The first provisions of the class indicated are those clauses of the constitution which, to all appearance, provide for a yearly organization of both the senate and the house of assembly. In this respect the two bodies are placed upon the same footing, and subjected to the same regulations. No express power to organize is conferred upon either of them, but by necessary implication, it belongs similarly to both. The assemblymen and senators are required to meet yearly, at an appointed day. With respect to the former class, each of the class has the undisputed right to take part in the organization, and it would certainly seem to follow that each senator is vested with a similar prerogative. When the power to organize is merely a legal intendment, the power consists in a right to organize in the customary manner, and it therefore excludes the notion of a minority ruling in the transaction. In the case of the assembly, it is admitted that the organization must be effected in accordance with usual modes. In that affair it is not pretended that there can be any dominance of a minority. It does not appear,

therefore, how it can be reasonably maintained that the senate, in exercising this important function, shall be subjected to an abnormal condition, and that, in its use, there shall be a dominance of the minority. The organizing power of the senate being derived in its totality by legal implication, it appears to be plain that the law will not imply a regulation that would be both unusual and unjust.

The next provision to which reference will be made appears to be of paramount importance. It is to be found in paragraph 3 of section 1, in article 4. It is thus expressed: “Members of the senate and general assembly shall be elected yearly and every year on the first Tuesday after the first Monday in November, and the two houses shall meet separately on the second Tuesday in January next after the said day of election, at which time of meeting the legislative year shall commence.” This clause is significant with respect to the subject we are considering in all its parts, its first observable feature being that it appoints a day for the organization of both legislative houses. The purpose for the meeting on the day specified cannot be doubted. Indeed, it never has been doubted. It has always been so understood and acted upon. It, therefore, is plain that it is a directum for the senate to organize; for the expression is, “The two houses shall meet separately.” Both houses here are placed upon the same basis for the same purpose, and most assuredly they are thus similarly treated as though an organization were equally essential to the legal existence of each body. The assembly is, of course, a body that needs a yearly resurrection; and the senate is here required, to all appearance, to do precisely what the assembly is directed to do. Beyond all question, we here find that a duty is imposed on both the assembly and the senate to confer at an appointed time, and to effect a yearly organization. Such a regulation is appropriate to a body that expires yearly, but it is inappropriate and unprecedented in its application to a body that is possessed of a permanent life. In the practice of the United States senate, which, we have stated, is an ever-living body, there is no fixed day for the admission of new members-elect. The certificates of incoming senators are presented from time to time, or at convenient occasions, and are thus severally passed upon. From the regulation in question it appears to be, if not the necessary, at least the reasonable, inference, that the senate of this state is no more a continuous body than is the assembly. The two remaining regulations of this section cited lead strongly, as it is deemed, to the same result. The first of these is the direction, in the language of the statute, “that the two houses shall meet separately on,” etc. Now, it is obvious that the expression “houses” must, of necessity, be construed to denote the members of such houses. It can mean nothing else, for it is obvious that, at the time specified, there is no house of assembly in existence. Ascribing, then, this necessary signification to this expression, we have a constitutional direction that the members of the senate shall assemble at the time

specified, in order to organize. It does not seem that it can be denied that such a regulation, in a very perspicuous form, repudiates the notion of a continuous senate. Also, in the next place, the designation of a legislative year—that is, when such year shall begin, and when it shall end—tends in the same direction. What has a perpetual body to do with prescribed periods of time? The legislative year, thus established, obviously accords with the official life of the assembly, and it appears reasonable to suppose that it was meant to accord with a senatorial life of equal extent. In fine, after a very careful study of the constitution of the state, my conclusion is that its intimations are all to this effect: that the claim, advanced for the first time on this occasion, that the senate is a permanent, continuous body, is without any valid foundation.

Nor has there been found any more substantial basis for the doctrine just discarded in the past practice of the senate in respect to its yearly organization. The practice may be thus generally described: In the first instance, the senate, under the new constitution, was organized as the house of assembly now is,—by the action of all its members. Then for some years afterwards, upon the senators convening, a roll containing the names of all the senators was called; but in subsequent years the practice was to call the names only of the senators holding over. This was not an unnatural course, as those senators had before taken the oath of office, and their credentials had already been inspected. In this condition of things, the custom obtained for the incoming members to present their credentials to the body of senators holding over, and upon their approval they were sworn in. The office thus performed by the old senators was, in the substance, purely formal, as much so as though they had been a committee appointed by the body of senators to inspect and to report upon the credentials of the new senators. On no occasion did they exercise any other power, nor did they ever pretend to be possessed of any other power. There is not an instance in which they undertook to adjudicate on the right of a senator-elect to his seat, nor did they ever hold such right in sufferance. If this body has the absolute power now asserted for the first time, and after a lapse of half a century, it certainly would be a most strange circumstance that during this long period the existence of such power was never manifested by a single word or a single act. The claim of such an imperial authority, made at this late day, is an entire novelty, and, like most novelties in legal matters, is not well founded. It is likewise in this connection important to note that during that long time the senatorial action was regulated by the eighty-fifth section of the act relating to elections (Revision, p. 358), which is in the following terms:

"That the senate and assembly shall convene and hold their sessions in the state house in Trenton; and in the organization of such houses, the certified copies of the statements of determination made under the direction of the sixty-ninth section of this act shall be deemed and taken to be *prima facie* evidence

of the right of persons therein mentioned to the seats in the houses, respectively, to which they shall have been so determined to be elected." No one can look at this act and fail to perceive that it is absolutely irreconcilable with the theory of an over-existent senate. This is so entirely the case that the very astute counsel of President Adrain insisted that it was void, as it attempted to prescribe to an existing senate a rule controlling its action in a matter committed to its exclusive jurisdiction by the constitution. On the premises postulated by counsel that the senate is ever-living, his argument was invincible; but the existence of the statute, and a submission to it, for such "a cycle of years," exhibited in a very impressive form the fact that the contemporaneous construction of the constitution in the particulars in question was adverse to the present claim, which I have designated as a "novelty." This statute is not to be misunderstood in this respect that it provides for the introduction of senators by the process of organization; and it rejects altogether the idea of an admission of senators into a body already formed as continually existing. When we add to the fact that the ancient and continued practice has been in pursuance of, and in obedience to, this law, the further circumstance that the senate, as a matter of fact, has been, and must of necessity be, yearly organized, and that, in the performance of this ultimate act in such process,—that is, in the choice of its permanent president,—all the senators elected have invariably co-operated, the pretense of a continuous senate must be declared to be an utter fallacy. The construction that would convert this customary method of senatorial procedure into a practice to admit members into a body always existing, and therefore always organized, seems to me an afterthought; and the fact that such a theory is a novelty, undreamed of for half a century, is of itself enough to explode it. In legal affairs, it is the practical and common-sense view that, in general, is the true view, as neither the affairs of men nor of state can be regulated by logical refinement. Where subtlety begins the law ends. When I accept, therefore, the understanding that plainly appears to have prevailed for so long a time, I feel great confidence that I have not fallen into error. The doctrine in question stands, as I think, condemned, both by the intimations of the constitution itself, as well as by a long continued and practical exposition.

The result of the inquiry before us is that we have concluded that the senate of New Jersey is not a continuous body, but that it expires annually, in the same sense that the assembly does. Therefore, our conclusion is that Mr. Adrain has no title to the office that he ostensibly holds, and that the appropriate judgment must be entered against him. With respect to the title of the opposite claimant, Mr. Rogers, we hold that his title must be regarded as constitutional and valid. Our resolution in this regard is founded entirely on the power that, touching the act of re-organizing its own body, the majority of senators are the absolute masters of the occasion. Such action is taken by a body co-ordinate

with ourselves, and whose proceedings, when not violative of the constitution of the state, we have no capacity to supervise or control. In our opinion, when a majority of the senators organized the senate, and elected Mr. Rogers as president, such action was and is conclusive upon this court, as well as upon all departments of the government. Let a judgment be entered accordingly.

I am authorized by the following of my associates to say that they concur in these views: *Justices DePue, Van Syckel, Dixon, Reed, Garrison, and Lippincott.*

Abbott, J., dissenting:

The senate of New Jersey came into existence under the Constitution of 1844. It was created to take the place of the legislative council provided by the Constitution of 1776. The council was an annual body, its members being all elected for one year only. The senate at its first meeting in 1845 consisted of nineteen members, one from each of the then counties of the state. It was divided as equally as possible into three classes. The seats of the senators of the first class were vacated at the expiration of the first year, of the second class at the expiration of the second year, and of the third class at the expiration of the third year, so that in accordance with the constitution one class may be elected every year; and if vacancies happen by resignation or otherwise, the persons elected to supply such vacancies shall be elected for the unexpired terms only. The term of office of senators is three years. Two new counties have been created since 1844, and the full senate now consists of twenty-one senators, of whom eleven are a quorum to do business.

At the election held in November, 1893, eight senators were elected to take the places of the senators whose terms of office would expire January 8, 1894. On January 9 there were existent thirteen hold-over senators, and eight senators-elect. Nine of the hold-over senators met in the senate chamber and elected one of their number, Robert Adrain, their presiding officer, and thereafter claimed to have elected him "president of the senate," upon the insistence that the four other hold-over senators were actually or constructively present at the time of his election. The four, however, insisted upon certain assurances from the nine as to their future action, and these being refused, they withdrew and associated themselves with seven of the senators-elect, and these eleven organized themselves into a second body, which they insist is the true senate of New Jersey, because, as they contend, the quorum of the senate provided for by the constitution was present at this organization. This body elected Maurice A. Rogers as "president of the senate." The thirteen hold-over senators constituting the two classes of the senate whose terms of office had not expired, did not voluntarily act together as one body, but divided themselves as I have stated. Under the constitution, the senate elects its own president. If either of the bodies described was the true senate of New Jersey at the time

it acted, then the person chosen by that body is president of the senate.

The questions in this case are: First, whether the court has jurisdiction to try the issues raised by the record; second, jurisdiction being found, is either of the respondents president of the senate of New Jersey? It is clear that to elect a president of the senate, the body exercising such power must be the senate. There can be only one senate in existence, and the decision of the rights of the respondent therefore depends upon the answer to the question, Was either of these bodies the senate of New Jersey?

I have reached the conclusions for the reasons hereinafter stated, that neither of said bodies at the time it acted was the true senate of New Jersey; that the senate is a continuous body, and at that time consisted of the thirteen senators composing the two classes whose terms of office had not then expired.

The jurisdiction of the court to try this controversy is in my judgment clear. The object of the litigation is not to interfere with the functions of the legislative department of the state, or either of the houses, which, together, constitute that department; it is to ascertain whether either of the two bodies claiming to be the senate is really the senate of New Jersey. That such an inquiry is a judicial one seems to be established on principle and authority. *McCrory, Elections*, 396; *Prince v. Skillin*, 71 Me. 367, 36 Am. Rep. 325; *Re Gunn*, 50 Kan. 155, 19 L. R. A. 519. This jurisdiction has also been upheld where it relates to the executive department, and the question was, Which of two contestants was lieutenant governor of a state? *Atty-Gen. v. Barston*, 4 Wis. 567. The reasons for upholding the jurisdiction of this court, stated in the opinion of the learned chief justice, are conclusive. It is true that our constitution declared that "the legislative power shall be vested in a senate and general assembly," but when two bodies each claim to be the senate, a judicial question is presented.

This court in *State v. Young*, 82 N. J. L. 29, 32, says that "a legislative bill, which wanted the approval of either the assembly or the senate, or that of the governor, would be so plainly defective on constitutional grounds that this court would not hesitate in the exercise of its clearly legitimate power in declaring it absolutely void." In the same case it treats the certificate signed by the president of the senate and the speaker of the house as "conclusive evidence" of the passage of a bill through the two houses. The court may, therefor, inquire into the question of title when two persons claim to be president of the senate, and to do so in this case, it is necessary to decide which body, if either, is the constitutional senate.

This court having jurisdiction, the duty is imposed upon it, of deciding which of the claimants, if either, has shown title to the office. The question of title involves the inquiry, whether our senate expires annually in the same sense that the assembly does, or is like the senate of the United States, a continuous, "ever living body." There is no

such body as a "new senate" known to the Constitution of the United States. There is biennially a new house of representatives, because the entire membership of that body expires at the end of every second year, but not so the senate. The constitution replenishes that body every two years by the election of a class of senators, and thereby gives continuity to that body. The debates in the Constitutional Convention of 1787, and those in the senate, and the procedure of that body, show that the senate of the United States is continuous, and in the case of *Robertson v. Smith*, 109 Ind. 79, the supreme court of Indiana, while holding that the senate of Indiana is not a continuous body, states the reason why it is not such, and recognizes the feature which establishes the continuity of the United States senate. Judge Niblack in delivering the opinion of the court says: "I feel quite assured that the senate of this state is not, like the senate of the United States, a continuous body. In the senate of the United States a majority constitutes a quorum, and as there is always more than a quorum of qualified senators holding seats in that body, its organic existence is necessarily continuous. But in the senate of this state two thirds of its members are necessary to make a quorum. As one half of its members go out of office at the end of each legislative term of two years, that is to say, on the day after each general and biennial election it becomes at the end of each such legislative term, a disorganized body."

The reasons given by this learned judge, for stating that the United States senate is necessarily continuous, apply equally to both the United States senate and to the senate of New Jersey. A majority constitutes a quorum in both bodies, and in both there is always more than a quorum of qualified senators holding seats in the body. If it is necessarily continuous in one case, it must, for the same reasons, be necessarily continuous in the other.

If the rule applicable to the United States senate is to be applied to the senate of this state, the thirteen so-called hold-over senators were the senate of New Jersey on January 9, and as such had the exclusive and absolute power to determine "the elections, returns, and qualifications of its own members." Such has ever been the practice and usage in the senate of the United States. Every senator-elect must there present his credentials to the senate composed of the hold-over senators, and must be inducted into office with the assent of that senate, so composed. Upon the question of the admission of a senator into the senate of the United States, no senator-elect has ever been treated as a member of that body. In every instance induction has been by the action of a majority of a quorum of the senate composed of senators theretofore inducted into office. This practice is necessarily based upon the assumption that the senate is always in existence, always composed of inducted senators, and that it has existed, as an "ever-living senate," from the time of its organization to the present hour.

I feel the more confidence in stating this

view thus broadly, because in the opinion of the court in this case, read by the learned chief justice, it is stated as an incontrovertible proposition that the United States senate "is an ever-living body."

It is insisted, however, that although it is true that the senate of the United States is a continuous body, yet the New Jersey senate is different from its great prototype. This contention is founded upon alleged differences between the Constitution of the United States, and the constitution of the state of New Jersey, and an alleged difference of practice prevailing in this state.

An examination of the two instruments, and the practice thereunder, will not support this contention. The language of our constitution is substantially identical with that part of the Constitution of the United States, whose provisions have been held to create a continuous senate. Let us compare the two instruments.

The Constitution of the United States provides: "Article 1, section 3. 1. The Senate of the United States shall be composed of two senators from each state, chosen by the legislature thereof for six years; and each Senator shall have one vote.

"2. Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one third may be chosen every second year; and if vacancies happen, by resignation or otherwise, during the recess of the legislature of any state, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.

"Section 5. 1. Each house shall be the judge of the elections, returns, and qualifications of its members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner and under such penalties as each house may provide.

"2. Each house may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two thirds, expel a member.

"4. Neither house, during the session of congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting."

The Constitution of New Jersey provides:

"Article 4, section 2. 1. The senate shall be composed of one senator from each county in the state, elected by the legal voters of the counties respectively for three years.

"2. As soon as the senate shall meet after the first election to be held in pursuance of this constitution, they shall be divided as equally as may be into three classes. The seats of the senators of the first class shall be vacated at the expiration of the first year, of the second class at the expiration of the sec-

and year, and of the third class at the expiration of the third year, so that one class may be elected every year; and if vacancies happen, by resignation or otherwise, the persons elected to supply such vacancies shall be elected for the unexpired terms only.

"Section 4. Each house shall be the judge of the elections, returns, and qualifications of its own members, and a majority of each shall constitute a quorum to do business, but a smaller number may adjourn from day to day and may be authorized to compel the attendance of absent members, in such manner and under such penalties as each house may provide.

"3. Each house shall choose its own officers, determine the rules of its proceedings, punish its members for disorderly behavior, and with the concurrence of two thirds may expel a member.

"5. Neither house, during the session of the legislature, shall, without the consent of the other, adjourn for more than three days nor to any other place than that in which the two houses shall be sitting."

A comparison of these provisions in the two constitutions shows that they are exactly parallel, and it is apparent that the language of the New Jersey Constitution of 1844 is a copy of provisions in the Constitution of the United States, with only such changes as were rendered necessary by reason of the difference in the terms of office of senators in the two bodies and the constituencies they represent. The only real difference is that our senators are chosen for three years instead of six, and represent counties instead of states. But that one constitution was modeled upon the other seems to me beyond question. The reasons given by *Judge Niblack* for the continuity of the United States senate exist with reference to our senate under language similar to that used in the Constitution of the United States to create a continuous senate. Not only does this clearly appear from the language itself, but the history of the adoption of the provisions of our constitution, and the arguments and debate in our constitutional convention, and the procedure thereunder, confirm this conclusion.

When the convention met in 1844, two different views were represented by the members of that body: One party was in favor of continuing the policy laid down in the Constitution of 1776 and making the terms of office of the members of both houses annual, while the majority were in favor of modeling our senate upon that of the United States. The convention, after a most interesting debate upon the report of the committee on this point favored the latter proposition and settled the question, by a vote of thirty to twenty-two.

The reasons influencing the majority were clearly stated by Mr. Vroom in his speech to the convention, June 7, 1844: The composition of the senate being under consideration, he said "the reason,—the great object of fixing the terms of senators at three years, is not only because they are connected with the executive, but by this means the senate will be a more permanent body than the house of

assembly. . . . If the senate is elected annually, you will have a changing legislature as we always have had." On motion made to amend the term of senators from three years to two Mr. Ogden, although advocating it, said: "The reasons given in favor of permanency of the senate are strong."

That the statesmen in the convention of 1844 meant to make the state senate an ever-living body when they used in our constitution the language of the Federal Constitution that made the United States senate continuous cannot be more forcibly presented than by quoting the language of the learned judge who wrote the opinion in *State v. Kuhl*, 51 N. J. L. 199. He says: "That in a convention in which these distinguished men exercised a controlling influence a clause should have been incorporated in our state constitution, with the intention that it should receive an interpretation different from that which we may reasonably assume they knew had been applied to it in the unvarying practice of the federal government for nearly half a century is scarcely conceivable."

After the Constitutional Convention of 1844 had thus for the purpose expressed, incorporated in our fundamental law the provisions of the Constitution of the United States which makes the United States senate "an ever living body," we find that the state senate at its first session, in 1845, proceeded to follow the exact mode of procedure, under the Constitution of 1844, that the United States senate at its first session adopted under similar provisions in the United States Constitution.

The action of the senate at its first session under the Constitution of 1844 was in strict conformity with the action taken by the senate of the United States when it first met in 1789. In both bodies a special committee was appointed and reported a mode of classifying the senators, which divided them into three classes, and the term of each class was decided by lot, and the senate decided "that the classes shall vacate their seats in the senate according to the order of numbers drawn for them, beginning with number one."

Not only was the provision of our constitution in reference to classification of senators suggested by the provision of the Federal Constitution, but the exact mode of dividing the classes used by the United States senate was adopted by the New Jersey senate. (See *Benton's Abridgment*, vol. 1, pp. 14, 15, and *Senate Journal* 1845, p. 169).

The procedure of the first two sessions of the senate undoubtedly reflected the views of the framers of the Constitution of 1844. Alexander Wurts, president of the Constitutional Convention of 1844, was a member of the senate of 1845. He was also president *pro tempore* of the senate of 1846.

It is important and instructive to note the difference between the steps taken to induct into office the senators-elect in 1845 and those taken to induct the senators-elect at the next legislative session in 1846.

The senate journal of January 14th, 1845, shows that "John C. Smallwood, Esq., of the county of Gloucester, produced a certificate of election as a member of the senate for the county of Gloucester, which certificate was

read and approved. Thereupon he took and subscribed the affirmation prescribed by the constitution and laws of New Jersey before the Hon. Alexander Wurts, one of the members of the senate-elect, and took his seat in the senate." And thereafter each senator elect produced and presented his own certificate of election, and the same was read and the same action taken thereon, as in the case of Mr. Smallwood, and each thereafter took and subscribed the same affirmation before Mr. Smallwood, and thereafter took his seat in the senate, and then the record proceeds: "The members of the senate present having all been sworn or affirmed, proceeded to the election of a president of the senate."

In 1846, however, the senate did not proceed in this matter. It changed its mode of procedure because there was then an existing senate composed of two hold-over classes. (Class two and class three drawn and named by the senate in 1845). In 1846 the record shows that Senator Wurts, being then a hold-over senator, was appointed president *pro tem.*, and the journal of January 13, 1846, states: "The president *pro tempore* having taken the chair, Mr. Hulme presented the credentials of the Hon. Stephen R. Grover, elected a senator from the county of Essex, which were read and approved; and the oath prescribed by law having been administered to Mr. Grover he took his seat in the senate."

The same procedure was had with reference to all the other senators-elect who had been chosen by the counties to succeed the senators in class one, whose term of office had expired at the close of the legislative year of 1845. These credentials, according to the journal, were in every instance presented, read, and approved and the oath of office administered to the senators-elect, before they took their seats in the senate. It will be noted that at the first session of the senate, each senator-elect presented the certificate of his own election; the next year the credentials of each senator-elect were presented by a senator of one of the hold-over classes. The credentials thus presented were "read and approved." Can there be any doubt of the significance of this procedure? To whom were the credentials presented if not to the senate? And if there was no difference between the first and second session, if each was a "new senate," why was it considered necessary after the senate was organized in 1845 that an inducted senator should in every instance present the credentials of a senator-elect. The procedure shows that Senator Wurts and his hold-over associates (composed of the second and third classes of the senate of 1845) entertained the belief that they were the senate, and that the bearers of credentials, the senators-elect, could not participate in the proceedings of the senate, even to the extent of presenting credentials, until they have been admitted to membership by the affirmative action of an existing and continuing senate. If there was not a senate in existence, to whom did Mr. Hulme present the credentials of Mr. Grover, as stated in the journal.

The organization of the senate in 1845 was necessarily done in the manner stated by the journal. It was necessary, because there was

no senate then in existence, which could judge of the credentials of senators-elect. The New Jersey senate in this respect followed the procedure of the organization of the senate of the United States. Each took the same action because of the necessity of organizing at the beginning of their existence by the consent of those claiming to be senators. The procedure of induction into the state senate thus instituted in 1846 has never been changed. No senator, with but a single exception, has ever been admitted to membership, except by the presentation of his credentials by an inducted member and by the approval of those credentials by a vote of the senate, presided over by a president *pro tempore* or permanent. The single exception is found in the journal of July 12, 1875, which states that "Mr. Taylor moved that in consequence of the Hon. J. Howard Willets not having his credentials present as senator-elect from the county of Cumberland he be permitted to take the oath of office and to file his credentials with the secretary at his earliest convenience," which was agreed to. The oath prescribed by law having been duly administered to Mr. Willets by the president *pro tempore* he took his seat in the senate.

This exception shows that the senate composed of the hold-over senators (which according to the journal on that day were fourteen in number), exercised the power of admitting a senator without the presentation of his credentials. They determined his election, returns, and qualifications without the presence of any certificate of the result of the election.

Continuing the history of the senate from 1847 to 1893, inclusive, the unbroken custom has been for the president of the senate, permanent or *pro tempore*, to administer the oath to those admitted to the body and the record of each of these years shows that these oaths were administered in open session, whether there was or was not a contest as to a seat. An examination of the cases, where the right of the member-elect to take a seat in the senate has been impeached, shows that no senator-elect has ever been permitted to take his seat in the senate as a matter of right, upon the mere presentation of his credentials. In every instance the senate has acted as an organized, existing senate, and the senate when thus acting has, in every instance, been composed exclusively of inducted senators, acting as an organized body. No senator-elect, since 1845, has ever been inducted into office as a senator except by permission or affirmative action of the senate.

The cases of contest shown in the record are as follows: John Torrey, Jr., senator-elect from Ocean county (S. J. Jan. 12, 1869); John Hopper, senator-elect from Passaic county (S. J. Jan. 13, 1874); Edward F. McDonald, senator-elect from Hudson county (S. J. Jan. 14, 1890); Wm. J. Keys, senator-elect from Somerset county (S. J. Jan. 13, 1891); Robert S. Hudspeth, senator-elect from Hudson county (S. J. Jan. 12, 1892). In each of these years the journal shows that the roll of senators was called by the secretary chosen at the preceding session of the senate, and that only the names of the hold-

over senators were called as members of the then existing senate. In every instance a president *pro tempore* was chosen by the hold-over senators, acting as the senate, and was in the chair as presiding officer of that body, before any credentials of senators-elect were presented to the senate. These credentials were always presented by a hold-over senator, and the returns and protests were read and referred to a committee, or otherwise disposed of by the senate, acting as a tribunal having absolute power over the subject-matter. In Mr. Torrey's case in 1869, fourteen hold-over senators acted as the senate and as such elected a president *pro tempore*. The credentials of this senator-elect were presented to this senate by a member thereof, one of the hold-over senators, and on motion were referred to the committee on elections, with the petition accompanying them. Then, upon motion of a hold-over senator, the record states that he "was allowed" to take the oath prescribed by law. The oath was administered to him by the president *pro tempore* of the senate. After all this action of the senate, and not before, the record shows, that he "took his seat in the senate." The only difference in Mr. Hopper's case in 1874, was that the protest against his election was read and laid on the table, this senate being composed of fifteen hold-over senators, and his credentials were "read and approved by the senate," and thereafter on taking an oath in like manner "he took his seat in the senate." In the contests in 1890, 1891, and 1892, similar action was taken by the senate, the protests in each case being read and referred to the committee on elections, the oath administered in open senate by its presiding officer and then, and not until then, the senator-elect taking his seat as a senator. The existence of the power to thus receive protests and act thereon, to waive the production of credentials (as in 1875) to adopt special motions for admission without adjudication upon returns, to choose a president *pro tempore* by the hold-over senators who presided and administered the oath to the incoming senators, can be supported only upon the theory that the senate is an ever-living body, the vitality of which is not interrupted by the expiration annually of the terms of a class of senators, composing one third of its membership.

At the commencement of the legislative year of 1887, there were fourteen hold-over senators, and they alone acted as the senate; they repeatedly by motion and by a majority vote postponed the organization of the senate from January 11 to February 1st, and on this last date the hold-over senators, still acting as the senate, elected a president *pro tempore* and proceeded, as a senate, to induct the senators-elect into office in the same way as heretofore stated. This precedent and the record of votes taken, clearly show that it was then considered unquestioned, that the hold-over senators constituted the senate, and that senators-elect had no right to participate in the action of the senate, until they were inducted into office by the senate composed of hold-over senators in the mode that had been

recognized as proper for nearly half a century.

From 1846, when Senator Wurts was chosen president *pro tempore* of the senate to the present time, no one has ever been admitted to the senate until after the election by the hold-over senators of a president *pro tempore*; nor has the holder of credentials from any county ever been admitted to the senate (except in the case of Senator Willetta, in 1875, hereinbefore referred to), except upon the presentation to that body of his credentials, and its acceptance or approval of the same. No senator-elect has ever been admitted except upon the approval of his credentials or the waiver thereof by a senate, presided over by a president; nor is there a single instance, since 1845, where a senator has been inducted, except by taking the oath of office in open senate administered to him by the president of that body. The senate journals from 1849 to 1893, inclusive, show in every instance, that the hold-over senators only were called to order, as the senate, by the secretary of the preceding session. The journal of the sessions of 1846, 1847, and 1848 do not show any participation, by vote or action in the senate, of any senators-elect, although it is stated by the secretary in those years that both senators and senators-elect appeared in their seats. The journals of those years do, however, show that no senator-elect was ever president or nominated any officer, or ever made any motion, voted upon any question, or participated in any way in the proceedings of the senate until after his credentials had been presented by an inducted senator and been received and approved by the senate. Only after this was done were these senators-elect sworn in by the president of the senate. After all this action by the senate, and not before, do the journals of these years state as to each senator-elect, "he took his seat in the senate." The Journal of 1849, and every journal since, expressly shows that the senate called to order consisted only of the hold-over senators. No others are stated to have appeared in their seats or to have been called. This was so in years when there were contests and in years when there was no contest.

The question in this case is not what the hold-over senators should do in the performance of their constitutional duty, but whether they had the power and authority to act as a senate under the constitution. If they had this power this court cannot review their action for any reason whatever. "The question of power alone can be considered by this court." (*State v. Kuhl*, 51 N. J. L. 206). This court has no right to instruct the senate as to matters which involve its duty only, and not its power. (*Id.* p. 208).

This history of the senate of New Jersey, showing a claim of continuous existence on the part of hold-over senators for nearly fifty years, without protest, seems to me to be a complete answer to the insistent, that the contention that the senate is an ever-living body is a novel one.

The unbroken usage and construction of our constitution for nearly fifty years by the sen-

ate itself should, under the authority of *State v. Kuhl*, settle the question of the continuity of the senate and the right of the hold-over senators to judge of the elections, returns, and qualifications of senators-elect, unless the constitution of the state contains some clear and express provision which is incompatible with this result. That case cites with approval the following language of Mr. Cooley which is especially applicable to the question now before us: "When there has been a practical construction which has been acquiesced in for a considerable period, considerations in favor of adhering to this construction present themselves to the courts with a plausibility and force, which it is not easy to resist."

It is insisted, however, that our state constitution did not create a continuous senate, because it does not, in terms, provide for an always-existing presiding officer, as does the Constitution of the United States when it makes the vice-president the president of the senate, or as did our first state constitution, which made the governor, the "constant president" of the legislative council. It is argued that the permanency of the presiding officer creates the permanency of the body itself, as under such a provision there is no necessity for periodical re-organization. It is also argued that the provision of our constitution that the senate shall be composed of one senator from each county in the state elected by the legal voters from each county, is obviously to provide that each county shall be represented at all times by a senator, and have a voice in the senate, through him, on every measure or question that comes before it. It is further insisted that the continuity of the state senate is negated by the constitutional provision requiring the two houses composing the legislature to meet separately the second Tuesday in January, after each election.

I cannot find in these provisions, or in any other clause in the constitution, anything which will annually disorganize the senate as the house of assembly is disorganized every year by the expiration of the terms of all its members. How is the existence of a permanent officer necessary for a continuous senate? The senate has express power under the constitution to choose its own officers, and whether it exists as a senate expiring every year, or as a continuous senate, that power can be exercised at any session. The death or resignation of the president of the senate would have no influence upon the continuity of that body. Whenever the senate meets and has no presiding officer, it can elect one and proceed with its business. Under the Constitution of 1776 all the members of the legislative council were elected annually for one year. So careful were the framers of that instrument to provide for the yearly disorganization of that body, that they required the members of the council to take a constitutional oath that they would never by any act, word, or proceeding, do anything which would change their term of office beyond the annual elections. The same constitution provided that the governor of the state should be chosen annually by the joint

meeting of the legislative council and the house of assembly, and each governor when thus chosen, became "the constant" presiding officer of the council. The council was not, however, a continuous body because a "constant" presiding officer was provided for it, and the senate does not fail to be a continuous body, because it has no constant president, while it has the power at all times to elect its own president. Its continuing existence gives it the continuing power to always have a president, by its own action as a senate.

The claim that the senate of the United States is a continuous body does not rest upon the fact that the Federal Constitution provides an always-existing presiding officer. The provisions of that instrument upon this point are these:

"The vice-president of the United States shall be president of the senate, but shall have no vote, unless they be equally divided.

"The senate shall choose their other officers, and also a president *pro tempore*, in the absence of the vice-president, or when he shall exercise the office of president of the United States."

It would be difficult in these provisions to find any support for the continuity of the United States senate. The absence of a presiding officer does not work the dissolution of a legislative body. What shall be done, in the absence of the vice-president, is provided for by the Federal Constitution; what is to be done in the absence of the president of our state senate is provided, in the absence of rules adopted by that body by ordinary parliamentary procedure. Our senate has the power to elect its presiding officer and thus provision is made, which is equally efficacious with that contained in the Constitution of the United States, to always have a president of the senate. Would any one contend that if the vice-president of the United States and the president *pro tempore* were both absent or dead, or unable to act, that the United States senate would cease to be a continuous body. It could and would under such circumstances exercise the inherent power of every legislative body under universal parliamentary law, and choose a presiding officer, and proceed with its business, just the same as if nothing had happened to affect its existence or its powers.

An examination of the provisions of our constitution, as to what constitutes the senate, and a consideration of similar provisions in the Federal Constitution, will also fail to disclose any substantial difference, affecting the question of the continuity of the two bodies.

The Constitution of the United States provides that the senate shall be composed of two senators from each state, yet no one has ever contended that the fact that certain states were not represented in the senate, deprived that body of its continued existence or affected the power of the other senators to act, so long as a quorum remained to do business. This court has also said in *State v. Egg Harbor City*, 55 N. J. L. 247, that "it has never been supposed that the death of a member of a state legislature suspended its

power to enact laws until the vacancy was filled." This is true because the quorum remains to do business. I have failed to find any text-writer, authority, or precedent to uphold the proposition, that the expiration of the terms of office of less than a quorum of a legislative body suspends its existence, or any of the powers given to it by the constitution. If the United States senate continues to exercise its powers as such, when certain states are unrepresented therein, it is difficult to perceive how the fact that all the counties of our state are not actually represented in the state senate at the commencement of the legislative session, can deprive that body of its continued existence, and right to act as the senate, so long as a quorum is present. If all of the counties in the state having senators whose terms expired failed to elect senators, or elected those whom the constitution declared should not be members of the senate, would any one doubt that the hold-over senators would still be a senate, if the quorum provided for in the constitution remained. If they would be the senate in such a case, it is difficult to conceive of any case in which they would not constitute a constitutional senate.

The case of *State v. Egg Harbor City*, 55 N. J. L. 245, would seem to recognize the principle that a legislative body is not rendered incompetent to act by reason of a vacancy in its membership, by death, resignation or otherwise, if a quorum remains. That was a case in Egg Harbor city. There were at the time of the passage of an ordinance, two vacancies in the common council, caused by resignation, which the mayor had power to fill. He had not exercised this power, and only six of the ten members of the council convened and voted for the ordinance. The charter required the concurrence of a majority to pass ordinances. The court says: "In this instance six members convened and voted for the ordinance. A quorum was, therefore, present, and a majority of the whole number of members voted in the affirmative. A legislative body thus constituted is not rendered incompetent to act by the death or resignation of one or more of its members, so long as there continues to be the quorum required by the statute. It has never been supposed that the death of a member of a state legislature suspended its power to enact laws, until the vacancy was filled."

Accepting its decision as a correct statement of the law, and applying the principle upon which it is based, to the present case, I am unable to perceive what force there is in the insistence, that the senate must at all times be composed of one member from each of the twenty-one counties of the state. If neither death nor resignation disorganizes the senate, so long as a "quorum" remains to do business, it is because its continued existence does not depend upon every county having at all times a member in the senate. If this "quorum" is a senate for any purpose under the constitution, it is a senate for all purposes mentioned therein, and its existence is not interrupted or affected, because there are senators-elect claiming seats in that body.

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The presence of these persons, and their presentation of credentials, has no effect whatever except to call upon this tribunal, the senate, to exercise its constitutional power as to these claimants, by judging of their elections, returns, and qualifications. Our constitution and that of the United States are practically alike so far as their provisions affect this question. The Constitution of the United States says: "The senate of the United States shall be composed of two senators from each state." Our constitution provides that "the senate shall be composed of one senator from each county in the state." The fact that at times the United States senate has not been thus composed, either by reason of civil war, failure of the state legislature to act, or any other reason whatever, has never affected its continuity, either in the estimation of the senate itself, or of any text-writer or judicial authority. Unless we are to adopt a different rule in this state, and to do so without precedent or authority, our senate, so long as it has a "quorum," will like the senate of the United States continue to be an ever-existing body unaffected by the fact that certain counties are temporarily, for any reason, unrepresented.

It is also contended that the New Jersey senate is not continuous because our constitution provides that the "houses shall meet separately on the second Tuesday in January next after the said day of election." It is argued that this provision negatives the idea of a continuous senate. So far from this being a supportable inference, this section may, without violence to its obvious intent, be held to be wholly irrelevant to the question before us. The direction to meet on a certain day or days could be as well given to a continuous body as to a novel one. Section 4, art. 1, of the Federal Constitution provides that "the congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day."

The congress consists of the senate and house of representatives. In that constitution each of these bodies is designated as a "house." The direction that congress shall assemble annually has never been construed to affect the continuity of the senate of the United States, nor have I found any writer who alludes to this direction for annual meetings as in any way affecting this question of continuity. The federal senate, and the state senate may be called upon to meet, at any time, by invitation of the executive. For legislative purposes the houses constituting the congress, and the houses constituting our legislature are directed to meet at certain times, but it is difficult to perceive why a continuous senate could not, as well as a novel body, be the subject of this constitutional mandate to meet on a certain day. Nor is it perceived why the words requiring "each house" to meet annually should be construed to disorganize the state senate, when a like requirement in the Federal Constitution does not affect the continuity of the federal senate. The vitality of the body depends upon the existence of a "quorum."

capable of doing business. That quorum constitutes a senate. Its action is the expression of the will of the senate, and no authority can be found which states any other conclusion. All difficulty and confusion in constitutional construction is avoided by applying the rule laid down by Judge Niblack—that the continuity of the body depends upon the fact that in the senate a majority constitutes a quorum, and as there is always more than a quorum of qualified senators holding seats in that body, its organic existence is necessarily continuous.

Every other element, power, or condition of the senate can be absent, except that stated by Judge Niblack, and yet it will still be a continuous body. The senate of the United States remains a continuous body because two thirds of its members are always, in contemplation of the constitution, in existence. That body is an ever-existing senate, although the vice-president may be acting as president, and the president *pro tempore* be absent or dead. An examination will, I am confident, fail to find any provision in the Federal Constitution which can be successfully invoked, upon principle, to sustain the proposition that the senate is an ever-living, continuous body, except that one which provides for the division of the senate into three classes, two of which always hold over, and the further provision, that makes a majority of the whole number of possible senators, a "quorum" to do business, and act as the senate for all purposes. These provisions were, by the Convention of 1844, incorporated into our state constitution, and, under the case of *State v. Kuhl*, should have the same force and effect as were theretofore given to them, in the construction of the Federal Constitution.

In the argument of counsel for Mr. Rogers, great stress has been placed upon section 85 of the Election Act, which makes the certificate of election *prima facie* evidence in the organization of the two houses.

The origin of this section is found in section 94 of an Act "To Regulate Elections," passed March 12, 1839 (Laws 1839, p. 229), which provides "that the legislative council and general assembly shall convene and hold their sessions in the state house at Trenton, and shall commence their session on the fourth Tuesday of October next after they shall have been elected: and in the organization of each house the certified copies of the statements of determination made under the direction of the 78th section of this Act, shall be deemed and taken to be *prima facie* evidence of the right of the persons therein mentioned to seats in the house respectively," to which they shall have been elected.

In 1839 both houses, the legislative council and the general assembly, were yearly bodies, expiring annually as to their entire membership.

The Constitution of 1776, then operative, vested the government "in a governor, legislative council and general assembly." Under it the counties severally, chose annually, at the same election, one person to be a member of the legislative council and three members of assembly, with the right

of a majority of the representatives in council and general assembly convened, to add to or diminish the number or proportion of the members of the assembly for any county. Under this instrument, the assembly and council "when met," were severally made the judges of the qualifications and election of their own members. The constitution was silent with reference to "returns." It appears that the Act of 1839 was passed in view of this omission in the constitution, and the legislature had undoubtedly a right, in the absence of constitutional provision in reference thereto, to declare that certified copies of the statements of determination of election, made by the board of county canvassers should be *prima facie* evidence of the result of the election.

When the convention framed the Constitution of 1844 it provided therein, not only that the senate should be the judge of the election and qualifications of its members, as provided in the Constitution of 1776, but it went further, and gave the senate like power as to the "returns." The power as to all these matters affecting senators-elect was thereafter vested in the senate itself. The Act of the Legislature of 1846, passed after the adoption of the constitution, and after the second meeting of the senate elected under that instrument, cannot, therefore, affect or in any way abridge these powers of the senate, given to it by the Constitution of 1844. This view is recognized as "invincible" in the opinion of the court, read by the chief justice, if the proposition is established, that "the senate is ever-living." If, therefore, it has been demonstrated that the state senate, like the federal senate, is a continuous body, the Act of 1846 is void in so far as it purports to establish a rule controlling its action in a matter committed to the exclusive jurisdiction of the senate by the constitution.

The supreme court has clearly stated the limitation of the power of the legislature in this matter, in reference to the house of assembly, and the same rule applies to the senate under the same constitutional provision. The court says: "The legislature have the power to determine the source from which the certificate of election shall issue, but the house of assembly, being by the constitution the judge of the election of its own members, can go behind the certificate whether issued by a board of canvassers, or by order of a justice of the supreme court, and finally decide who is entitled to the seat." *State v. Brambach*, 47 N. J. L. 85, 88.

If it was ever the intention of the legislature to attempt to give any force or validity to the certificates of the county boards of canvassers, except to make them evidence, in the first instance, of the right of the holders thereof to claim as members-elect, an examination of the record and history of the senate will show that the act has remained a dead letter since its passage. The record shows that the senate has never given to the certificates of election any force or vitality not entirely subject to the will of the senate. In the unbroken history of the senate, since the act was passed in 1846, no member has

ever been admitted upon his credentials, as a matter of right. The senate, in every instance, according to its record, has passed upon these credentials; sometimes it has waived their presentation; at other times it has admitted the senator-elect, and referred the credentials to the committee on elections for trial thereafter, but always, the record shows, without a single exception, the senate has asserted its right to decide upon the admission of the members-elect. No senator-elect has ever been inducted, except with the consent of the senate as an existing body. In every instance these credentials have been presented by a hold-over senator, or, if presented after the first meeting in January, then by a member of the senate, theretofore inducted into office by the action of the senate.

With this unbroken line of precedents, it may be stated with confidence that a certificate of election entitles the holder to no right whatever, as against the constitutional power of the ever-existing senate to take such action thereon as it may decide to be proper.

The considerations stated having led me irresistibly to the conclusion that the senate, at the commencement of the legislative session of 1894, was a continuous body, composed of the two classes of hold-over members, it necessarily follows, that, on the 9th of January, 1894, the thirteen hold-over senators, who composed the two classes of senators whose terms had not expired at that time, were the senate of New Jersey, and as such had the exclusive right to decide upon the qualifications, elections, and returns of the eight senators-elect. If this be established, then the body composed of seven senators-elect, and four hold-over senators, was not at that time the true senate of New Jersey, authorized to determine the elections, returns, and qualifications of these senators-elect, and had no power to elect a president of the senate.

The question still remains, Was the body which elected Mr. Adrain, its presiding officer, the senate of New Jersey?

The constitution provides in reference to the senate and assembly, that "a majority of each shall constitute a quorum to do business." (Art. 4, § 4, par. 2). This paragraph should be construed in connection with article 4, section 2, which provides that "the senate shall be composed of one senator from each county in the state." These taken together would require in this state eleven senators to constitute a "quorum" to do business. There was, at that time, no rule of the senate in existence, enabling the nine senators present to compel the attendance of absent members. The rules adopted in 1893 had been expressly limited in their application to that session of the senate, and the power to make rules necessarily carried with it the power to fix the time during which they would be operative, subject always to the power of the senate to create or change rules at any time, in its discretion.

Mr. Adrain was not on the ninth of January, 1894, president of the senate by reason of his election as such at the session of 1893, because the senate in 1893, in the exercise of its powers to choose its presiding officer, had

limited his term of office to that session. It is further contended on his behalf that the four hold-over senators ratified the proceedings of the nine by acquiescence, and that if that contention cannot be sustained he is nevertheless the president of the senate, because nine senators were two more than a majority of the thirteen senators then holding office, and that, consequently, their action was the action of the senate.

To support this contention the court has been referred by counsel to the standing rule of the United States senate, which provides that "a quorum shall consist of a majority of the senators duly chosen and sworn." (Barclay's Dig. 1868, p. 283).

That this is the present rule of the United States senate is unquestioned, and its application to legislation in that body is such that the most important measures may be enacted without the assent of a number equal to a majority of all the senators, to which all the states are entitled under the constitution. Within a few weeks a most important measure affecting the coinage of silver was passed in the United States senate by forty-four affirmative votes, there being then two or three vacancies existing in the representation of the forty-four states.

The Constitution of the United States provides that "a majority of each (house) shall constitute a quorum to do business," and this provision was copied into our state constitution of 1844. If the above rule, now in force in the federal senate, had been in force at the time of the adoption of our constitution, in 1844, the contention based thereon would be controlling. The present rule, however, was not in force in 1844, and consequently its definition of a "quorum" was unknown to the able statesmen who composed the constitutional convention of that year. On the contrary, the opposite rule then prevailed. Prior to 1864 it was held by the senate of the United States that a "quorum" could be formed only by the presence of a majority of all the senators possible from all the states. June 30, 1862, Senator Sherman introduced the following resolution: "That a majority of the senators duly elected and entitled to seats in this body is a constitutional quorum," which met with such opposition that it was not until the first day of May, 1864, that it was finally adopted in the following form: "Resolved, That a quorum of the senate consists of a majority of the senators duly chosen." The rule adopted was modified in 1868 by adding the words "and sworn." This rule changing the basis of the "quorum" had its origin in the fear that the senate of the United States, by reason of secession and other events, was in danger of being frequently without a quorum, if the rule requiring a majority of all the senators possible under the constitution was adhered to. The necessity for the adoption of Mr. Sherman's resolution has passed away, but the rule has been continued in its present shape since 1868. The interesting debate upon this resolution during the two years that it was pending shows conclusively that at the time of the adoption of our constitution, in 1844, the unchallenged practice

of the United States senate required the presence of a majority of all possible senators to constitute a quorum. (Cong. Globe, 1861-2, 1863-4, Index title *Buorum*). This being the view held in the United States senate when our convention met in 1844, it is safe to assume that when its members adopted the language of the United States Constitution as to a "quorum," they meant to use it in the sense then accepted by the senate of the United States. I therefore assume that on the 9th of last January the presence and participation of at least eleven senators were necessary to constitute a quorum of the senate of New Jersey. At the usual hour for commencing the annual session of the legislature there were but nine senators in the chamber, and it was not within the power of these nine to choose a president of the senate or do any other business as a senate. They had, however, the right common to everybody, to choose one of their number to preside over their deliberations. The constitution confers upon a number less than a quorum the right to adjourn from day to day, and that this might be done in an orderly manner it was proper that one of such minority should be called upon to preside. The person thus chosen to provide form for the doings of this minority would not, however, be the president of the senate, because the senate was not present at his election. It is further contended that after Mr. Adrain had, upon motion adopted by nine senators, taken the chair, the four other hold-over senators ap-

peared, and thus supplied the number necessary to constitute a quorum. If the four had, as a matter of fact, joined the nine in acting upon the resolution which is depended upon to secure Mr. Adrain's title, there would be good ground for the contention in this case that he was elected by their votes. The meeting of the thirteen hold-over members would then have constituted the senate of New Jersey, and they could have proceeded to the enactment of laws and have done all other acts that a senate of twenty-one members may do. The four, however, insist that they did not join the nine; that they did not act with them, and that they were present only for the purpose of demanding the induction of certain senators-elect upon the presentation of their credentials. They further insist that their demands meeting with refusal, they withdrew from the company of the nine. The evidence in this case clearly supports this claim, and the mere presence of the four in the senate chamber in the attitude of protestants, and distinctly refusing to act with the nine, except upon certain conditions, which were denied, cannot be held to have supplied the "quorum" necessary to do business. Mr. Adrain was, therefore, only presiding officer of a body consisting of nine senators, and was not elected president of the senate by a "quorum" of that body.

In view of these conclusions I am of the opinion that judgment of ouster should be entered against both respondents.

CALIFORNIA SUPREME COURT (Dept. 2).

LEVEE DISTRICT, NO. 9, *Appt.*,
c.

L. P. FARMER *et al.*, *Repts.*

(.....Cal.....)

1. An order to vacate a highway is not subject to collateral attack on the ground that the petition asked for two disconnected objects, being the vacation of one road and the opening of another,—especially where it does not appear that the new road is in fact an alteration of the old one.
2. The discontinuance of a road is not a taking or damaging of the property of an abutting owner within the constitutional provision as to compensation for property taken or damaged for public use.

(January 26, 1894.)

A PPEAL by plaintiff from a judgment of the Superior Court for Sutter County in favor of defendants in a proceeding to enjoin defendants from closing a public highway. *Affirmed.*

NOTE.—The above decision is in conflict with decisions in some of the states as shown in the *note* to *Selden v. Jacksonville (Fla.)* 14 L. R. A. 370, among them being the *Michigan case of Pearsall v. Eaton County Suprs.* reported in 4 L. R. A. 193, although it is supported by decisions in Iowa and Pennsylvania which are given in the said *note*.
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The facts are stated in the commissioner's opinion.

Messrs. M. C. Barney and W. T. Phipps for appellant.

Messrs. A. C. McLaughlin, Dist. Atty., W. H. Carlin and M. E. Sanborn, for respondents:

The orders of the board of supervisors cannot be collaterally attacked.

Waugh v. Chauncey, 18 Cal. 11; *Fall v. Paine*, 23 Cal. 302; *Birler v. Sacramento County Suprs.* 59 Cal. 698; *Los Angeles County v. San José Land & Water Co.* 96 Cal. 93; *Humboldt County v. Dinsmore*, 75 Cal. 804.

The first proceeding before the board was simply the alteration of a road, which is provided for by our statute.

Pol. Code 2681, 2682, 2683, 2684 *et seq.*; *Shue v. Richmond Twp. Highway Comr.* 41 Mich. 688.

An alteration by competent authority of an existing road or way is a discontinuance of those portions of the way which do not come within the newly assigned limits, and no special order of discontinuance is necessary.

For an exception recognized in all the states as to vacation of a remote portion of a street for which no damages can be recovered, see the case next following as well as cases collected in the *note* above referred to.

Brook v. Horton, 68 Cal. 558; *Hobart v. Plymouth County*, 100 Mass. 159.

This is a suit for an injunction, and in cases of supposed obstructions to highways this extraordinary writ is not favored.

Irwin v. Dixon, 50 U. S. 9 How. 10, 18 L. ed. 25; *Leach v. Day*, 27 Cal. 648.

The board may exercise this power by "an ordinary order;" and it is doubtful if even a petition is required; certainly nothing more than a petition is necessary.

Keena v. Placer County Suprs. 89 Cal. 11.

The ultimate decision of the question, whether a given road will subserve the public need or convenience must rest somewhere, and it is wisely left for the legislature to determine in such manner as they may provide.

Sherman v. Buick, 82 Cal. 241, 91 Am. Dec. 577.

A public road belongs to nobody but the state and when the government sees proper to vacate it, the consequential loss, if there be any, must be borne by those who suffer it, just as they would bear what might result from a refusal to make it in the first place.

Paul v. Carter, 24 Pa. 207, 64 Am. Dec. 649; *Southwark R. Co. v. Philadelphia*, 47 Pa. 814; *McGee's App.* 114 Pa. 471; *Gerhard v. Seekonk River Bridge Comrs.* 15 R. I. 334; *Clarke v. Providence*, 1 L. R. A. 725, 16 R. I. 387; *East St. Louis v. O'Flynn*, 119 Ill. 200, 59 Am. Rep. 795; *Barr v. Oaklaosa*, 45 Iowa, 275; *Brady v. Shinkle*, 40 Iowa, 576; *Ellsworth v. Chickasaw County*, 40 Iowa, 571; *Gray v. Iowa Land Co.* 28 Iowa, 387; *Coster v. Albany*, 43 N. Y. 399. See also *Feiring v. Irwin*, 35 N. Y. 486; *Mills, Em. Dom.* § 817.

An act should not be declared unconstitutional and void, unless there is a clear repugnance between the act and the constitution; and where there is a reasonable doubt whether the act is repugnant to the constitution, its constitutionality should be affirmed.

University of California v. Bernard, 57 Cal. 612; *Polack v. San Francisco Orphan Asylum Trustees* 48 Cal. 490; *San Francisco v. Spring Valley Water Works*, Id. 493; *People v. Williams*, 64 Cal. 502; *Brook v. Horton*, 68 Cal. 554.

The state has no proprietary interest in the streets of a city, dedicated to public use.

San Francisco v. Spring Valley Water Works, 48 Cal. 493.

Then by what specious sophistry does appellant convince itself that it has acquired rights distinct from the public at large and which it can retain after the public use has ceased?

Weyl v. Sonoma Valley R. Co. 69 Cal. 202.

There can be no private property in a street except the fee of the owner, which is held subject to the easement so long as the public continue to use the street as a highway.

Pacific R. Co. v. Wade, 13 L. R. A. 754, 91 Cal. 449-453.

Haynes, C., filed the following opinion:

Appellant brought this action against the individuals composing the board of supervisors of Sutter county, two persons who were overseers of road districts, and others who were owners of lands through which a certain road ran, to enjoin them from closing

up or vacating said road. Appellant is a corporation organized to maintain a levee along a portion of Feather river to prevent overflows, and the part of said road in question is contiguous, for the greater part of its distance, at least, to the levee; and the complaint alleges that it is the only inlet or outlet to the levee for the purpose of protecting or repairing the same, and charges that the defendants are preparing and threatening to, and will, unless restrained by the court, fence, plow up, and destroy the same, without any legal right or authority so to do, to plaintiff's great and irreparable damage. The prayer is for a temporary restraining order and a perpetual injunction. The answer of defendants, in addition to denials, alleged that on January 6, 1892, the board of supervisors ordered the road abandoned and discontinued, such order to take effect May 1, 1892. Upon the trial, defendants had findings and judgment in their favor, from which judgment the plaintiff appeals. The facts appear in a bill of exceptions. At the commencement of the trial, counsel for defendants suggested that, if the orders of the board of supervisors alleged in the answers were valid, that would dispose of the case, and proposed that the first proofs be directed to that issue, to which counsel for plaintiff assented. The proceedings of the board were thereupon put in evidence by defendants, and plaintiff put in no evidence whatever. The principal question, therefore, is as to the validity of the order vacating the road.

Appellant attacks the validity of the order mainly upon two grounds: (1) That the petition upon which the proceedings were based was for laying out and establishing a new road, and vacating an old one, and (2) that it did not appear from the proceedings that there was any connection or relation between the two, as that the construction of the new road rendered the old unnecessary. It requires neither discussion nor authority to sustain the proposition that two wholly disconnected objects cannot properly be joined in the same proceeding and order; and while these proceedings do not expressly, or in direct language, show that the new road is but an alteration of the old, making a portion of the old road unnecessary, the surveys and descriptions of the new road and the old, which were put in evidence, sufficiently show that fact. The portion of the old road vacated is about two miles in length, and the points where the new diverges from it at one end, and unites with it at the other, are given, while the courses of the surveys show that the divergence is at no place considerable,—perhaps not exceeding forty rods. The petition was signed by the required number of qualified persons; the descriptions of the road sought to be established and the one to be vacated were definite, and did not show that they were disconnected matters which ought not, or could not, be joined in the same proceeding; and as to all facts tending to show whether the power of the board ought, or ought not, to be exercised, either by granting or denying the petition in whole or in part, the board exercises judicial functions (*Damrell v. San Joaquin County*

Suprs. 40 Cal. 158; *Re Grove Street*, 61 Cal. 458; *Waugh v. Oharuncey*, 18 Cal. 11; and its judgments are final, and cannot be attacked collaterally, but may be reviewed upon certiorari where the jurisdiction of the board has been exceeded. *Fall v. Paine*, 28 Cal. 808; *Murray v. Mariposa County Suprs.* 28 Cal. 495; *Damrell v. San Joaquin County Suprs.* 40 Cal. 154; *Bizler v. Sacramento County Suprs.* 59 Cal. 701.

This disposes of all the objections to the introduction of the records, except the one now to be noticed, and upon which appellant principally relies, viz.: That the provisions of the political code which purport to confer the power upon the board of supervisors to vacate public roads are unconstitutional, because they do not authorize the board to assess the damages caused thereby to abutting owners, nor in any manner provide for compensation to them, and that the rights of such abutting owners are property which under the constitution cannot be taken away or damaged without compensation. We are not cited to any case in this state where the question thus made has been called to the attention of the court or decided. Appellant cites *Elliott, Roads & Streets*, p. 114; but this citation has no material bearing upon the question. The author is there discussing the rights of abutting owners arising from the dedication of streets by the owner of the soil, and improvements made on the faith of such dedication, as is clearly shown by the cases cited in the footnote. One of these cases (*Story v. New York Elev. R. Co.* 90 N. Y. 123, 43 Am. Rep. 146) was where the city owned certain lands, and surveyed and platted them into lots and streets, and sold them, the deeds therefor containing a covenant on the part of the grantor to make the streets, which "shall forever thereafter continue and be for the free and common passage, and as public streets and ways, for the inhabitants and all others," etc.; and it was held that the covenantees could not be deprived of the street without compensation. Another case cited is *Le Clercq v. Gallipolis Trustees*, 7 Ohio, pt. 218, 28 Am. Dec. 641. There the corporation owned the lands, and platted them, and designated a certain portion as a public square, and placed a value on the lots at which they were sold, the value of those on the public square being higher "because it was forever inalienable and to be kept open;" and it was held "that where land is dedicated to the use of the inhabitants of a town, one or more, especially one whose property is affected in value, may enforce the execution of the trust." In the first of these cases the right of the abutter rested upon a covenant in his deed from the city, and in the second upon a trust created for his benefit, which the trustee could not disregard. Here, however, there was no dedication, nor any covenant on the part of the public, nor any trust in the public of the land upon which the road was laid for the use of the appellant or of the public. Whatever trust existed in the state was of an easement, not for the use or benefit of appellant, but for the use of the public, to continue for such time only as the use thereof

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by the public should be necessary. But it does not appear probable that the levee was built because the road was there, or on the faith that it would never be vacated, but because the river was there and likely to overflow; and therefore appellant is not within the authority he cites. Appellant, however, cites us to the statement of the same author at page 662, where the broad proposition is asserted that "the right which an abutter enjoys as one of the public, and in common with other citizens, is not property in such sense as to entitle him to compensation on the discontinuance of the road or street, but, with respect to the right which he has in the highway as a means of enjoying the free and convenient use of his abutting property, it is radically different, for this right is a special one. If this special right is of value,—and it is of value if it increases the worth of his abutting premises,—then it is property, no matter whether it be of great or small value. . . . For this reason we think the discontinuance or vacation of a street in such manner as to prevent access to the property of an adjoining owner is a 'taking' of property within the constitutional inhibition, and cannot be lawful without compensation to such owner." The cases cited by the author do not sustain the proposition. *Cincinnati v. White*, 31 U. S. 6 Pet. 431, 8 L. ed. 452, was where lands were dedicated and set apart "forever" as a common. *Concord's Petition*, 50 N. H. 530, was under a statute which provided: "On petitions for discontinuance of highways referred to the county commissioners, if they report for the discontinuance, they shall assess the damages occasioned to any person thereby." *Indianapolis v. Croas*, 7 Ind. 9, related to an alley in the city, and it was held that real estate dedicated for a street or alley could not be reclaimed by the donor without the consent of the owners of the property adjoining such street or alley. The court, in its opinion, called attention to the distinction between the modes of establishing streets in a town and of common roads,—that the former is a dedication by the owner, and the latter by appropriating private property to a public use by the state by the exercise of the right of eminent domain. *Haynes v. Thomas*, 7 Ind. 88, was also a case involving the dedication of land for a public street, and in no way bears upon the question now under consideration. The case cited from 50 Ind. 587 (*Butterworth v. Bartlett*) arose under a statute which provided that, upon the vacation of a highway, one through whose land the highway passed, who should be injured by the vacation of it, should be entitled to damages for such injury. Two other cases cited by the author related to the right of an owner, whose lot abutted on a street, to damages resulting from the use of the street by railroads, such use being an additional servitude. The only case cited by the author in which the question at bar was discussed is *Pearall v. Eaton County Suprs.*, 74 Mich. 558, 4 L. R. A. 198; and the opinion in that case concludes as follows: "The statute of 1887, at page 185, recognizes the right of Mrs. Pearall to her damages in this case, and has undertaken to provide a mode for

obtaining them, but it is not the one authorized by the constitution." The reporter adds, in a footnote, that the act provided for a jury of six freeholders instead of twelve.

Schaufele v. Doyle, 86 Cal. 107, and *Brown v. Seattle*, 5 Wash. 85, 18 L. R. A. 161, cited by appellant, were each cases of injury to abutting property resulting from a change of grade of an existing street in a city, whereby a change in the surface of the lot was made necessary to its convenient use and enjoyment, as by grading or filling, or changing approaches. In these cases, as in multitudes of others of like character, much is said about the rights and property of the abutting owner in the street; but what is said must be read in the light of the facts of each particular case. No one questions that an abutter upon a country highway has an interest in the easement created for public use; but it does not follow that such abutter is entitled to damages upon the vacation of such highway, nor that the vacation of it is a taking or damaging of private property for public use. The interest of each abutting owner is the same. Though it may be of greater use or benefit to one than to others, it is a common right, created in the same way, for the same purpose, of the same duration, and subject to be discontinued when the interests of the public, for whose benefit it was created, requires it,—that is, when it ceases to be necessary for public use. The easement is created for the public, not for an individual, though an individual may have a private way even by condemnation. Nor does the fact that a way may be necessary for a single abutter affect the conclusion that it is no longer necessary as a public road. If it were otherwise, no public road could be vacated so long as it could be shown that it was necessary for a single abutter, and thus the public could be required to maintain what is in fact a private way. That an abutter may be injured by the discontinuance or vacation of the road is conceded; but "there is no contract with surrounding property owners that a public improvement shall always exist as at present, and no damages will be allowed for its discontinuance, notwithstanding improvements have been made on the supposition that they will remain, and notwithstanding property has been thereby enhanced in value." *Mills*, Em. Dom. § 317. In Iowa the supreme court says: "We have held that the vacation of a highway does not take from an individual residing thereon his property, either for public or private use, and that he cannot recover damages therefor, although he may suffer inconvenience and loss therefrom." *Barr v. Oskaloosa*, 45 Iowa, 275. The supreme court of Pennsylvania said: "But by the vacation of Washington street no private property was taken or applied to public use;" and the court further held that the power of the legislature was not restrained in that regard by the provision in the constitution requiring municipal corporations to make compensation for private property taken, injured, or destroyed by the construction or enlargement of their works,

highways, or improvements, and which also provided that private property should not be taken or applied to public use without just compensation. *McGee's Appeal*, 114 Pa. 471. The supreme court of Illinois said: "It is not true, in fact or in law, that defendant has either taken or damaged plaintiff's property for public use. It has taken no property for public or any other use. That of which complaint is made is the vacating of certain streets. In no sense can that act be construed as either taking or damaging private property for public use, as those terms are used in the constitution." *East St. Louis v. O'Flynn*, 119 Ill. 200, 59 Am. Rep. 795.

Whatever of apparent hardship there may be in particular cases where roads have been created by use when the country was new, as in this state, and for the temporary convenience of a sparsely settled country, a greater hardship would be entailed upon the public if those roads could not now be vacated or changed to meet the present changed situation without compensating those whose premises may abut thereon for the loss or inconvenience they may sustain, as, if that were the rule, none would consent to the change, and the added burden would be an embargo upon the creation of new and more desirable roads. The creation of highways by use, or under the statute, creates an easement for the benefit of the public for such time only as the public necessities and convenience may require, and creates no covenant or obligation in favor of an abutter that it shall always exist; but, on the contrary, the statutes, while providing for the establishment and maintenance of highways, also provide for vacating the same, and abutters must be held to have acquired and improved their property in view of that fact; and hence no one can acquire a legal interest in it other than that which is common to all, and this common interest the authority relied upon by appellant concedes does not entitle an abutter to damages upon the vacation of the road. The public use ceases upon such vacation, and an injury to the appellant consequent upon such ending of the use cannot be held to be a taking or damaging for a public use. The first order of the board of supervisors was valid, and the second order, passed to meet an objection made by appellant, was unnecessary, and did not affect the validity of the first. The plaintiff having introduced no evidence, the findings were proper. If the fact or extent or amount of the injury sustained by appellant had been found by the court, it would not avail to sustain a bill for an injunction, since it was *damnum absque injuria*.

The judgment appealed from should be affirmed.

We concur: **Vancille, C.; Searls, C.**

Per Curiam:

For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

Rehearing denied.

MICHIGAN SUPREME COURT.

Christian H. BUHL, *Plf. in Err.*,
v.
FORT STREET UNION DEPOT CO.

(.....Mich.....)

The inconvenience caused to an abutting owner on a street by discontinuing another portion of the street, making travel to and from his premises less direct, is *damnum absque injuria* being the same in kind that all the public suffers, and cannot be regarded as damages within the provision of a statute providing for the payment of all damages consequent on the closing of streets.

(February 6, 1894.)

ERROR to the Circuit Court for Wayne County to review a judgment in favor of defendant in an action brought to recover compensation for alleged injuries to plaintiff's property by reason of the closing of a street by defendant. *Affirmed.*

The facts sufficiently appear in the opinion. *Mr. C. A. Kent*, for plaintiff in error:

It may be admitted, that under our general constitutional provisions the legislature may authorize municipalities, or even corporations, only quasi public, like railroad companies, to condemn private property, without giving compensation for land injured but not taken.

Cooley, Const. Lim. 6th ed. p. 666 *et seq.*; *Pontiac v. Carter*, 82 Mich. 164; *Hatch v. Vermont Cent. R. Co.* 25 Vt. 49.

And it may also be admitted that, as a general rule, where the legislature authorizes the taking of property on payment of compensation, and makes no provision for the payment of damages to property not taken, the owners of the latter cannot recover for such damages.

Schneider v. Detroit, 2 L. R. A. 54, 72 Mich. 246.

The Statute of 1891 provides for the recovery of damages such as plaintiff has suffered.

Under the charter of 1886, the power of the council to abolish or vacate streets is retained. Charter of 1886, p. 69.

But the method in which streets can be vacated seems to have been carelessly or intentionally dropped from the charter. Perhaps this leaves the method of such vacation to be regulated by the general law.

James v. Darlington, 71 Wis. 178.

And such vacating of a street can only be made when it is a public improvement.

Detroit v. Ft. Wayne & E. R. Co. 90 Mich. 646; *Clinton v. Cedar Rapids & M. R. Co.* 24 Iowa, 455; *Ligars v. Chicago*, 139 Ill. 46.

It is not necessary under the Statute of 1891 that the closing of the street should be a public benefit, and the closing can be made before the damages are paid, and the persons damaged are left to the uncertainties of a suit against the company, contrary to the usual and just rule.

Cooley, Const. Lim. 6th ed. pp. 693, 694.

The words of the statute in their common meaning cover plaintiff's case, and if they do not they cover no case, and the provision for the recovery of damages is absolutely nugatory.

If possible some rational meaning must be found in every clause and word in our statute, and no part can be rejected. It would be an insult to a co-ordinate branch of the government for this court to say that the legislature meant nothing, when they provided in the Act of 1891 for the recovery of damages.

Endlich, Interpretation of Statutes, §§ 27, 265, 295; Sedgw. Stat. & Const. L. pp. 226, 233; *Nichols v. Halliday*, 27 Wis. 403; *Simmons v. California Powder Works*, 7 Colo. 285; *Manis v. State*, 3 Heisk. 315; *Henry v. Perry Twp. Trustees*, 48 Ohio St. 871; *Smith v. Jones*, 15 Mich. 281; *People v. Ingham County Suprs.* 20 Mich. 95; *Peninsular R. Co. v. Duncan*, 23 Mich. 180; *Potter v. Safford*, 50 Mich. 46.

If the statute were capable of any interpretation which would not cover plaintiff's case, still, according to the weight of authority and reason, it should be interpreted to cover it.

McCarthy v. Metropolitan Board of Works, L. R. 7 C. P. 508, L. R. 8 C. P. 191, L. R. 7 H. L. 243; *Caledonian R. Co. v. Walker*, 7 App. Cas. 259.

The constitutions of several states provide "that property shall not be taken or damaged for public use without just compensation."

In *Rigney v. Chicago*, 103 Ill. 64, this provision was considered, and it was held that the owner of a lot, the rent of which was reduced by an obstruction 220 feet from the lot, by which access to an important thoroughfare was made difficult, could recover therefor.

See also *Lewis, Em. Dom.* § 227; *Chicago v. Taylor*, 125 U. S. 161, 31 L. ed. 638; *Lake Erie & W. R. Co. v. Scott*, 8 L. R. A. 330, 132 Ill. 429.

In Nebraska, where the constitution in the taking of property for public use is like that of Illinois, the *Rigney* case has been approved.

Gottschalk v. Chicago, B. & Q. R. Co. 14 Neb. 550; *Chicago, K. & N. R. Co. v. Hazels*, 26 Neb. 364; *Omaha & N. P. R. Co. v. Janacek*, 30 Neb. 276.

In *Parker v. Boston & M. Railroad*, 3 Cusb. 107, 50 Am. Dec. 709, under a statute which provided that every railroad corporation shall be liable to pay all damages that shall be occasioned by laying out and making and maintaining their road, or by taking any lands or materials, it was held, "that a party who sustains an actual and real damage, capable of being pointed out, described, and appreciated, may recover."

See also *Bradley v. New York & N. H. R. Co.* 21 Conn. 294; *Mills, Em. Dom.* § 194; *Woodbury v. Beverly*, 153 Mass. 245.

The constitution of Missouri is like that of Illinois with reference to the taking of property for public use, and the decisions there

NOTE.—The above case is a recognized exception to those which hold an abutting owner entitled to damages for discontinuance of a highway in front of his premises. For authorities on the subject, 23 L. R. A.

see the note to *Selden v. Jacksonville (Fla.)* 14 L. R. A. 370.

See, in connection with this, the case preceding, *ante*, 383.

limit the damages in accordance with the position of defendant in this case.

Glasgow v. St. Louis, 107 Mo. 198, and cases there cited.

Perhaps the Pennsylvania decisions favor the same view.

Pennsylvania R. Co. v. Lippincott, 116 Pa. 472; *Pennsylvania R. Co. v. Marchant*, 119 Pa. 541; *Dooner v. Pennsylvania R. Co.* 142 Pa. 86. See also *Coster v. Albany*, 43 N. Y. 399.

Messa. James F. Joy and F. A. Baker for appellee.

Montgomery, J., delivered the opinion of the court:

The common council of the city of Detroit vacated that portion of Fourth street in said city extending from Congress street to Fort street. The defendant thereupon occupied the vacated portion of the street for depot purposes, which of course resulted in closing the street to public travel. The action was had under authority of Act No. 94 of the Laws of 1891, amendatory to the "Union Depot Act," so called. The amendatory section of 1891 provides that "any corporation organized under this act shall have power, with the consent of the common council of any city, or the village board of any village, in which the station and depot grounds of such company are located, to occupy and close any highway, street, or alley within the limits of its station and depot grounds, but such company shall pay to the parties entitled to the same, any and all damages that may accrue to them in consequence of the closing of any such highway, street, or alley; and such damages may be recovered in an action on the case in any court of competent jurisdiction." The plaintiff is the owner of a brick block fronting Fourth street and extending from Larned street to Congress. He brings this suit to recover damages resulting to his property from the closing up of Fourth street between Congress and Fort. The portion of the street beyond Congress is made less accessible from plaintiff's property, it being made necessary to make a detour of Third street instead of passing directly through what was formerly a part of Fourth. It cannot be doubted that there has been some resulting disadvantage occasioned by the closing of that portion of the street. The question presented is, Is the resulting inconvenience *damnum absque injuria*, or should the damages actually resulting to the property be held recoverable? It is contended, on the one hand, that such inconvenience as the plaintiff suffers is of like character to that which any member of the community submits to, differing only in degree. On the other hand, it is broadly claimed that under the statute in question any person who is actually damaged by the closing of the street is entitled to recover his damages, and the fact that it is difficult to draw the line showing when depreciation of property will end does not militate against the right, or present any greater obstacle than is often presented in other classes of cases, and that the question can safely be left to the good sense of the court and the jury.

1. Under the right of eminent domain where

there is no other limitation of the power than such as is contained in our constitution, which provides that private property shall not be taken for public use without just compensation, it is conceded that it is competent for the legislature to provide for a public improvement which may work an incidental damage to property without providing compensation for property not actually taken. See *Pontiac v. Carter*, 83 Mich. 164; *Ilkinkman v. Detroit*, 9 Mich. 108; *People v. Ingham County Suprs.* 20 Mich. 95. And the distinct question of whether the discontinuance of a public street, or its appropriation to other purposes than that of a highway, constitutes a taking of the property of the users generally (other than abutting owners) has been distinctly ruled in the negative by many of the American courts. See *McGee's App.* 114 Pa. 477; *Smith v. Boston*, 7 Cush. 254; *Paul v. Carver*, 24 Pa. 207, 64 Am. Dec. 649; *Fearing v. Irwin*, 55 N. Y. 486; *Hatch v. Vermont Cent. R. Co.* 25 Vt. 49; *Dill. Mun. Corp.* 4th ed. § 666.

But it is contended that the statute in question is more nearly analogous to those constitutional provisions, which exist in some of the states, that property shall not be taken or damaged for public use without just compensation, and it is urged that where these provisions exist, in some of the states at least, a doctrine has been held which sustains the plaintiff's contention here. Plaintiff's counsel also relies upon decisions of the English courts as sustaining his contention. The English statute provides for compensation to the owner of lands injuriously affected, and it has been held that this entitles one to compensation whose land was permanently diminished in value by an authorized obstruction to a street, although his lot was at a distance from the obstruction. *McCarthy v. Metropolitan Board of Works*, L. R. 7 C. P. 508, L. R. 87 H. L. 248; *Caledonian R. Co. v. Walker*, 7 App. Cas. 299. Mr. Sedgwick, in the eighth edition of his work on Damages (sec. 1093), comments upon these decisions as follows: "The disposition made by the English courts of the question of redress for interference with access from private property to streets and highways is particularly deserving of attention. Under the rule already stated, if the owner had suffered no injury to his right of ownership he would have no right of action in respect of his interest in lands, if there had been no statutory powers; consequently he cannot maintain a claim to compensation under the statute. The claim, therefore, seems to be limited and defined by the right of access. If the access is taken away, or rendered less convenient, and the value of the lands depreciated, even though they do not immediately abut on the public highway or river, the plaintiff can recover; but if the obstruction is only temporary, or an inconvenience, diverting the public and causing a loss in custom or trade, the damage, as it would not have given the owner any right of action if there had not been any statutory powers, is not recoverable."

The plaintiff also cites cases in which the construction of a constitutional provision en-

titling the party to compensation where property is taken or damaged is claimed to be sufficiently broad to include the present case. The cases cited are: *Rigney v. Chicago*, 102 Ill. 64; *Chicago v. Taylor*, 125 U. S. 161, 81 L. ed. 638; *Gottschalk v. Chicago, B. & Q. R. Co.* 14 Neb. 550, 561; *Chicago, K. & N. R. Co. v. Hazels*, 26 Neb. 384; *Omaha & N. P. R. Co. v. Janacek*, 30 Neb. 276; *Harvey v. Georgia, S. & F. R. Co.* 90 Ga. 66; *Omaha v. Kramer*, 25 Neb. 489; *Montgomery v. Townsend*, 80 Ala. 489; *Hot Springs R. Co. v. Williamson*, 45 Ark. 429; *Moore v. Atlanta*, 70 Ga. 611; *Longmont v. Parker*, 14 Colo. 386. In the case of *Longmont v. Parker* it was held that, under a constitution providing compensation for lands taken or damaged, a landowner whose means of ingress and egress are interfered with by the construction of a ditch on the highway abutting his land is entitled to recover as damages depreciation of the property because of such ditch.—*Richmond, C.*, dissenting. In *Moore v. Atlanta* it was held that, under a similar constitution, damages resulting to the abutting owner from a change in the grade of a street could be recovered. The same thing was held in *Montgomery v. Townsend*. In *Hot Springs R. Co. v. Williamson* it was held that the owner of premises abutting upon a street may recover from a railroad company damages resulting to his premises from the construction of a roadbed in its right of way along the street in such a manner as to obstruct access to the premises, though the owner has no interest in the fee. In the case of *Omaha v. Kramer* it was held that the construction of a viaduct on a street upon which the plaintiff's land abutted was such damage as could be recovered for, the court stating that, under the constitutional provision providing that property taken or damaged shall be paid for, the words "or damage" include all actual damage resulting from the exercise of the right of eminent domain which diminishes the market value of private property. The court repudiates the English rule and the rule adopted in Pennsylvania that, under such a provision, no damage can be recovered except such as the plaintiff could be entitled to sue for and recover at the common law if the act had not been authorized by statute. See, as to the English rule, 8 Sedgw. Damages, § 1124; the Pennsylvania rule, *Pennsylvania R. Co. v. Marchant*, 119 Pa. 541. In *Rigney v. Chicago* the city constructed a viaduct or bridge along Halsted and across Kinsey streets at their intersection, which was twenty feet west of plaintiff's premises, fronting on Kinsey street. The viaduct in question cut off all communication with Halsted street by way of Kinsey street, except by means of a pair of stairs at the intersection of the streets. Halsted street is one of the main thoroughfares of Chicago, on which is operated a line of horse railway. The evidence showed that the value of plaintiff's lot was largely depreciated. The question is considered at great length, and the majority of the court reach the conclusion that the plaintiff, under the facts stated, is entitled to recover compensation for the injury to his property; the constitution providing that private property

shall not be taken or damaged for public use without just compensation. Three members of the court dissented from this opinion,—Justices Scott, Craig, and Sheldon. The Supreme Court of the United States, in *Chicago v. Taylor*, followed the decision of the state court, and affirmed a recovery by a plaintiff whose property was damaged by the construction of a viaduct on the street abutting the plaintiff's premises. Limitations have been placed upon the rule by the supreme court of Illinois. In *Chicago v. Union Bldg. Assn.*, 102 Ill. 379, 40 Am. Rep. 598, the plaintiff sought to enjoin the closing of a street three and one half blocks from his premises, which act he claimed worked a peculiar injury to him. The court says: "It has been supposed in argument that our constitution, in providing that 'property shall not be damaged for public use without due compensation,' necessarily modifies the doctrine of these cases [referring to Massachusetts, Pennsylvania, Iowa, and other cases cited] to some extent. As far as affects the present question, we are of opinion this supposition is not well founded." See also the case of *East St. Louis v. O'Flynn*, 119 Ill. 200, 59 Am. Rep. 795. The counsel for the plaintiff argues that these cases were wrongly decided, as the court attempts to determine as a matter of law in each case whether damages have resulted. This only illustrates the difficulty in drawing any precise line, if it be admitted that one other than the abutting owner is entitled to recover damages for the obstruction or discontinuance of a public street. Indeed, it is not altogether clear that the line intended to be drawn by the supreme court of Illinois is not the one indicated, namely, between an abutting owner affected by the closing of a street adjacent to his premises and one whose property is incidentally affected by the closing of a street in another block. In *East St. Louis v. O'Flynn*, *supra*, it is said: "The only question that can be considered in this court is purely a question of law. It is, Can defendant as a matter of law be held liable to the plaintiff for damages resulting from the vacation of streets and alleys between Front and Fourth streets, the vacation being in another block in the city than that in which plaintiff's property is situated?" The court then considered the force and effect both of the constitutional provision and the statute of the state as bearing upon the subject; the constitutional provision being that private property shall not be taken or damaged for public use without just compensation, and the statute providing that when property is damaged by the vacation or closing of any street or alley the same shall be ascertained and paid as provided by law. The court says: "Here plaintiff's lot is not adjacent to the streets or alleys vacated. It is in another block. The access to and egress from his lot are not affected by the vacating ordinance passed by the city. The street in front and the alley in the rear of his property remain open as before, affording the same access to and egress from it. The inconvenience that would be occasioned to plaintiff in going from the street in front of his house to a particu-

part of the city, on account of vacating and closing up certain streets and alleys in another block, is the 'same kind' of damage that would be sustained by all other persons in the city that might have occasion to go that way; and, although the inconvenience he may suffer may be greater in degree than to any other person that fact would not give him a right of action." The court held that he had no right of action. In *Chicago v. Union Bldg. Assn.*, it was held that the fact that property owners upon a street have been specially assessed as benefited by the opening of a street some blocks off and have paid assessments does not give them any special property in said street, any more than any other taxpayer, and gives them no equitable ground to enjoin the vacation of such part of the street. The same view was taken in *State v. Elizabeth*, 54 N. J. L. 463. It was said: "It is assumed by counsel for prosecutrix that, because the prosecutrix was assessed for a benefit resulting from the opening of this street peculiar to herself, she got a vested right in the continued existence of the street, of which she could not be stripped without compensation. But this, I think, is more plausible than substantial. While the right she got may have been of peculiar benefit to her property, yet it was a right which she shared with the public. The privilege of using the street was shared by each member of the community. It may not have been of the same value to each member of the community, but the right to use the street was in each citizen the same. It was exclusively a public right, put under the control of the representatives of the public. It was subject to alteration or abolition when, in the judgment of those to whom the public interests were confided, those interests demanded such action." It was held in that case that a person owning lands upon a part of a street not vacated is not deprived of any vested rights in property for which he is entitled to compensation by reason of such vacation.

A distinction may well be held to exist between the injury which results to an abutting owner, or another so situated that the means of ingress and egress to and from his premises are cut off by a discontinuance of a street, and one owning land upon another street or on the same street at a distance from the part of the highway discontinued. The subject has been considered by the supreme court of Massachusetts many times. In *Stanwood v. Malden*, 157 Mass. 17, 16 L. R. A. 591, damages were sought for a discontinuance of a part of Sumner street in Malden, which runs into Florence street obliquely just opposite the petitioner's land. It was said it is possible, if not probable, that the money value of plaintiff's property is diminished by diverting the stream of travel which formerly flowed towards it over Sumner street; and it was contended, on the authority of the English cases, and for the further reason that the laying out of the discontinued piece of street would have been a benefit for which the petitioner might have been assessed, that it would follow logically that a recovery should be had for its discontinuance. But the supreme court, following

Smith v. Boston, 7 Cush. 254, denied the right. In *Smith v. Boston* it appeared that the plaintiff owned several lots in the city on or near Market street, and offered to prove that the value of each had been lessened and that rent of one or more of them diminished, but it appeared that no one of the lots bounded on that part of the street which had been discontinued. Chief Justice Shaw, in conveying the opinion of the court, said: "There is obviously a difficulty in laying down a general rule applicable to all cases. One limit, however, must be observed, which is that the damage for which a recompense is sought must be the direct and immediate consequence of the act complained of, and that remote and contingent damages are not recoverable. The inconvenience of the petitioner is experienced by him in common with all the rest of the members of the community. He may feel it more, in consequence of the proximity of his lots and buildings. Still it is a damage of like kind, and not in its nature peculiar or specific. . . . We do not mean to be understood as laying down a universal rule that in no case can a man have damages for the discontinuance of a highway unless his land bounds upon it, although, as applicable to city streets, intersecting each other at short distances, it is an equitable rule. A man may have a farm, store, mill, or wharf, not bounding on a street, but communicating with it by a private way, so situated that he has no access to his property but by the public way. If this is discontinued, he must lose the benefit of his estate or open a way at his own expense, which might be a direct and tangible damage consequent upon the discontinuance of the public way, and we are not prepared to say that he would not have a claim for damages under the statute." In *McGee's App.*, 114 Pa. 477, the court considers the effect of a constitutional provision which reads as follows: "Municipal and other corporations and individuals, invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured, or destroyed by the construction or enlargement of their works," etc. The court held that this gave no right of action to the owner of a lot whose property was incidentally injured by the vacation of a public street. In the case of *Coster v. Albany*, 48 N. Y. 899, the city was authorized by act of the legislature to cause the removal of a bridge which was a portion of a street leading to plaintiff's lot, which act provides that the city should pay all damages to property caused by the improvement, and should enter into a contract and give a bond to the state to do so. The language of the act was substantially the same as that under consideration here. The court says: "'Damage' and 'claim' are words having a well-defined meaning in statutes and legal instruments. And for so much as they rightfully convey, for so much is the city bound. 'What is a claim? It is, in just judicial sense, a demand of some matter, as of right, made by one person of another, to do or forbear some act or thing as a matter of duty.' The plaintiffs may claim no more of the city than the

law will give them as a matter of right. The city need pay as much as the state should pay as matter of duty." Considering the question of whether the plaintiffs had such a right which had been encroached upon, the court says: "The plaintiffs further claim that the best approach to their property having been by the Hamilton street bridge, and that having been entirely removed by the agents of the state, a damage has resulted to their property for which the city is liable. No part of the bridge was on the property of the plaintiffs. They had no interest or right in it as property. There is left to the plaintiffs an approach to their property by the State street bridge, though less near, less easy, less commodious. The damage to the plaintiffs' property from this cause is entirely indirect and remote. It is not claimed to the contrary, and we shall assume that the state had right, by virtue of this act or from other source, to do this work, and in doing it to remove this bridge. The bridge, so far as the plaintiffs were interested in it, was but a part of a public street or highway. Over streets and highway the legislature has control, and may, when no private interests are involved or invaded, close them and altogether relinquish their use by the public. And if in the exercise of this right a street be discontinued, and the value of lands abutting on other parts of the street, and on neighboring streets, is lessened, it is not such an injury to the owner as to entitle him to damages." In *Glasgow v. St. Louis*, 107 Mo. 204, the plaintiff sought to enjoin the vacation of Twelfth street, one block south of property owned by plaintiff, lying between Thirteenth and Fourteenth streets. The situation of the property was not materially different from the property of plaintiff in the present case. The court says: "There is no doubt but a property owner has an easement in a street upon which his property abuts which is special to him and should be protected, but here the plaintiffs own no property fronting or abutting on the part of the street which was vacated. Their property is surrounded by streets not touched or affected by the vacating ordinance. They will be obliged to go a little further to reach Twelfth street, but that is an inconvenience different in degree only from that suffered by all other persons, and it furnishes no ground whatever for injunctive relief. Nor are the plaintiffs entitled to any relief by reason of

the clause in the present constitution which declares 'that private property shall not be taken or damaged for public use without just compensation.' To entitle them to relief because their property will be damaged, though not taken, they must show a special injury. Here there is no physical interference with their property, nor is any right or easement connected therewith or annexed thereto affected. They will, therefore, suffer no injury which is special or peculiar to them. The inconvenience, if any in reality there is, is the same as that cast upon other persons. For these reasons the constitutional amendment furnishes them no ground for complaint."

We think the weight of authority in this country fully sustains the contention of defendant that such an injury as that resulting to the plaintiff here is one which he suffers in common with the general public, and *damnum absque injuria*. But it is contended by the plaintiff that, unless the amendatory act is so construed as to give the plaintiff a right of action in the present case, the provision that damages may be recovered is rendered wholly nugatory, as it is urged that only such streets as are within the depot grounds are permitted to be vacated, and that there is no abutting owner who could be injuriously affected by the closing of such streets. And, as applied to the present case, such is possibly the result of this construction. But the act is general, and applies to all depot companies. The street which passes through depot grounds may be a *cul de sac*, and in such case the closing of a street might leave the owner of the property without any means of egress whatever. In such case, undoubtedly, his right to damage would be as clear for the interruption of his means of ingress and egress as would be that of the abutting owner for a similar interference with a like right. See opinion of Shaw, *Ch. J.*, in *Smith v. Boston*, *supra*; *Pearse v. Eaton County Supra*, 71 Mich. 438; *Goss v. Westphalia Twp. Highway Comrs.* 63 Mich. 608; *People v. China Twp. Highway Comrs.* 35 Mich. 15.

The circuit judge directed a verdict for the defendant on the ground that the plaintiff was not entitled to recover any damage for the closing of the street in question. We think his conclusion was right, and *the judgment will be affirmed*, with costs.

The other Justices concur.

OHIO SUPREME COURT.

James HICKEY, *Plff. in Err.*,

LAKE SHORE & MICHIGAN SOUTHERN R. CO.

(51 Ohio St. —.)

"Where a railway company makes a

***Headnotes by the COURT.**

deed poll of land in fee, along which its right of way is located, "subject to the condition that the said grantee, his heirs and assigns, shall make and maintain good and sufficient fences on each side of the right of way of the railway as now located and built, . . . which condition and obligation shall be perpetually binding on the owners of land,"—*Held:*

(a) **That the grantee, by accepting**

NOTE.—Liability of grantee upon a condition of deed poll.

Upon the above question the states are divided,
23 L. R. A.

some holding the grantee liable only in assumption as upon an implied promise, others holding him liable as upon an express covenant.

the deed, will be deemed to have entered into an express undertaking to perform the condition contained in the deed, and such undertaking will run with the land, and become obligatory upon a subsequent owner by purchase from the grantee of the company.

(b) After the grantee of the company has ceased to be the owner of the land, by conveying the same in fee to another, the company will not have a right of action against its grantee, for non-performance of the condition to make and maintain fences between the right of way and the land sold.

(January 23, 1894.)

ERROR to the Circuit Court for Cuyahoga County to review a judgment reversing a judgment of the Court of Common Pleas in favor of defendant in a proceeding brought to enforce a covenant to maintain a fence. *Reversed.*

Doctrine against liability upon the covenant.

A deed poll is that which is plain without indenting, so called because it is cut even or polled. Every deed that is pleaded shall be intended to be a deed poll, unless it be alleged to be indented. Co. Litt. § 370.

In *Platton Covenants*, 18, it is stated that the action of covenants, unless founded on the custom in London, or on a contract with the king and a subject, can never be supported against a person who neither by himself, nor by some other person acting on his behalf, has executed a deed under seal.

An action of covenant is of a technical nature and cannot be maintained, except against a person who, by himself or some other person acting in his behalf, has executed a deed under seal, or who, under some very peculiar circumstances, such as those mentioned in *Coke upon Littleton*, 281a) has agreed by deed to do a certain thing. *Burnett v. Lynch*, 5 Barn. & C. 689, 8 Dowl. & R. 368.

Covenant does not lie without a deed; so held in an action brought upon a covenant contained in a deed of composition with creditors, which was signed by one partner only in a partnership firm, the court holding that the partner not joining in the deed could not be made a party to the action. *Metcalfe v. Ryecroft*, 6 Maule & S. 75. *Wilson v. Woolfrye*, Id. 841, to the same effect.

In *Yrear Book*, 88 Edw. III., 8, the form of action as said to be debt.

The signing of a deed is the material part of the execution, the seal being a mere form, and a written or ink seal is good. *McDill v. McDill*, 1 Dall. 63.

In *Lock v. Wright*, 1 Strange, 571, it was held that mutual covenants could not arise out of a deed poll, because it was not the act of both parties, and that the grantee on it is liable in an action of debt.

In *Moore v. Jones*, 3 Ld. Raym. 1536, it is held that an action of covenant could not be maintained except upon a deed, and that an allegation that a party *concessit per quoddam scriptum factum*, did not imply that the writing was a deed, neither did the allegation that the party covenanted *per quoddam scriptum factum*.

In *Chancellor v. Poole*, 3 Dougl. 764, the action was in covenant for rent, the declaration stating the demise by indenture under seal from the lessor to the lessee, and a subsequent deed poll between the lessee, the lessor, and the defendant whereby the lessee with the consent of the lessor, the plaintiff in the action, bargained and sold the premises to the defendant. The court held that the assignee of the term declared as such, was not liable for the rent accruing after he had signed over, though it 23 L. R. A.

Statement by Dickman, J.:

The Lake Shore & Michigan Southern Railway Company, the defendant in error, commenced the original action against James Hickey, the plaintiff in error, in the court of common pleas of Cuyahoga county. The original petition filed by the company reads as follows:

"The plaintiff says it is a corporation duly organized under the laws of Ohio, and, as such, owns and operates a line of railroad from Cleveland, Ohio, to Toledo, Ohio; that prior to December 30, 1874, it owned in fee simple three hundred eighty-two and 20-100 acres of land, situate in the township of Olmstead, Cuyahoga county, Ohio, through and along parts of which is and was located its line of railroad and right of way; that said lands were fully described in a certain deed by it executed and delivered to the defendant, James Hickey, on or about December

was stated that the lessor was a party executing the assignment and agreeing thereby that the term which was determinable at his option should be absolute.

Such an action cannot be maintained in the name of an assign of the promisee. *Standen v. Christmas*, 10 Q. B. 185, 18 L. J. Q. B. 295, 11 Jur. 694; *Blockford v. Parson*, 5 C. B. 280, 17 L. J. C. P. 193, 12 Jur. 377.

Connecticut.

Again in *Hinsdale v. Humphrey*, 15 Conn. 431, it was held that an action on the covenant would not lie against a lessee, under a lease by deed poll signed by the plaintiff alone, and that assumpsit or case was the proper remedy for the recovery of the rent, and that the acceptance of the lease by the lessee was not sufficient to bind him by way of covenant.

Massachusetts.

The principle is well settled, that where one, by deed poll, grants land and conveys any right, title, or interest in real estate to another, and where there is any money to be paid by the grantee to the grantor, or for his use and benefit, and the grantee accepts the deed and enters on the estate, the grantee becomes bound to make such payment or perform such duty, and not having sealed the instrument he is not bound by it as a deed, but it being a duty the law implies a promise to perform it, upon which promise, in case of failure, assumpsit will lie. *Pike v. Brown*, 7 Cush. 183.

The above principles were applied to a case, where by deed poll, an estate was conveyed subject to a mortgage containing the clause, "which said sum (meaning the mortgage money) is part of the consideration before named, and this deed is on the condition" that the grantee assume and pay the same, it appearing that the grantee entered upon and took possession of the estate conveyed, but neglected and refused to pay. *Ibid.*

Again in *Goodwin v. Gilbert*, 9 Mass. 510, where certain duties were reserved to be performed by the grantee, under a lease created by deed poll.

In that case, the court held that the fact of there being no memorandum signed by the party did not bring the case within the statute of frauds, the law raising the promise in such a case. *Goodwin v. Gilbert*, *supra*.

So in *Nugent v. Riley*, 1 Met. 117, 35 Am. Dec. 355, where the instrument purported to be an indenture, but was executed by the lessor only and recited that the lessee had paid the full rent for the term, and covenanted, promised, and agreed "to reconvey the said premises to the lessor upon the payment of the aforesaid sum, and interest there-

80, 1874, and recorded in book 238, pages 445 and 446, of Cuyahoga county records, to which reference is here had; that said defendant went into possession of said lands under said deed, and they have ever since been occupied by him or his vendees; that said deed so delivered to and accepted by said defendant contained the following condition and agreement:

"This conveyance is made subject to the condition that the said James Hickey, his heirs and assigns, shall make and maintain good and sufficient fences on each side of the right of way of the Lake Shore & Michigan Southern Railway as now located and built through said first-named lot or tract herein conveyed and on the south line of said right of way, which is the north line of the second lot herein conveyed west of the two acres reserved and conveyed to Michael McCormick, which condition and obligation shall be perpetually binding on the owners of the land."

"The plaintiff says that afterwards, and before October 10, 1884, the defendant sold off

sundry parcels of said land to sundry individuals or parties, to wit, to John Beana, Michael Standen, Edward Standen, Theodore Shearing, John Gannon, Andrew Broadwell, Thomas Costello, Michael Beana, George Bash, Martin Standen, Gust Gable and Mrs. Patrick McKenna each holding under the defendant a separate parcel of said land; that prior to said October 10, 1884, the fences along the line of its road and in front of the several parcels of said land sold by said defendant to the parties above named, became and were out of repair; were not good and sufficient, and were not in condition to turn stock and animals as required by law, portions requiring entirely new fences, and other portions repairing only; that plaintiffs gave notice to each of said vendees or occupiers under said defendant Hickey, and requested them and each of them to repair and rebuild said fences and put them in the condition required by said contract and the laws of the state; that said occupiers wholly refused and failed to repair and reconstruct said fences;

on" it was held there was no covenant technically on the part of the lessor to reconvey upon condition, because he had not executed the instrument, it being inserted in the same conveyance which raised the term and leased the estate; it insured by way of condition, and the lessee by accepting the deed in the form of an indenture, but in fact a deed poll, became bound by the condition.

In the above case the court held the parties related to each other as mortgagor and mortgagee, and further, that although there was no stipulation on the part of the lessee to account for surplus rents after the debt was paid, but only to reconvey upon payment, yet an action of assumpsit would lie to recover the rents after the debt was paid, a promise to repay the same being implied by law. *Nugent v. Riley*, *supra*.

Where land was conveyed by deed poll for valuable consideration, the deed containing a stipulation that the grantee, his heirs, and assigns should build and maintain a fence the whole extent of the line bounding the grantor's land, it was held to be a valid and binding contract, although the deed was not signed by the grantee. *Newell v. Hill*, 2 Met. 180.

In *Parish v. Whitney*, 8 Gray, 516, a stipulation in a deed poll, for the erection and maintenance of a fence between the premises conveyed and those adjoining, was not an incumbrance so as to enable a subsequent grantee to sue the original grantee for a breach of covenant against incumbrances, it being merely a personal agreement of the grantee made as part of the consideration and evidenced by his acceptance of the deed, and was binding upon him and his legal representatives, but did not affect the estate. To the same effect, *Plymouth v. Carver*, 16 Pick. 183.

A devise upon condition that the devisee perform an obligation renders the devisee liable to assumpsit if he accepts the devise, the law raising an implied promise in such a case. So held in *Felch v. Taylor*, 18 Pick. 183, where the obligor of a bond devised the estate with a condition that the devisee perform the condition attached to the bond.

The general doctrine was applied in *Maine v. Cumston*, 98 Mass. 817, in an action for the cost of half the sum expended in the erection of a partition wall, made use of by the defendant in constructing a house.

The decision in *Parish v. Whitney*, *supra*, was supported as falling within the rules, that no easement in or on conveying real property can be created

by contract of the party except by deed, and that an agreement under seal by the party who is to perform it cannot create a covenant or run with the land.

If a grantee accepts such a deed, a promise binding himself and his representatives personally is doubtless implied. *Bronson v. Coffin*, 108 Mass. 175, 186, 11 Am. Rep. 536.

So an agreement to repair buildings upon land contained in a deed poll, not being under seal, is not a covenant, but is in the nature of assumpsit, on the promise implied from the acceptance of the deed. *Martin v. Drinan*, 128 Mass. 515.

New Jersey.

In *Ludlum v. Wood*, 2 N. J. L. 52, it is said that an action of covenant cannot be brought except on a sealed instrument. In that case the action was brought on a covenant on a surety bond, given for the appearance of a defendant.

If the action is one of covenant the demand must show that the instrument on which the action was brought was under seal. *Bilderback v. Pouner*, 7 N. J. L. 77.

But see *infra*.

New York.

The same doctrine was held in *Gale v. Nixon*, 6 Cow. 445, assumpsit being held to be the proper form of action, and that covenant would only lie where the instrument was actually signed and sealed by the party, or by his authority, a mere recognition of the contract, though in writing and under seal, not being sufficient to create a covenant. In the above case the action was brought to recover purchase money.

In *Van Santwood v. Sandford*, 12 Johns. 197, it was held in an action of covenant, that there must be an averment that the writing or contract was sealed by the defendant, and that a statement that the defendant made the writing, etc., setting forth the same with the name and scroll with an L. S., was not sufficient.

In *Rogers v. Eagle Fire Co. of New York*, 9 Wend. 611, it was stated that the conveyance of the land in that state, in common, if not by universal use, were by poll deed, and that assumpsit would lie to recover the consideration money expressed in them, and that it made no difference whether such consideration was a sum in gross or an annual rent.

In the above case the court approved of the doc-

that it waited a reasonable time, to wit, one month, and the occupiers refusing and failing so to do, the plaintiff caused said fences to be repaired and rebuilt, as follows, and at the following costs, paid by the plaintiff:

"Repairing fence on line of lands occupied by T. Costello.....	\$ 2 46
Repairing fence on line of lands occupied by G. Gable.....	1 99
Repairing fence on line of lands occupied by Mrs. P. McKenna.....	4 49
Repairing and rebuilding fence on line of lands occupied by George Bash.....	17 39
Repairing and rebuilding fence on line of land occupied by Michael Beans.....	44 77
Repairing and rebuilding fence on line of land occupied by A. Broadwell.....	10 34
Repairing and rebuilding fence on line of land occupied by J. Gannon.....	33 14
Repairing and rebuilding fence on line of land occupied by Martin Standen.....	32 43
Repairing fence on line of lands occupied by Michael Standen.....	1 95
Repairing fence on line of lands occupied by Edward Standen.....	1 81

Making a total of..... \$ 150 82

"That each of the parcels of land so oc-

cupied by said parties and who were notified respectively as aforesaid, were parts of the land so conveyed to said defendant by the plaintiff and containing the contract aforesaid; that said fences so rebuilt and repaired by the plaintiff were upon the line of plaintiff's right of way, and were and are the identical fences which, by the terms of said contract, the said defendant obligated himself to build and keep in repair; that said work was done by plaintiff prior to March 18, 1885, and was worth the price and value aforesaid, and of all which defendant had notice; that, by reason of the premises, an action has accrued to plaintiff to have and recover of the defendant the cost and expense aforesaid of said fencing.

"Wherefore plaintiff prays judgment against the defendant for said sum of \$150.82, with interest after March 18, 1885."

To this petition the defendant demurred, on the grounds:

1. That there was a defect of parties defendant.

trine of the court as expressed in *Goodwin v. Gilbert*, 9 Mass. 510.

In *Bowen v. Bell*, 20 Johns. 338, 11 Am. Dec. 286, the action was brought in assumpsit to recover the consideration money of property of which the defendant was in position and had accepted the title, and the court held the plaintiff entitled to recover, although the defendant had not signed the instrument.

But see *infra*.

Pennsylvania.

An action on the covenant will not lie in the case of a grantee accepting a deed and entering into possession thereunder, if the deed is not signed and sealed by him. *Maule v. Weaver*, 7 Pa. 329.

In the above case, *Chief Justice Gibson* expresses himself against the doctrine of liability upon such a covenant in the following words: "How it came to be thought by the profession at an early day, and to be handed down to the present, that an action of covenant might be maintained against the grantee in a deed poll under any circumstances, or against any one else who had not sealed it, I cannot imagine." *Ibid*.

The question, however, is now provided for by the Pennsylvania Act of April 25, 1850, § 8 (*Purdon's Dig.* p. 361), which provides that in all cases now pending or hereafter to be brought in any court of record in this commonwealth, to enforce the payment of ground rent due and owing upon lands or tenements, held by virtue of any lease for life or a term of years, or in fee, the lessor, his heirs, and assigns shall have a full and complete remedy therefor, by action of covenant against the lessee or lessees, his heir, or their heirs, executors, administrators or assigns, whether the said premises, out of which the rent issues, be held by deed poll or otherwise.

Vermont.

In *Johnson v. Muzzy*, 45 Vt. 319, the court followed the ruling of the Connecticut and Massachusetts cases, holding that an action of covenant would not lie against a lessee under a deed poll, even though he had accepted the lease and taken possession of the premises, if such deed were not signed by him, the court holding that such deed could not in legal contemplation be held to be that of the defendant.

In the above case, the court cited and relied upon *House v. Foster*, decided in that court in the year 1852, but not officially reported, wherein it was held 23 L. R. A.

that such a deed was not legally that of the defendant, and that covenant could not lie. *Johnson v. Muzzy*, *supra*.

Contrary doctrine.

A covenant is an agreement between two or more persons by an instrument under seal, to do or not to do some particular thing. It can only be created by deed, but may be by a deed poll (the party named in the deed), as well as by indenture; but where lands are conveyed by indenture to a person who does not seal the deed, yet if he enters upon the land and accepts the deed in other matters, he will be bound by the covenant contained in it, *Taylor, Land. & T.* § 245.

In 1 Esp. N. P. pt. 2, 114, it is said the action of the covenant lies equally, whether it be by indenture or deed poll.

In *Staines v. Morris*, 1 Ves. & B. 9, the defendant was held bound by an express personal covenant, though he had not executed the instrument in which it was contained, that as he took the estate under the instrument, he took it subject to the accompanying covenant. To the same effect, *Wilkins v. Fry*, 1 Meriv. 255.

Georgia.

Where a deed conveyed the right of way through lands to a railroad company, its successors and assigns, and was signed by the grantor alone and contained the following clause, "It is hereby agreed and understood a depot and station is to be located and given to the said (lessor), on the land or strip above conveyed, to be permanently located for the benefit of said (lessor) and his assigns, and to be used for the general purposes of the said railroad,"—it was held that an action on the covenant would lie against the assignee of such company, the company having accepted the deed. *Georgia Southern Railroad v. Reeves*, 64 Ga. 492.

In the above case it was held that such a covenant would run with the land. *Ibid*.

New Hampshire.

In an action of covenant contained in a deed poll entered into by a married woman for herself, her heirs, and assigns, to erect and maintain a fence, the deed being recorded, it was held that such deed created an incumbrance upon the estate so as to entitle a subsequent grantee to take advantage of a covenant against incumbrances in the conveyance to him. *Burbank v. Pillsbury*, 48 N. H. 476, 97 Am. Dec. 632.

2. That the petition did not state facts sufficient to constitute a cause of action.

The demurrer was sustained, to which ruling the plaintiff excepted.

The plaintiff, not desiring to amend or further plead, it was considered and adjudged, that the defendant go hence without day and recover of the plaintiff his costs, to which judgment the plaintiff excepted.

On petition in error filed in the circuit court by the plaintiff, the judgment of the court of common pleas was reversed, and the cause remanded for a new trial.

This proceeding is instituted by James Hickey, the defendant below, to reverse the judgment of the circuit court.

Messrs. G. M. Barber and A. W. Barber, for plaintiff in error:

There is no provision in the contract that the plaintiff may rebuild and repair and charge the cost thereof to the defendant. Plaintiff's cause of action, if it have one under the alleged contract, is for whatever damages it may have suffered by reason of the alleged breach of the contract.

Huston v. Cincinnati & Z. R. Co. 21 Ohio St. 235.

The condition is in the following language: This conveyance is made subject to the condition that said James Hickey, his heirs and assignees shall make and maintain good and sufficient fence on each side of the right of way, etc. Which condition and obligation shall be perpetually binding on the owner of the land.

The intent and meaning must be ascertained from the whole instrument interpreted and construed by just and proper rules.

4 Kent, Com. 132; *Mansury v. Southworth*, 9 Ohio St. 340; *Huston v. Cincinnati & Z. R. Co. supra*; *Walah v. Barton*, 24 Ohio St. 28; *Wilmington & Z. R. Co. v. Bosworth*, 2 L. R. A. 199, 46 Ohio St. 81.

The condition runs with the land and is binding on the owners of the abutting land perpetually.

Worthington v. Hewes, 19 Ohio St. 66; *Taylor v. DeBus*, 81 Ohio St. 468; *Smith v. Harrison*, 42 Ohio St. 180.

The whole intent of the parties was to create an easement in favor of the estate of the railroad company in the land occupied by it for its road and a servitude upon the abutting property.

Washb. Easem. 4th ed. p. 681.

Messrs. Estep, Dickey, Carr & Goff, for defendant in error:

This covenant in the deed was a personal covenant, binding upon Hickey, and it continues to be so binding. It is unquestionably also a covenant running with the land upon which the assigns of plaintiff are also liable.

Sutliff v. Atwood, 15 Ohio St. 186; *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35, 13 Am. Rep. 558; *Rogers v. Eagle Fire Co.* 9 Wend. 618; *Trotter v. Hughes*, 12 N. Y. 74, 62 Am. Dec. 187; *Belmont v. Coman*, 22 N. Y. 438, 78 Am. Dec. 213; *Spaulding v. Hallenbeck*, 35 N. Y. 204, 616; *Burbank v. Pillsbury*, 48 N. H. 475, 97

New Jersey.

In *Finley v. Simpson*, 22 N. J. L. 311, 53 Am. Dec. 252, the general principle is stated as being, that an action of covenant can only be sustained where the instrument upon which the action is brought, has been actually signed and sealed by the party, or by his authority.

It was held in that case, however, that where an indenture purporting to be *inter partes* conveyed an estate to the grantee who accepted the deed and the estate therein conveyed, he was bound by the indenture, though not sealed and delivered by him. *Finley v. Simpson, supra*.

In *Harrison v. Vreeland*, 38 N. J. L. 306, where the instrument was a deed poll, and not the deed of the party, it was held that a covenant by implication could not arise, the exceptions to the general rule not embracing mere personal contracts by which no estate in land passes.

Where land was conveyed subject to certain mortgages to secure payment of a given sum, which mortgages were assumed by the party of the second part, an action was brought for breach thereof. The court held that the grantee in a deed, by accepting the same, became liable on the covenants therein contained, purporting to be made by him. *Sparkman v. Gore*, 44 N. J. L. 252, following *Finley v. Simpson, supra*.

New York.

Where the deed was made in consideration of the "covenants and conditions" thereafter contained and was not signed by the grantee, the court held that the acceptance of the deed and the taking of possession under it by the grantee, bound him by the covenants contained as effectually as if he had signed it. *Spaulding v. Hallenbeck*, 35 N. Y. 204, 208.

So in *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35, 13 Am. Rep. 558, the grantee in a deed poll was held 33 L. R. A.

bound by the covenant in an action thereon, the court holding such grantee, having accepted the deed and enjoyed the estate, was estopped from denying the covenant. The court affirmed the judgment of the general term, 50 Barb. 135.

So where land was conveyed subject to a mortgage, it was held that the acceptance of the conveyance containing a statement that the grantee is to pay off an incumbrance binds him as effectually as though the deed had been *inter partes*, and had been executed by both grantor and grantee. *Trotter v. Hughes*, 12 N. Y. 74, 62 Am. Dec. 137.

In such a case the grantee is not personally bound to pay the debt charged upon the land. *Belmont v. Coman*, 22 N. Y. 438, 78 Am. Dec. 213.

The same principles are upheld in *Bowen v. Beck* 94 N. Y. 86, 46 Am. Rep. 124, where it was sought to hold the grantee in foreclosure proceedings.

In *Countryman v. Deck*, 13 Abb. N. C. 110, the action was brought for specific performance of an alleged covenant to maintain a fence against the subsequent purchaser, and the court held that the acceptance of the deed without signing was sufficient covenant to bind a grantee.

North Carolina.

A grantee accepting a deed poll containing covenants or conditions to be performed by him as the consideration of the grant, becomes bound for their performance, although he does not execute the deed as a party. *Maynard v. Moore*, 76 N. C. 158.

And an assignee of such grantee will also be bound thereby. *Ibid*.

It would be difficult, if not impossible, to maintain the action against an assign of the promisor. *Martin v. Drinan*, 128 Mass. 515; *Parish v. Whitney*, 8 Gray, 516; *Bronson v. Coffin*, 108 Mass. 175, 11 Am. Rep. 335.

E. W.

Am. Dec. 633; *Atlantic Dock Co. v. Leavitt*, 50 Barb. 135; *Pike v. Brown*, 7 Cush. 138.

Dickman, J., delivered the opinion of the court:

In December, 1874, the railway company executed and delivered to James Hickey, the plaintiff in error, a deed, duly recorded thereafter, of three hundred and eighty-two acres of land, situate in Cuyahoga county, Ohio, and the grantee entered into possession of the granted premises. The deed contained the following condition and agreement:

"This conveyance is made subject to the condition that the said James Hickey, his heirs and assigns, shall make and maintain good and sufficient fences on each side of the right of way of the Lake Shore & Michigan Southern Railway as now located, . . . which condition and obligation shall be perpetually binding on the owners of the land."

Subsequently to the conveyance, Hickey sold to different parties sundry parcels of the same land. The fences along the line of the railway, and in front of the several parcels thus sold, becoming out of repair, the railway company requested each of the vendees and occupiers of the parcels of land purchased from Hickey, to repair and reconstruct the fences, in accordance with the condition and agreement in the deed from the railway company. Upon the vendees and occupiers refusing and failing so to do, the company caused the fences to be repaired and rebuilt, in a manner sufficient to turn stock and animals as required by law, and commenced the original action to recover the cost and expense of such repairing and rebuilding.

The question presented is, whether the cost and expense so incurred should be borne by the plaintiff in error, the first grantee, or by his respective vendees along the line of whose land the fences have been repaired or rebuilt.

It was resolved in *Spencer's Case*, that the law would not annex the covenant to a thing which had no being at the time of the demise, as in the case of a covenant by a lessee to build a wall upon part of the land demised and if the covenant should be entered into by the lessee for himself, his executors and administrators, without naming his assigns, the lessee, his executors or administrators would be bound and not his assignee. But, it was also resolved, that if the lessee had covenanted, for himself and his assigns, to make a new wall upon some part of the thing demised, forasmuch as it was to be done upon the land demised, it would bind the assignee; for although the covenant extended to a thing to be newly made, yet, as it was to be made upon the thing demised, and the assignee was to take the benefit of it, it should bind the assignee by express words. *Spencer's Case*, 5 Coke, 16, first and second resolutions; 1 Smith, Lead. Cas. 68. In other words, the covenants which are connected with the estate run with the land, and vest in point of benefit and liability in the assignee.

Nor is this principle to be restricted in its application to leases or deeds *inter partes*, executed by both lessor and lessee, or grantor and grantee. Where a grantee accepts a deed,

and goes into possession of the premises under it, he is bound by the conditions contained in the deed as effectually as if he had signed and sealed the instrument. Although not executing the instrument, he should be deemed to have entered into an express undertaking to do what the deed says he is to do; and such undertaking or obligation imposed upon and assumed by the grantee, if not technically a covenant running with the land, is, nevertheless, an agreement of the grantee, evidenced by his acceptance of the deed, which might bind him and his personal representatives, and by express words, his heirs and assigns.

In *Burbank v. Pillsbury*, 48 N. H. 475, 97 Am. Dec. 638, it was held that a clause in a deed poll, to the effect that the grantee agrees for herself and for her heirs and assigns, that she and they would forever make and maintain a fence all around the granted premises, was of the same effect as an express covenant, signed and sealed by the grantee; that it would run with the land; that it created an incumbrance upon the land; and, by implication, it was recognized that a subsequent grantee would be liable to the original grantor in an action of assumpsit for nonperformance of the stipulation. A decision substantially similar was rendered in *Kellogg v. Robinson*, 6 Vt. 276, 27 Am. Dec. 550.

And, in *Georgia Southern Railroad v. Reeves*, 64 Ga. 492, the grantor in consideration of \$25, and of the building of the railroad, conveyed to a company, its successors or assigns forever, in fee simple, the right of way through his land, and added in the deed the words: "It is hereby agreed and understood a depot and station is to be located and given to said Reeves, on the land or strip above conveyed, to be permanently located for the benefit of said Reeves and his assigns, and to be used for the general purposes of the railroad company." It was held that the grantee, by accepting such deed, entered into a covenant to comply with its terms, and this covenant ran with the land and became obligatory upon any second company which became the purchaser, under proper legal direction, of the rights, privileges, franchises, and property of the former. See also *Countryman v. Deck*, 18 Abb. N. C. 110.

If the conditions, stipulations, or covenants in a deed poll may thus run with the land, and bind the first grantee and subsequent purchasers from him, why, it is inquired, should not the plaintiff in error, as well as his grantees, be holden to perform the condition and obligation contained in the deed from the railway company? If the conveyance had been made subject only to the condition that, "James Hickey, his heirs and assigns" shall make and maintain good and sufficient fences on each side of the right of way of the railway, the railway company, we think, might, at its election, pursue either the original grantee or his vendee, or both, for payment. But the conveyance contains the further provision, that such "condition and obligation shall be perpetually binding on the owners of the land." This provision cannot be regarded as meaningless and without design. In the construction of deeds, the object of all rules is to ascertain the intent

of the parties. And in construing the words of a grant, of covenant, of qualification, condition, restraint, exception or explanation, every word should be presumed to have been used for some purpose, and should be deemed to have some force and effect, if it can have. *Devlin, Deeds, § 840; Salisbury v. Andrews, 19 Pick. 250, 252.*

In the case before us, the railway company conveyed the land in fee, and as part consideration, imposed a condition for making and maintaining fences, which was to be "perpetually binding on the owners of the land." The meaning of the condition, we think, was to place upon Hickey an obligation to make and maintain the fences only during the time he was the owner of the land. At his death, his heirs, upon succeeding to the ownership, would be held to make and maintain the fences while their ownership lasted. If he or his heirs or devisees should sell the land, the assignees would likewise be held while they continued to be owners—the obligation thus running with the land. Manifestly, it was not Hickey's intention to assume an obligation *in perpetuum*, and after having sold and conveyed the premises in fee, to remain bound for life, and his heirs to be bound after his death, to build and keep up the fences between the right of way and the land sold. And in getting at the intention of the railway company, the obvious inference would be, that the company would naturally provide for a recourse to those who might own the land at the time the fences needed repairing or rebuilding, rather than to its grantee and his heirs, who might perhaps at the time be dead, or unable to be found. We cannot but conclude that the company intended when the land was conveyed, to trust to the land and its owners, for a performance

of the condition contained in the deed, and not to its grantee after he ceased to be the owner. The fact that the company imposed the condition, that the grantee and "his assigns" should make and maintain the fences, and added thereto, that the condition or obligation should be perpetually binding on "the owners of the land," would indicate an intention to make ownership the test as to who should be bound to perform the condition in the deed.

In *Worthington v. Hewes, 19 Ohio St. 66*, there was a demise of certain real estate to the lessee and his assigns, for ninety-nine years, renewable forever. The lease provided that the rent was to be fixed by a re-appraisal of the premises every fifteen years. The stipulation in the lease as to the mode of appointing appraisers was held to be a covenant running with the land, and not a collateral covenant. For all substantial purposes, the estate was treated as a leasehold estate in name and in form only. The lessor, in effect, having parted at once with his entire estate, the lessee was deemed to have taken in form a chattel, but in fact an estate in fee. The liability of the lessee for rents was regarded as simply a question of intention; and it was held that, after an unconditional assignment by the lessee, he was not liable for future rents, and had no right to interfere in the appointment of appraisers, which was a matter to be adjusted, not by the original parties to the lease, but by their assignees. The decision, though not altogether decisive, is, in a measure, forcibly illustrative of principles involved in the case at bar.

The judgment of the Circuit Court, in our opinion, should be reversed, and that of the Court of Common Pleas affirmed.

KENTUCKY COURT OF APPEALS.

D. R. BEARD *et al.*, Appls.,
v.
City of HOPKINSVILLE *et al.*

(.....Ky.....)

1. No formal assignment of a city to the class to which it belongs is necessary

NOTE.—What constitutes an "indebtedness" within the meaning of constitutional and statutory restrictions of indebtedness of municipal corporations.

An indebtedness within restrictions upon municipal indebtedness is an agreement of some kind by the municipality to pay money, where no suitable provision has been made for the prompt discharge of the obligation imposed by the agreement. *Sackett v. New Albany, 88 Ind. 473, 45 Am. Rep. 487.*

The word "indebtedness" is to be given its fair and legitimate meaning and general acceptance. *French v. Burlington, 43 Iowa, 614; Grant v. Davenport, 36 Iowa, 396.*

And a debt in its general sense is defined in *State v. Hawes, 112 Ind. 323*, which is a municipal indebtedness case, to be "a specified sum of money which is due or owing from one person to another, and 28 L. R. A.

to make operative a constitutional provision limiting the amount of indebtedness of the city according to its classification on population.

2. A contract by a city to pay an annual rental for the use of water hydrants and electric lights is a contracting of indebtedness within the meaning of a constitutional limitation when the city is already in-

debted not only the obligation of the debtor to pay but also the right of the creditor to receive and enforce payment."

An indebtedness cannot arise unless there is either a legal, equitable, or moral obligation to pay a sum of money to another who occupies the position of creditor and who has a legal or moral right to call upon or constrain the debtor to pay. *Quill v. Indianapolis, 7 L. R. A. 631, 124 Ind. 232; State v. Hawes, supra.*

A restriction upon incurring indebtedness in any manner or for any purpose is usually held to include all debts incurred in any manner. *Council Bluffs v. Stewart, 51 Iowa, 385; East St. Louis v. Flannigan, 26 Ill. App. 449; Norton v. East St. Louis, 36 Ill. App. 171; Lake County v. Rollins, 130 U. S. 632, 32 L. ed. 1090.*

In *French v. Burlington, 43 Iowa, 614*, the restriction was held to apply to the necessary and con-

See also 24 L. R. A. 781; 25 L. R. A. 281; 31 L. R. A. 794; 32 L. R. A. 393, 835; 35 L. R. A. 686; 36 L. R. A.

A. 217; 26 L. R. A. 493; 27 L. R. A. 769; A. 157; 33 L. R. A. 137, 474, 554; 34 L. R. A. 228, 407.

debted beyond the prescribed limit although the usual and legal income from taxation and otherwise would be sufficient to pay all the current expenses including such rental.

(January 23, 1894.)

APPEAL by complainants from a judgment of the Circuit Court for Christian County in favor of defendants in an action brought to set aside a contract for lighting the defendant city, on the ground that the expense would exceed the constitutional limit of indebtedness. *Reversed.*

The facts are stated in the opinion.

Messrs. J. I. Landes, Petree & Downer, C. H. Bush, Joe McCarroll, C. F. Campbell, and J. T. Hanbery, for appellants:

Sections 157 and 158 of the new Constitution,

venient improvement of the streets as well as all other things deemed necessary and proper for the comfort and health of the people.

Bonds or other obligations to pay money generally fall within restrictions upon municipal indebtedness. *Winamac v. Huddleston*, 182 Ind. 217; *State v. Babcock*, 24 Neb. 640; *McPherson v. Foster*, 43 Iowa, 48, 22 Am. Rep. 215.

But bonds are invalid only when issued after the limit is reached. That a portion of an indebtedness is within the limit will not legalize that which is in excess of it. *McPherson v. Foster*, and *State v. Babcock*, *supra*; *Sutro v. Pettit*, 74 Cal. 832.

Nor is the portion within the limit invalidated by the fact that another portion of it is in excess of the limit and illegal. *State v. Crete*, 33 Neb. 568; *McPherson v. Foster*, *supra*.

It must appear that the particular indebtedness sued upon was incurred after the limit was passed. *George D. Barnard & Co. v. Knox County*, 37 Fed. Rep. 563.

The term "indebtedness" is not to be confined to debts by bond. *Grant v. Davenport*, 36 Iowa, 396; *Council Bluffs v. Stewart*, 51 Iowa, 385.

Or by loan. *People v. May*, 9 Colo. 80; *Rollins v. Lake County*, 84 Fed. Rep. 845.

An implied as well as an express indebtedness or promise is included within a restriction upon municipal indebtedness, a claim for the return of moneys received in bonds issued in excess of the limit falling within it. *Litchfield v. Ballou*, 114 U. S. 190, 29 L. ed. 182.

Municipal restrictions apply not only to present indebtedness but also to such as is payable upon some future contingency or which depends upon some contingency for the creation of the liability. *Burlington Water Co. v. Woodward*, 49 Iowa, 58; *Prince v. Quinoy*, 123 Ill. 443; *Spilman v. Parkersburg*, 35 W. Va. 605.

But the contingency must be sure to take place irrespective of any future action of the city. If it depends upon such action it will only become an indebtedness within such restrictions when such action is had. *Burlington Water Co. v. Woodward*, *supra*.

If the indebtedness is payable at all events it is within the restriction. *Law v. People*, 37 Ill. 385.

An issue of warrants in excess of the limits does not constitute incurring an indebtedness within a restriction thereon where the municipality has money in its treasury to meet them. *Dively v. Cedar Falls*, 27 Iowa, 227.

This principle is also indirectly involved in *Grant v. Davenport*, 36 Iowa, 396, and *Sackett v. New Albany*, 38 Ind. 473, 45 Am. Rep. 467.

Obligations payable out of a particular fund and 23 L. R. A.

the former of which, among other things, prohibits any county, city, town, taxing district, or other municipality from creating a debt in any year, exceeding the income and revenue provided for such year, without the assent of two thirds of the voters thereof voting at an election to be held for that purpose, were self-executing, and in force at the date of the contract, and the latter of which limit the per cent of indebtedness, which we claim has been extended by the contract in question.

A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced.

Cooley, Const. Lim. 6th ed. p. 99; *Law v. People*, 37 Ill. 385; *Springfield v. Edwards*, 84 Ill. 626; *East St. Louis v. People*, 124 Ill. 655; *Bass v. Nashville*, Meigs, 421, 33 Am. Dec. 154;

for which the fund only and not the municipality is liable are not within those restrictions. *Quill v. Indianapolis*, 7 L. R. A. 681, 124 Ind. 292; *Strieb v. Cox*, 111 Ind. 290; *Baker v. Seattle*, 2 Wash. 578.

And the same rule applies to agreements to accept certificates of assessment in full satisfaction. *Davis v. Des Moines*, 71 Iowa, 500.

As to warrants drawn on taxes which have been levied payable only out of the tax, see *infra* under heading *Provisions for future payments*.

But an acknowledgment of the indebtedness of the city and the promise to pay in the bond or other evidence of the obligation makes the city absolutely liable and brings the indebtedness within the restriction. *Fowler v. Superior*, 85 Wis. 411; *Law v. People*, 37 Ill. 385.

Where no provision is made for raising or appropriating revenue to be applied in payment the municipality is liable and an indebtedness within the restriction is created. *Murphy v. East Portland*, 42 Fed. Rep. 308; *Salem Water Co. v. Salem*, 5 Or. 30; *Austin v. Seattle*, 2 Wash. 697.

And the mere fact that provision for payment is made is not in itself sufficient. All power to resort to the municipality or its funds must be expressly taken away. *State v. Fayette County Comrs*, 37 Ohio St. 526; *Kimball v. Grant County Comrs*, 21 Fed. Rep. 45.

A restriction upon borrowing or incurring indebtedness for a general purpose does not apply to indebtedness for special purposes such as the construction of a sidewalk. *Hitchcock v. Galveston*, 96 U. S. 341, 24 L. ed. 550; *Galveston v. Heard*, 54 Tex. 420; *Galveston v. Loonis*, Id. 517.

A restriction upon contracting funded debts is not applicable to ordinary debts growing out of transactions with single individuals and represented by a single instrument like a debt incurred in the purchase of market grounds. *Kitchum v. Buffalo*, 14 N. Y. 356.

Where an issue of bonds brings the indebtedness up to the limit interest coupons attached thereto for the payment of interest until the bonds fall due are not to be considered as raising the indebtedness above the limit. *Gibbons v. Mobile & G. N. R. Co.*, 36 Ala. 410.

A municipality whose indebtedness is up to the limit may employ an agent or attorney to contest a part of its indebtedness and secure a reduction thereof, though his compensation would raise the original amount above the limit. *Logansport v. Dykeman*, 116 Ind. 15.

An indebtedness incurred in the exchange of an old fire engine for a new one is within a restriction upon new debts. *Hudson v. Marietta*, 64 Ga. 293.

Kine v. Defenbaugh, 64 Ill. 291; *Mitchell v. Illinois & St. L. E. & Coal Co.* 68 Ill. 286; *Willis v. St. Paul Sanitation Co.* 16 L. R. A. 281, 48 Minn. 140; *People v. McRoberts*, 62 Ill. 88; *Johnson v. Parkersburg*, 16 W. Va. 402, 37 Am. Rep. 779.

Under the contract for water and electric lights between John P. Martin and the city of Hopkinsville, the aggregate amount (\$95,000) which the city agreed to pay during the period of twenty years for water and light, although it is to be paid in fixed annual (or quarter-annual) sums, is a debt for the aggregate sum from the date of the contract, of the character that is prohibited and declared void by the charter of March 5, 1870, and §§ 157, 158, of the Constitution.

An obligation or liability to pay money, arising upon or growing out of contract, is a debt, according to the common understanding, as well as the definitions in all of the lexicons.

The hypothecation of shares of railway stock owned by a municipality for the purpose of investing the money in another railroad creates an indebtedness within a restriction thereon. *Baltimore v. Gill*, 31 Md. 375.

The Maine constitutional limitation upon municipal indebtedness expressly provides that it shall not be construed as applying to any fund received in trust by a city or town. *Ayer v. Bangor*, 86 Me. 611.

An indebtedness in excess of the limit incurred pursuant to authority legally conferred before the adoption of the constitutional limit is not affected by it. *Board of Education v. Bolton*, 104 Ill. 220.

In *Law v. People*, 37 Ill. 385, it was held an indebtedness in excess of the limit is presumed to be illegal and the burden of proof to establish its validity rests with the party asserting it.

But in *Atlantic City Water Works Co. v. Atlantic City*, 48 N. J. L. 373, it was held that it does not follow that an obligation is necessarily in excess of a limit because it calls for payments *in futuro* indefinitely, and the court cannot assume it in the absence of an averment to that effect.

Must be voluntary.

In order to fall within municipal restrictions the indebtedness must be one created by the voluntary action of both the debtor and creditor. *Thomas v. Burlington*, 69 Iowa, 140.

The intent of such provisions is to limit or restrict the power of the municipality as to any indebtedness or liability which it has discretion to incur or not to incur. *Lewis v. Widber*, 99 Cal. 412; *McCracken v. San Francisco*, 16 Cal. 591.

Thus an involuntary liability arising *ex delicto* is not within restrictions upon municipal indebtedness. *Thomas v. Burlington*, *supra*; *Bloomington v. Perdue*, 99 Ill. 329; *McCracken v. San Francisco*, *supra*.

And a municipality cannot set up that it is already indebted in excess of the limit as a defense in an action against it for injuries growing out of negligence. *Bloomington v. Perdue*, *supra*.

This rule was applied to a claim for damages resulting from a defective sidewalk, in *Rice v. Des Moines*, 40 Iowa, 638.

And to a similar claim for injuries caused by the negligent construction and maintenance of gutters in streets, in *Bartle v. Des Moines*, 38 Iowa, 414.

The responsibility imposed upon a municipality for the want of fidelity of those who act for it is not within restrictions and limitations upon municipal indebtedness. *Chicago v. Sexton*, 115 Ill. 230.

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Niles Water Works v. Niles, 59 Mich. 311; *Coulson v. Portland*, Deady, 481; *Scott v. Davenport*, 84 Iowa, 208; *Erie's App.* 91 Pa. 398; *French v. Burlington*, 42 Iowa, 614; *Burlington Water Co. v. Woodward*, 49 Iowa, 58; *Springfield v. Edwards*, 84 Ill. 626; *Fuller v. Chicago*, 89 Ill. 283; *Prince v. Quincy*, 105 Ill. 138, 44 Am. Rep. 785; *People v. May*, 9 Colo. 80; *Davenport v. Kleinschmidt*, 6 Mont. 502; *Oulbertson v. Fulton*, 127 Ill. 30; *Law v. People*, 37 Ill. 392. *Messrs. James Breathitt, City Atty., and Wood & Bell*, for appellees:

In *Holtzhauer v. Davenport*, 15 Ky. L. Rep. 168, the court says: "Section 157 of the present Constitution . . . is not self-operative, but is addressed to the legislature, indicating the limitations on the powers it shall give the several classes of towns and cities when it shall come to provide for their classification and government by general laws; and until this is done, which must be within four years from

Nor do they apply to cash transactions out of which indebtedness arises, not by virtue of the contract, but because of its breach. *Congers v. Kirk*, 73 Ga. 480.

Nor do they apply to liabilities arising from mistake. *McCracken v. San Francisco*, 16 Cal. 591.

So, an enforced indebtedness, or an indebtedness which the law casts upon a municipality as distinguished from its own voluntary acts and contracts performed by the proper municipal officers, is not within such restrictions. *McCracken v. San Francisco*, *supra*; *Thomas v. Burlington*, 69 Iowa, 140; *Grant County v. Lake County*, 17 Or. 453; *Potter v. Douglas County*, 37 Mo. 239.

Thus a claim for the recovery of taxes paid under protest or under legal compulsion is not an indebtedness within such restrictions. *Thomas v. Burlington*, *supra*.

Nor is a claim for moneys paid to city officers by mistake. *Hintrager v. Richter* (Iowa) May 17, 1898.

Nor does the restriction apply to an indebtedness imposed upon a municipality by the legislature in the adjustment of the matters of indebtedness between different municipalities after a change of boundaries between them. *Grant County v. Lake County*, *supra*.

Nor is the indebtedness of a municipality increased by its union with another municipality, the body created by the union having both the debts and the property. *True v. Davis*, 6 L. R. A. 266, 133 Ill. 522.

A sheriff's claim for keeping, clothing, boarding, and transporting prisoners is a debt incurred by a municipality by compulsion of law, and is not therefore within municipal restrictions. *Potter v. Douglas County*, *supra*.

Neither is a claim for books, stationery, etc., which the officer incurring the indebtedness is required by law to purchase. *George D. Barnard & Co. v. Knox County*, 37 Fed. Rep. 563. To the contrary, *Barnard v. Knox County*, 105 Mo. 323, 13 L. R. A. 244, overruling *Potter v. Douglas County*, *supra*.

In *Lake County v. Rollins*, 130 U. S. 583, 32 L. ed. 1060, however, a case arising in the district of Colorado, it was held that the restriction is absolute applying to indebtedness for all purposes whatever including ordinary and compulsory indebtedness such as witnesses' and jurors' fees, election costs, charges for board of prisoners, county treasurer's commissions, etc.

See further *infra*, as to debts for current expenses.

It is held in California that a constitutional provision that no city shall incur any liability exceeding in any year the income and revenue provided for

January 1, 1891, the existing charters of towns and cities continue in force, including their tax rates and methods of raising revenue."

Appellees deny that the Ohio Valley Railway bonds were a debt due by the city at the time the contract was made with Martin.

At the time this contract with Martin was made, June 18, 1892, the railway company had not complied with its contract, and the line was not completed, nor the conditions complied with until some time in August following. Then and only then did the subscription on the part of the city become due and a debt.

Cumberland & O. R. Co. v. Barren County Ct. 10 Bush, 604.

Sections 157, 158, of the Constitution limiting the indebtedness of municipalities, is substantially the same as that of the constitution of Iowa and Indiana, from which they were evidently taken.

Our constitution should receive the same

construction given by the states from which they are borrowed.

Cooley, Const. Lim. 15th ed. § 64; *Fall v. Hazelrigg*, 45 Ind. 576, 15 Am. Rep. 278; *Langdon v. Applegate*, 5 Ind. 327; *Clark v. Jeffersonville, M. & I. R. Co.* 44 Ind. 248; *Sidwell v. Evans*, 1 Penn. & W. 383, 21 Am. Dec. 387; *Bank of Illinois v. Stoo*, 16 La. 539, 85 Am. Dec. 323.

Such a construction has been had both in Iowa and Indiana, and in cases not only similar but almost identical with this now before the court.

Grant v. Davenport, 36 Iowa, 896, involved the construction of a contract for water made with the city of Davenport.

The conclusion reached by the court is that where the contract made by the municipal corporation pertains to its ordinary expenses and is together with other like expenses within the limits of its current revenues and such special

such year except on certain conditions, does not apply to claims for salary of municipal officers whose salaries are fixed and offices created by statute. The liability being deemed to have been established by the legislature cannot be said to have been incurred by the city. *Lewis v. Widber*, 99 Cal. 412.

The auditing and payment of demands for salaries of such officers is not affected by the one twelfth act of California prohibiting the incurring of any indebtedness in any manner or for any purpose exceeding in any year the income and revenue provided for it for such year, or in any month thereof which shall exceed one twelfth part of the amount permitted to be expended during the fiscal year. *Welch v. Strother*, 74 Cal. 413; *Cashin v. Dunn*, 58 Cal. 582.

In Illinois the salary of a health officer is held to be within the restriction. *Norton v. East St. Louis*, 86 Ill. App. 171.

Future indebtedness.

Many of the cases agree with the principal case that debts payable in the future or upon the happening of some future event as the rendition of service, or the delivery of property, are within such restrictions upon municipal indebtedness, as well as debts presently payable. *Springfield v. Edwards*, 84 Ill. 626; *Law v. People*, 87 Ill. 385; *Prince v. Quincy*, 28 Ill. App. 490; *Prince v. Quincy*, 105 Ill. 123, 44 Am. Rep. 785; *Niles Waterworks v. Niles*, 59 Mich. 311; *Smith v. Newburgh*, 77 N. Y. 130; *State v. Atlantic City*, 49 N. J. L. 558; *Davenport v. Kleinschmidt*, 6 Mont. 502; *State v. Medbery*, 7 Ohio St. 522; *Erie's App.* 91 Pa. 386; *Coulson v. Portland*, Dady, 431.

The restriction applies to contracts for years relating to ordinary current expenses payable out of current revenues. *Prince v. Quincy*, and *Prince v. Quincy*, and *Springfield v. Edwards*, *supra*.

In *East St. Louis v. East St. Louis Gas-Light & Coke Co.*, 98 Ill. 415, 38 Am. Rep. 97, a contract for lighting the streets for a term of years at an agreed price to be paid monthly was upheld upon the ground that it created no present indebtedness for the whole sum, but that the indebtedness accrued from month to month as the gas was furnished. But this ruling was explained in *Prince v. Quincy*, 105 Ill. 123, 44 Am. Rep. 785, upon the theory that it did not affirmatively appear therein that the city was indebted beyond its limit.

East St. Louis v. East St. Louis Gas-Light & Coke Co., *supra*, was followed, however, and cited as authority in *Carlyle Water, L. & P. Co. v. Carlyle*, 31 Ill. App. 325, in which it was held that the rental of hydrants for a period of years does not create a

present indebtedness rendering an appropriation necessary upon entering into the contract and it is also followed in *East St. Louis v. Flannigan*, 26 Ill. App. 449, also a case of a contract for furnishing gas in which a distinction is drawn between a contract for a gross sum, some or all of which is payable in the future, and a contract for future services from time to time to be paid for as rendered from time to time.

The contrary rule has been adopted by the courts of some of the other states that agreements for future or periodical payments do not become obligatory and are not an indebtedness until the service or other consideration for that particular period has been rendered, the indebtedness being deemed to be conditional upon performance and the restrictions applying only when an overdue payment will raise the indebtedness above the limit. *Crowder v. Sullivan*, 13 L. R. A. 647, 128 Ind. 458; *Valparaiso v. Gardner*, 97 Ind. 1, 49 Am. Rep. 417; *State v. McCauley*, 15 Cal. 430; *Rome v. McWilliams*, 87 Ga. 106; *New Orleans Gas Light Co. v. New Orleans*, 43 La. Ann. 188; *Smith v. Dedham*, 144 Mass. 177.

In an early New York case it was held that a charter provision prohibiting expenditure beyond a certain limit during the current political year does not forbid the authorization of an expenditure in that year to be made, and for services to be performed in a subsequent year. *Weston v. Syracuse*, 17 N. Y. 110.

In *Smith v. Newburgh*, 77 N. Y. 130, holding that a lease of premises for a long term of years with rent payable semi-annually creates an indebtedness of the aggregate amount at the time of the execution of the lease, *Weston v. Syracuse*, *supra*, was distinguished upon the ground that it turned upon the peculiar phraseology of the charter provision.

But in *Utica Water-works Co. v. Utica*, 31 Hun, 423, it was held, without noticing either of the above cases, that a continuing contract for a supply of water to be paid for annually does not contravene a charter provision prohibiting debts which shall not be payable within the year in which contracted, and that it does not ripen into a debt except from year to year each year's indebtedness being only for the water furnished in that year.

Provision for future payment.

A municipality which has reached its limit may anticipate the collection of the revenue appropriated to its use by drawing warrants against taxes levied but not yet collected, thus virtually appropriating and assigning the amount

taxes as it may legally and in good faith intend to levy therefor, such contract does not constitute the incurring of indebtedness within the meaning of the constitutional provisions.

See also *Direly v. Cedar Falls*, 27 Iowa, 227. *Valparaiso v. Gardner*, 97 Ind. 1, 49 Am. Rep. 417, is on "all fours" with the one at bar, involving precisely the same questions.

The court in substance declares that where the installments for water can be met out of current revenues no debt is created, even though the indebtedness be beyond the limit, and that the city is only liable for the water as furnished, and not before and only after the money is earned does it become a debt.

See also *Quill v. Indianapolis*, 7 L. R. A. 681, 124 Ind. 292; *Crowder v. Sullivan*, 13 L. R. A. 647, 128 Ind. 489; *Valparaiso v. Gardner*, *supra*; *East St. Louis v. East St. Louis Gas Light & Coke Co.* 98 Ill. 415, 38 Am. Rep. 97; *Grant v. Davenport*, *supra*; Dill Mun. Corp. 4th ed. § 185.

drawn to the holder of the warrant. *Law v. People*, 87 Ill. 385; *Springfield v. Edwards*, 84 Ill. 626; *East St. Louis v. Flannigan*, 26 Ill. App. 449; *Fuller v. Heath*, 89 Ill. 296; *French v. Burlington*, 42 Iowa, 614; *Koppikus v. State Capitol Comrs.* 16 Cal. 248; *Alpena v. Kelley* (Mich.) Nov. 21, 1893; *State v. Parkinson*, 5 Nev. 15.

Where services are to be paid for in cash at the time of completion, out of a fund to be derived from special assessments upon the property benefited, no indebtedness is incurred therefor, even though during the pendency of the work bonds are issued to raise funds to carry it on. *Quill v. Indianapolis*, 7 L. R. A. 681, 124 Ind. 292.

An ordinance providing for local improvements to be paid for in part by general taxation and in part by assessment upon abutting property where no provision for credit or loan is made, does not create an indebtedness within a municipal restriction. *Jacksonville R. Co. v. Jacksonville*, 114 Ill. 567.

But in order to escape the restriction the tax must not only have been levied but the warrant must be drawn payable out of that particular fund and be such in legal effect as to discharge the municipality from all liability. *Springfield v. Edwards*, *Law v. People*, and *East St. Louis v. Flannigan*, *supra*; *Fuller v. Chicago*, 89 Ill. 282; *Spillman v. Parkersburg*, 35 W. Va. 605.

In *East St. Louis v. Flannigan*, *supra*, the language of the court would seem to confine the power to anticipate to the payment of current expenses.

The revenues must be absolutely certain to be received and it must be confined to the ordinary revenues. If the revenues of two years are required to pay an indebtedness previously incurred the restriction should be applied. *French v. Burlington*, 42 Iowa, 614.

The California courts have held that an act creating a future liability which appropriates the sum requisite to discharge it does not create a debt within restrictions upon municipal indebtedness though the limit is passed and though made in advance of the collection of the revenue. *Koppikus v. State Capitol Comrs.* 16 Cal. 248; *People v. Brooks*, Id. 1; *People v. Pacheco*, 27 Cal. 175; *State v. McCauley*, 15 Cal. 480.

In *People v. Pacheco*, *supra*, the law making the appropriation also imposed a special tax and set apart proceeds to constitute a special fund to meet it.

So a restriction upon incurring debts and making loans without a contemporaneous appropriation

Hazelrigg, J., delivered the opinion of the court:

On June 13, 1893, the appellee, through its board of councilmen, entered into a contract with its co-appellee John P. Martin, by the terms of which the latter agreed to construct and maintain in and near the city a system of waterworks and sewerage, and also an electric-light plant. For the use of seventy hydrants for five years, and of thirty-five arc lights for the same period, the city agreed to pay Martin, as rent, the sum of \$5,500 per year. At the expiration of the five years the contract for water rental was to continue fifteen years longer, at \$4,500 per year, the city having an option to renew the contract for lights at \$1,000 per annum. The city contained a population of more than 8,000, and less than 8,000, and therefore would be a city of the fourth class whenever the assignment and classification should be made of the cities and towns of the state as

ation of a sufficient annual income or tax to pay interest and sink the principal within a certain time, applies to funded debts only and does not require every contract to be accompanied by an appropriation though it may ripen into a debt. *Tatham's App.* 80 Pa. 465.

But a restriction upon incurring any expense unless an appropriation covering it had been previously made operates to invalidate any indebtedness incurred after an appropriation for that purpose has been made and exhausted. *Kingsland v. New York*, 5 Daly, 448.

A restriction upon the creation of debts unless at the same time provision is made for taxation for its payment requires debts for current expenses to run concurrently with the current revenues. They are invalid if they mature at such a time as to make them a charge upon future revenues. *Terrell v. Dessaint*, 71 Tex. 770; *Garrison v. Chicago*, 7 Biss. 490.

A two-year old note falls within this restriction. *Terrell v. Dessaint*, *supra*.

A contract by a parish engaged in heavy litigation with an experienced attorney other than the legal adviser of the parish is not within a statutory requirement that a debtor's liability cannot be incurred without at the same time providing for its payment. *Talbott v. Parish of Iberville*, 24 La. Ann. 185.

A restriction against incurring indebtedness exceeding in any year the income and revenues provided for it for such year prohibits the payment of an indebtedness of one year out of the income and revenues of another year. *San Francisco Gas Co. v. Brickwedel*, 62 Cal. 641.

Current expenses and indebtedness payable out of current revenues.

The courts of a number of the states have held that an absolute prohibition against incurring indebtedness in any manner or for any purpose beyond certain limits invalidates any contract raising the indebtedness above that limit even though it pertains to the ordinary expenses of the affairs of government. *Prince v. Quincy*, 105 Ill. 138, 44 Am. Rep. 785; *Prince v. Quincy*, 128 Ill. 443; *Prince v. Quincy*, 28 Ill. App. 490; *Springfield v. Edwards*, 84 Ill. 626; *Sackett v. New Albany*, 88 Ind. 473, 45 Am. Rep. 467; *People v. May*, 9 Colo. 80; *Nougues v. Douglass*, 7 Cal. 66; *Adams v. East River Sav. Inst.* 65 Hun, 145, affirmed 136 N. Y. 52; *Spillman v. Parkersburg*, 35 W. Va. 605; *Barnard v. Knox County*, 18 L. R. A. 244, 105 Mo. 382; *State v. Columbia*, 111 Mo. 385; *Book v. Earl*, 87 Mo. 246; *Hebard v. Ash-*

required by the constitution. This assignment or classification had not been made at the date of the contract or institution of this action. The indebtedness of the city was something like \$125,000, due, mainly, in 5-80 bonds to the Ohio Valley Railway Company. The value of the taxable property for 1891 was \$1,546,380. It is shown that with a tax rate of 75 cents on the \$100, together with the usual collections from other fixed sources, the city could pay its annual current expenses of all kinds, and also the additional water and light rental proposed in the contract, and still have an annual surplus of several thousand dollars. Immediately after this contract was made, the appellants, who are citizens and taxpayers of the city, instituted this action to have the contract declared void, contending that the city of Hopkinsville, or its board of councilmen, had no constitutional power to make the contract, because it bound the city to pay an indebtedness shown

to be in excess of the limitation imposed on the city and its authorities by the constitution. There were other contentions which are not necessary to notice. The chancellor determined all the points made against the plaintiffs below, upheld the contract and dismissed the petition. This appeal involves the correctness of that judgment.

The constitutional provision supposed to affect the question involved is as follows: "Sec. 158. The respective cities, towns, counties, taxing districts and municipalities shall not be authorized or permitted to incur indebtedness to an amount, including existing indebtedness, in the aggregate exceeding the following named maximum percentages on the value of the taxable property therein, to be estimated by the assessment next before the last assessment previous to the incurring of the indebtedness, viz.: . . . cities and towns of the fourth class, five per centum. . . . Provided, any city, town, etc., may

land County, 55 Wis. 145; Lake County v. Rollins, 130 U. S. 662, 32 L. ed. 1000.

And even though they are payable out of current revenues. Prince v. Quinoy, 23 Ill. App. 490.

A city whose indebtedness has reached the limit must carry on the corporate operations while in that condition upon the cash system and not on credit, doing nothing more than to anticipate a legal levy already made. Spilman v. Parkersburg, *supra*.

And even though they are compulsory obligations such as witnesses' and jurors' fees, election costs, charges for board of prisoners, county treasurers' commissions, etc. Lake County v. Rollins, *supra*.

As to compulsory indebtedness in such cases, see further *supra* under heading *Must be voluntary*.

In Indiana this rule does not extend to a contract for a usual and necessary thing such as water or light agreed to be paid for periodically as furnished, the debt for each period coming into existence when the compensation for that period has been earned. Crowder v. Sullivan, 13 L. R. A. 647, 128 Ind. 426.

Usual, ordinary, and necessary expenses are not included in restrictions upon municipal indebtedness by the courts of several of the states. Rice v. Keokuk, 15 Iowa; 57; Grant v. Davenport, 36 Iowa, 336; Tucker v. Raleigh, 75 N. C. 267.

So some of the cases hold that debts in the nature of ordinary administrative and current expenses payable out of current revenues are not within such restrictions. Laycock v. Baton Rouge, 36 La. Ann. 475; Dwyer v. Brenham, 65 Tex. 526; Grant v. Davenport, *supra*.

Neither is the issue of warrants for current expenses which do not exceed the current revenue the creation of an indebtedness within a prohibition thereof unless a special tax be levied to meet the interest and create a sinking fund. Corpus Christi v. Woessner, 58 Tex. 462.

And the same rule applies to ordinances directing street labor within the limit of current revenues. Reynolds v. Shreveport, 13 La. Ann. 426.

An indebtedness incurred for a supply of water for the use of the municipality and its inhabitants is an ordinary indebtedness for a municipal purpose not affected by the restriction within the rule relied on in the latter class of cases. Comstock v. Syracuse, 5 N. Y. Supp. 874; Grant v. Davenport, 36 Iowa, 336; Capital City Water Co. v. Montgomery, 32 Ala. 366.

So is an indebtedness for supplying light to the

city and its inhabitants. Laycock v. Baton Rouge, *supra*; Lott v. Waycross, 84 Ga. 681.

Including the establishment of an electric light system, that being a city purpose, within the meaning of a restriction on indebtedness except for a city purpose. Hequembourg v. Dunkirk, 49 Hun, 550.

So is an indebtedness for making and repairing township roads an incidental and ordinary expense. Lehigh Coal & Nav. Co's App. 112 Pa. 360.

So is an indebtedness incurred in the support of convicts. State v. McCauley, 15 Cal. 420.

In Jonas v. Cincinnati, 15 Ohio, 518, it was held that a contract for lighting a street is within a charter provision prohibiting the city council from making or authorizing any contract for the payment of money at any day beyond the current fiscal year.

In Austin v. Seattle, 2 Wash. 667, it was held that an indebtedness incurred for water and sewerage purposes is not to be considered as a part of the general indebtedness of the city and is not to be considered in determining whether the limit of general indebtedness has been reached.

But in Nelson v. New York, 63 N. Y. 535, it was held that a statutory prohibition against incurring expense unless an appropriation covering it had been previously made applies to an authorized purchase of sewer materials.

So in Wallace v. San José, 29 Cal. 180, an agreement to pay an attorney a sum of money at a future time if he succeeds in placing the city in possession of certain lands was held to be within a prohibition against creating debts to arise in the future unless there is money in the treasury to pay them.

A prohibition against borrowing money or contracting debts which cannot be paid out of the revenues of the fiscal year does not apply to a contract whereby the city agrees to pay an electric light company a certain sum per year for a number of years if the amount to be paid each year does not exceed the revenue for that year. Merrill Railway & Lighting Co. v. Merrill, 30 Wis. 353.

Change of form of indebtedness.

Bonds issued and sold for the purpose of refunding other valid outstanding bonds, the issuance of which does not in fact increase the indebtedness, but merely changes its form, are not affected by restrictions upon municipal indebtedness. *Atina L. Ins. Co. v. Lyon County*, 44 Fed. Rep. 329.

The same rule applies to the issue of new bonds or other evidences of indebtedness in the place of

contract an indebtedness in excess of such limitations when the same has been authorized under laws in force prior to the adoption of this constitution, or when necessary for the completion of the payment for a public improvement undertaken and not completed and paid for at the time of the adoption of this constitution. . . . "Sec. 166. All acts of incorporation of cities and towns heretofore granted, and all amendments thereto, except as provided in section one hundred and sixty-seven, shall continue in force under this constitution, and all city and police courts established in any city or town shall remain, with their present powers and jurisdictions, until such time as the general assembly shall provide by general laws for the government of towns and cities and the officers and courts thereof; but not longer than four years from and after the first day of January, one thousand eight hundred and ninety-one, within which time the general assembly shall provide by general laws for the government of towns and cities, and the officers and courts thereof as provided in this constitution."

By their contention the appellants mean that the indebtedness of the city at the time of the contract was in excess of 5 per centum on its taxable property, which is the limit prescribed by the 158th section of the Constitution for cities of the fourth class; and Hopkinsville is alleged to be a city of the fourth class, by reason of its population being 8,000 or more, and less than 8,000. In order to apply this limit of 5 per centum, counsel for the appellants plead as a fact that the population of the city was such as required its as-

signment and classification among cities of the fourth class. It is not contended, as we understand the argument, that the actual assignment—the mere form of classification—directed by the constitution to be made by the general assembly can be made by the courts, but that it was the evident intention of the framers of the constitution to have the whole-some limitations provided for in the section to apply instantly upon its adoption; that the assignment or classification was a mere form, and its delay should not entitle the cities desiring to do so to overreach the plain provisions of the constitution, and deliberately incur an unauthorized indebtedness. Notwithstanding the fact that some difficulty may seemingly arise in ascertaining what maximum percentage on the value of the taxable property in a given city is to be applied in determining what limitation on its indebtedness shall control in the absence of the classification, yet we are constrained to the conclusion that not to apply the section as one affecting and controlling the cities of the commonwealth, immediately upon the adoption of the constitution, would be in clear defiance of the determined will of the body framing the instrument. No one idea stands out more clearly than that barriers should be erected against the creation of municipal indebtedness. In times of popular excitement the internal improvement craze had well nigh wrecked many of the most flourishing counties and towns of the hitherto staid and conservative commonwealth. To seek excuses for withholding the application of these conservative restraints thus wisely devised by this body of enlightened men, and delay the

matured bonds or a pre-existing debt. *Blanton v. McDowell County Comrs.* 101 N. C. 532; *Powell v. Madison*, 107 Ind. 106; *Poughkeepsie v. Quintard*, 65 Hun, 141, affirmed, 136 N. Y. 275.

Stock created by the city of New York constituting a debt payable by taxation held by commissioners of a sinking fund provided for the payment of a public debt, the object of the purchase by the commissioners being the extinction of the stock, is not an indebtedness of the city within restrictions thereon. *Bank for Savings in New York v. Grace*, 102 N. Y. 314.

But where bonds are issued and sold the fact that the proceeds are to be used to acquire property equal in value to the amount of the loan will not withdraw them from the operation of the restriction. *Scott v. Davenport*, 34 Iowa, 208.

So in *Doon Dist. Twp. v. Cummins*, 142 U. S. 366, 35 L. ed. 1044, the United States Supreme Court held, following the trend of the Iowa decisions in a case arising under the constitution and statutes of that state, that bonds issued by a school district in excess of the limit and sold for the purpose of applying the proceeds to the payment of its previous bonded indebtedness are void in the hands of a purchaser with notice, reversing *Cummins v. Doon Dist. Twp.* 42 Fed. Rep. 644.

Restrictions upon loaning credit or becoming a stockholder in a corporation do not prevent a municipality already owning stock in a corporation for the construction of a public work from purchasing the rest and becoming the entire owner and agreeing upon a dissolution under legislative authority. *People v. Kelly*, 5 Abb. N. C. 383, 76 N. Y. 475.

Estimate of amount of indebtedness.

The estimate to find if the limit has been passed 23 L. R. A.

by an issue of bonds should be made at the time of the issue. If within it then it is immaterial that it would have exceeded at the time the bonds were issued. *Thompson-Houston Electric Co. v. Newton*, 42 Fed. Rep. 723.

Or at the time judgment thereon was rendered. *Wilder v. Rio Grande County Comrs.* 41 Fed. Rep. 512.

Unpaid interest on donations previously made will not be considered in making the estimates. *Jones v. Hurlburt*, 13 Neb. 125.

Nor will uncollected taxes or the levy for the current year be deducted. *Council Bluffs v. Stewart*, 51 Iowa, 385.

Restrictions apply to each municipality singly, so that where different municipalities embrace the same territory in whole or in part the validity of a debt incurred by one will not be affected by the extent of the indebtedness of the other. *Wilson v. Sanitary Dist. of Chicago Trustees*, 133 Ill. 443.

Nor does a restriction upon county indebtedness affect the validity of bonds issued by one of its precincts in addition to any amount the county may have issued. *State v. Lancaster County Comrs.* 6 Neb. 214.

So, a restriction upon a county containing a city with a designated number of inhabitants is to be taken distributively and not collectively, so that in determining where the limit has been reached a debt of one may not be charged against the other. *Adams v. East River Sav. Inst.* 136 N. Y. 52, affirming 65 Hun. 145.

The West Virginia Constitutional restriction is addressed not, alone to the legislature but to the several counties, cities, etc., and all other departments and officers of the state. *List v. Wheeling*, 7 W. Va. 501.

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beneficent results intended, merely because a formal assignment of a given city had not been made to its appropriate class, would be giving prominence to the shadow, and losing sight of the substance. Moreover, it will be observed that the percentages are not fixed wholly with reference to the classes to which the cities may belong, but the per centum fixed for some of the cities is made to depend on their population; and recourse must therefore be had, in such cases, to the ordinary methods of proof to ascertain the per centum applicable. In discussing a similar question it was said in *Law v. People*, 87 Ill. 385: "It has been repeatedly held, and is regarded as settled doctrine, that all negative or prohibitive clauses of this character found in a constitution execute themselves, as legislative provisions in the same or other language, prohibiting the incurring of such indebtedness, could be no more binding or forcible than the constitution itself." In the case of *Holtzhauser v. Newport*, 15 Ky. L. Rep. 188, it was contended that because the indebtedness of the city at the time of the adoption of the present constitution, and at the time the contracts in question were entered into, was in excess of 10 per centum on the valuation of her taxable property during that time, therefore the prohibitory provisions of section 158 were applicable; and we said of this contention: "It may be admitted that to the extent that this section provides for a state of case in existence at the time of the adoption of the constitution it is applicable to all towns and cities resting under the conditions named. But, in express terms, the limitation of 10 per centum may be exceeded when the proposed indebtedness has been authorized under laws in force prior to the adoption of this constitution." This section was therefore treated as in full force upon the adoption of the constitution, and as applicable to the cities and towns resting under the conditions named. The contract for the increased indebtedness of the city (Newport) was upheld upon the ground that it was contracted "under laws in force prior to the adoption of the constitution," those laws being in the form of amendments to the charter of the city, approved in 1890, authorizing the issuance of bonds for specific purposes, to be paid by taxes levied within certain specified tax districts created by the acts in question. These amendments to the organic laws of the city were held to be continued in force in express terms, under the provisions of section 166 of the Constitution.

Construing the section (158) as operative immediately upon the adoption of the constitution, the question is, Does the contract under consideration "authorize an indebtedness" on the part of the city of Hopkinsville "to an amount, including existing indebtedness, in the aggregate exceeding" five per centum on the taxable property of the city? The question is wholly new to the law of our state; but the constitutions of a number of the other states contain provisions similar to the one under consideration, and the answers given by their various courts to the question indicated are by no means harmonious. It is to be remembered that the annual rentals are

to be met out of the annual revenues without any increase of the tax rate of 75 cents on the \$100 of taxable property, and that as the contractor, Martin, furnishes the water and light, and thus earns the money, he is paid therefor. The appellees therefore contend that the liability is thus extinguished as soon as it comes into existence. They contend that "when liabilities are created, and appropriations are made, which are within the limits of the revenue accruing to meet them, they are not debts, within the meaning of the prohibition of the constitution." The cases relied on by them sustain their contention that revenues may be disposed of in advance of their receipt,—hypothecated, as it were, as if already in the treasury, and when such an appropriation will meet and discharge the obligation, which is but a contingent one, no indebtedness is created, in the meaning of the constitution. We suppose, however, that, if the words used in the constitution are to be given their usual and commonly accepted meaning by the contract in question the city does "incur an indebtedness," in the sense these terms are used in the constitution; and that this indebtedness is in excess of the limitation imposed is apparent.

Turning to some of the decisions in states with constitutional provisions similar to ours, we find the Illinois supreme court, in *Springfield v. Edwards*, 84 Ill. 626, thus discussing the question: "It is provided by section 12, article 9, of the present Constitution that 'no county, city, township, school district, or other municipal corporation shall be allowed to become indebted, in any manner or for any purpose, to an amount including existing indebtedness in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment,' etc. . . . The prohibition is against becoming indebted—that is, voluntarily incurring a legal liability to pay in any manner, or for any purpose—when a given amount of indebtedness has previously been incurred. It could hardly be probable that any two individuals of average intelligence could understand this language differently. It is clear and precise, and there is no reason to believe the convention did not intend what the words convey. A debt payable in the future is obviously no less a debt than if payable presently; and a debt payable upon a contingency, as upon the happening of some event, such as the rendering of service or the delivery of property, etc., is some kind of a debt, and therefore within the prohibition. If a contract or undertaking contemplates, in any contingency, a liability to pay when the contingency occurs, the liability is absolute,—the debt exists, and it differs from a present unqualified promise to pay only in the manner by which the indebtedness was incurred; and, since the purpose of the debt is expressly excluded from consideration, it can make no difference whether the debt be for necessary current expenses or for something else." In *Cullbertson v. Fulton*, 127 Ill. 80, in discussing a contract for constructing a system of waterworks to be paid for in the future, the court said: "By entering into the contract of

August 15, 1887, the city 'became indebted.' The obligation entered into by the terms of the contract constituted such an indebtedness as is contemplated by the language of the constitution. It cannot be said that the indebtedness did not come into being until the work was completed and accepted by the city. The city bound itself to pay for the work when it should be completed, and could be compelled to so if this work should be done according to contract;" and the case of *Springfield v. Edwards*, *supra*, is referred to and approved. To the same effect are the cases in the same court, of *Law v. People*, 87 Ill. 188, and *Prince v. Quincy*, 105 Ill. 188, 44 Am. Rep. 785.

In the case of *Sackett v. New Albany*, 88 Ind. 473, 45 Am. Rep. 467, it was held that, where the constitution forbids a municipal corporation ever to become indebted beyond a certain amount, that sum may not be exceeded, even for necessary expenses. The contract was for the erection of fire-alarm strikers and signal boxes at the price of \$3,325, when the limit imposed by the constitution had already been exceeded. The language of the constitution was similar to ours, and the court, by Chief Justice Niblack, after reviewing the decisions of the courts of Illinois and Iowa, said: "By 'indebtedness' in this connection we mean an agreement of some kind by the city to pay money where no suitable provision had been made for the prompt discharge of the obligation imposed by the agreement. It was obviously the intention of the legislature in submitting, and of the people in adopting, the thirteenth article of the constitution, to arbitrarily restrict the

power of municipal corporations to contract debts to a limited per centum of the taxable property, and to require, when that limit of indebtedness has been reached, that such corporation shall be prepared to pay for whatever of value they may obtain, without the incurrence of any further indebtedness for any purpose whatever."

That there are cases in all these states upholding contracts similar to the one now under consideration must be admitted, and that the two classes of cases are not easily, if at all, reconcilable, is evident. We have adopted the view in accord with the spirit of our constitution as we understand it, and as we think also in accord with better reason. Any other doctrine opens the door to all the mischief intended to be inhibited by the constitution. A fair illustration of the doctrine contended for by the appellees is given in the case of *Dively v. Cedar Falls*, 27 Iowa, 232, relied on by them, where it is held that "if A. should undertake to build a court-house within three years, doing so much, and to be paid accordingly, each year, the obligation of the contract would arise when executed; but the indebtedness under the constitution (if there were none other) would be measured by that to be paid each year." It seems to us that such a construction of the constitution would render the limitations in question wholly nugatory. It is needless to notice any other of the alleged reasons urged against upholding the contract, as the views here announced are fatal to its validity.

The judgment is reversed, with instructions to proceed according to the principles announced in this opinion.

SOUTH CAROLINA SUPREME COURT.

Charles S. McCULLOUGH *et al.*

v.

George Just BROWN *et al.*, *Appts.*

STATE of South Carolina, *Appt.*,

v.

Thomas FAGAN *et al.*

And Four Other Cases.

(.....S. C.....)

1. The police power of the state does not extend to the entire prohibition of the sale of intoxicating liquors by private individuals, and the giving of a monopoly of such business to the state, without any attempt to restrict or discourage such sales.
3. The state cannot embark in any trade which involves the purchase and sale of any article of commerce for profit, even in the

absence of any express provision in the constitution against it.

3. A statute prohibiting the sale of intoxicating liquors by any private individual and vesting in the state the exclusive right to manufacture and sell such liquors violates the provisions of the South Carolina Constitution, arts. 1 and 14, guaranteeing all men the rights of "acquiring, possessing, and protecting property," and providing that no person shall be "deprived of his property, immunities, or privileges . . . or deprived of his life, liberty, or estate, but by the judgment of his peers or the law of the land."
4. An injunction is a proper remedy on behalf of taxpayers to prevent the use of public funds in a business under an unconstitutional statute.

(April 19, 1894.)

A PPEAL by defendants from a judgment of the Court of Common Pleas for Darlington

NOTE.—The difficulty of preserving the true line between the rights of the individual and those of the public is well illustrated by the opinions in the above case. The evil of unrestrained traffic in intoxicating liquors and the need of a remedy are recognized in both opinions. But the difference of opinion seems to arise about the kind of remedy. It is to be regretted that the element of

novelty could not be eliminated from the remedy stricken down in this case, that the reasoning of the majority opinion might not have so large an advantage as is given by want of precedent. See in connection with the above case the somewhat analogous one of *Kippe v. Becker* (Minn.) 23 L. R. A. 387.

County in favor of complainants in a suit brought to enjoin the carrying into effect of the Dispensary Act of 1892. *Affirmed.*

APP^EAL by the state from a judgment of the Court of General Sessions for Richland County in favor of defendants in an indictment for selling intoxicating liquors in violation of the Dispensary Act. *Affirmed.*

The complaint in the injunction case alleged that the complainants were freehold voters and taxpayers of the town of Darlington, who sued on behalf of themselves and other taxpayers similarly situated; that the general assembly had recently passed the dispensary act; that such act was unconstitutional, in violation of article 1, section 8, of the Constitution of the United States, and of articles 5 and 7 of the Amendments; also in violation of article 1, sections 11 and 14, and article 9, sections 1 and 4, of the Constitution of South Carolina, and also was repugnant to the Constitution of South Carolina in attempting to reserve to the state the right to trade in intoxicating liquors to the exclusion of its citizens. That under this act Brown, Kirven, and Carter had been appointed the county board of control for Darlington county, and that the board met and appointed a day for receiving applications for county dispenser. That defendant John Buckner Floyd filed a petition for appointment, and that thereafter the board met and appointed Floyd. The complaint then alleged that Floyd's bond was not sufficient; that he did not have a majority of the freeholders of the town upon his petition, and asked for an injunction.

Floyd's petition was as follows:

"The State of South Carolina, Darlington County. To the County Board of Control: The undersigned, J. B. Floyd, respectfully petitions; for appointment as a dispenser at Darlington, in Darlington county. He resides in Darlington, has been engaged in business two years prior to this application as a student at the University of North Carolina, real estate agent, clerk in a lawyer's office, and clerk for his father, John Floyd, trial justice. He is a citizen of the United States and of South Carolina, has never been adjudged guilty of violating the law relating to intoxicating liquors, he is not a licensed druggist, keeper of an hotel, eating house, saloon, restaurant, or place of public amusement, and he is not addicted to the use of intoxicating liquors as a beverage. Dated at Darlington, S. C., this 7th day of June, 1893. J. B. Floyd.

"Sworn to before me this 7th day of June, 1893. [Seal.] John Floyd, Trial Justice.

"The State of South Carolina, County of Darlington. To the Honorable W. P. Carter, G. J. Brown, and J. O. A. Moore, constituting the county board of control for the county and state aforesaid, under an Act entitled 'An Act to Prohibit the Manufacture and Sale of Intoxicating Liquors as a Beverage within This State, except as is hereinafter Provided,' approved December 24th, A. D. 1892. The petition of John Buckner Floyd shows to your honorable body that he is an applicant for the position of county dispenser, under and by virtue of the said act, in and for the county and state aforesaid, and hereby prays your honorable body to issue to him a permit to keep and sell intoxicating liquors, as in said act provided, at

Darlington court-house, in said county and state; that your petitioner's name is John Buckner Floyd; that he resides with his father, John Floyd, at Darlington court-house, S. C.; that his present business or employment is as clerk in the office of the said father, who is trial justice for Darlington county, located at the town of Darlington, and that his employment for the past two years he was a student at the University of North Carolina, and for the rest of the time either as a clerk in a lawyer's office or as a real-estate agent and collector in the town of Darlington; that he is twenty-three years of age, and a citizen of the United States and South Carolina; that he has never been adjudged guilty of violating the law relating to intoxicating liquors, and is not a licensed druggist, a keeper of an hotel, eating house, saloon, restaurant, or place of public amusement; and that he is not addicted to the use of intoxicating liquors as a beverage; and your petitioner will ever pray, and so forth.

"The State of South Carolina, County of Darlington. Personally appears John Buckner Floyd, who, first being duly sworn, says that the allegations contained in the foregoing petition are true. J. B. Floyd.

"Sworn to and subscribed before me this 7th day of March, A. D. 1893. [Seal.] John Floyd, Trial Justice."

The petition signed by the voters of the county was as follows:

"Exhibit A.

"B" "The State of South Carolina, County of Darlington. To the Honorable W. P. Carter, Geo. J. Brown, and J. O. A. Moore, constituting the county board of control for the county and state aforesaid, under an Act entitled 'An Act to Prohibit the Manufacture and Sale of Intoxicating Liquors as a Beverage within This State, except as herein Provided,' and approved December 24th, 1892: The petition of the undersigned respectfully shows to your honorable body that they are freeholders and voters of the town of Darlington within the corporate limits of the town of Darlington, said state; that it has been brought to their attention that John Buckner Floyd has made application to your honorable body for a permit as county dispenser, authorizing him to keep and sell intoxicating liquors at Darlington court-house, S. C., as provided for in the above-stated act of the general assembly of said state, and that they hereby approve his application, and request his appointment as such dispenser; that they are informed and believe that the said John Buckner Floyd resides with his father, John Floyd, at Darlington, in said county and state; that his present business and employment is that of clerk in the office of his father, who is a trial justice for Darlington county, located in the town of Darlington; that his employment for the two years past has been a student at the University of North Carolina, the rest of the time either as a clerk in a lawyer's office or real-estate agent and collector in the town of Darlington; that he is twenty-three years of age, and a citizen of the United States and of the state of South Carolina; that he has never been adjudged guilty of violation of the law relating to intoxicating liquors; that he is not a licensed druggist, a keeper of an hotel, eating house, saloon, res-

taurant, or place of public amusement, and that he is not addicted to the use of intoxicating liquors as a beverage; that each of us for himself hereby states that before signing this petition he has read the same, understands the contents and meaning thereof, and is well and personally acquainted with the said John Buckner Floyd. C. S. Nettles" and seventy-nine others.

Floyd filed a separate answer, as did also the board of control.

Further facts appear in the opinion.

Mr. R. W. Boyd, for appellant:

The judge said that taxpayers had a perfect right to come, in their own names, into the court on its equity side, and prevent the establishment of a dispensary, if the act be unconstitutional. It is true that an unconstitutional act will be treated as void, and so declared, as against the rights of an individual; but to justify the court in acting, the individual must allege, and show, that the act contravenes some special individual right of his.

State v. Gathers, 15 S. C. 372; *Illinois & St. L. R. & Canal Co. v. St. Louis*, 2 Dill. 70; *Spencer v. McConnell*, 1 McLean, 337.

So for an individual to enjoin in equity the operation of an unconstitutional statute, he must allege irreparable special injury to himself. Nor will it do for him simply to allege such damage; he must show the facts upon which he predicates such allegation.

Illinois & St. L. R. & Canal Co. v. St. Louis, *supra*; High, Inj. § 34; *South Carolina S. B. Co. v. South Carolina R. Co.* 4 L. R. A. 209, 80 S. C. 545.

An apparent exception to the rule occurs where taxpayers of a municipal corporation seek to restrain the corporation from illegal action, likely to increase their taxes.

Mauldin v. Greenville, 8 L. R. A. 291, 33 S. C. 19.

The exception is only apparent; the case is really in strict accord with the rule.

Neumeyer v. Missouri & M. R. Co. 52 Mo. 81, 14 Am. Rep. 399.

If we eliminate the attack on the constitutionality of the act, what remains of the action questions the title to his office of a public officer, and seeks to set aside and prohibit the action and judgment of a quasi judicial tribunal, in a matter entrusted to their judgment and discretion.

State v. Sellers, 7 Rich. L. 370.

Such ends can be obtained in our courts in the name of the state alone through some one or more of the great prerogative writs.

Lavton v. Hutson, MS., Dec., 1821, 2 Rice, Dig. 138; *Cleary v. DeLisselline*, 1 McCord, L. 85; *State v. DeLisselline*, Id. 52; *State v. Stuart*, 5 Strobb, L. 31; *Leonard's Case*, 3 Rich. L. 118; *State v. Schnierle*, 5 Rich. L. 304; *Cooper v. Stocker*, 9 Rich. L. 298; *Follin v. Coogan*, 12 Rich. L. 44; *Hornesby v. Burdell*, 9 S. C. N. S. 308.

State officers will not be restrained from enforcing a law of the state merely upon the ground of its alleged unconstitutionality, especially when plaintiff shows no injury to himself, as likely to result from the enforcement of the law.

High, Inj. § 1815.

A judge ought not to decide on the constitutionality of a statute on a motion for an inter-

locutory injunction unless forced so to do.

Jeter v. State, 1 McCord, L. 238; *Ex parte Lynch*, 16 S. C. 40; *State v. Hagood*, 3 L. R. A. 841, 80 S. C. 24; *Scottish American Mortg. Co. v. Deas*, 35 S. C. 53.

A statutory enactment will not be declared unconstitutional, and therefore void, unless a clear and substantial conflict exist between it and the constitution.

People v. Gillson, 109 N. Y. 389.

Legislation by a state, prohibiting the manufacture within her limits of intoxicating liquors, to be there sold or bartered for general use as a beverage, does not necessarily infringe any right, privilege, or immunity secured by the Constitution of the United States.

Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205.

The first ten amendments to the Constitution of the United States were not intended to limit the powers of the states in respect of their own people, but to operate on the federal government only.

McElvaine v. Brush, 142 U. S. 155, 35 L. ed. 971.

With these exclusions, the question for discussion is, whether a state can, as a police measure, prohibit its citizens from the manufacture and sale of intoxicating liquors and undertake itself the business of purchasing and selling such liquors within its borders.

Mugler v. Kansas, *supra*.

The first inquiry is whether the act, in its dispensary provisions, is a mere pretense as a police measure, and has no real or substantial relation to the police purposes for the accomplishment of which it professes to have been enacted. In making this inquiry we must bear in mind what is also said in *Mugler v. Kansas*, *infra*, that when the question is as to the exercise of its police power by the state, "the power to determine such question so as to bind all must exist somewhere, else society will be at the mercy of the few who, regarding only their own appetites and passions, may be willing to imperil the peace and security of the many, provided only they are permitted to do as they please. Under our system that power is lodged with the legislative branch of the government.

Cooley, Const. Lim. *201.

Looking to the provisions of the act, it is manifest that these provisions are likely to be conducive to the end to an unusual extent.

The people, acting through the legislature, have the right to pass all measures within the fundamental limits of legislation and not prohibited by the constitutions, state and national.

Cooley, Const. Lim. 178.

This theory of legislative power under a state government has been time and again declared to be the correct theory by the courts of last resort in this state.

State v. Hutson, 1 McCord, L. 242; *State v. Williams*, 2 McCord, L. 801; *Pelzer v. Campbell*, 15 S. C. 502, 40 Am. Rep. 705; *Thorpe v. Rutland & B. R. Co.* 27 Vt. 142, 62 Am. Dec. 625; *Potter's Dwarr. Stat.* 60-65; *Cooley, Const. Lim.* §§ 87-173; *Pine Grove Twp. v. Talcott*, 86 U. S. 19 Wall. 673, 23 L. ed. 232.

A large power in the selection of appro-

private means for the accomplishment of governmental purposes is necessary to enable the legislature to adapt the laws to the ever varying needs and conditions of the people.

McCulloch v. Maryland, 17 U. S. 4 Wheat. 316, 4 L. ed. 679.

The object of a written constitution is to fix the fundamental principles and limit the powers of government and not to legislate on mere details. It is fixed in its nature and therefore unsuited to contain the laws which from time to time are made necessary by the ever-changing necessities and wishes of the people.

Ex parte Lynch, 16 S. C. 34.

Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a reasonable doubt.

Sinking Fund Cases, 99 U. S. 718, 25 L. ed. 501.

Any legislative act which does not encroach upon the powers apportioned to the other departments of the government, being prima facie valid, must be enforced, unless restrictions upon the legislative authority can be pointed out in the constitution, and the case shown to come within them.

Cooley, Const. Lim. p. 168.

The court has nothing to do with the motives and discretion of the legislature within its legitimate limits.

Powell v. Pennsylvania, 127 U. S. 679, 32 L. ed. 254; *State v. Wheeler*, 25 Conn. 297.

The general assembly has the general power of legislation upon all subjects not prohibited by the constitution.

Cooley, Const. Lim. 87-172.

Not only is there no constitutional inhibition, but it is the duty of the government to undertake a business theretofore left to and monopolized by private enterprise when the common good so requires.

Tiedeman, Pol. Powers, 318; *State v. Brennan's Liquors*, 25 Conn. 278.

In its prohibitory features, through which it alone materially affects the liberty and property of the citizens, the act is admittedly constitutional and in perfect accord with a line of authorities running back to a very early period in the history of the jurisprudence of the state.

Heisembrittle v. Charleston, 2 McMull. L. 236; *Charleston v. Ahrens*, 4 Strobb. L. 257; *Stark v. McGowan*, 1 Nott & McC. 387; *State v. Gaillard*, 11 S. C. 312; *State v. Bertin*, 21 S. C. 295, 53 Am. Rep. 677.

With such restrictions of legislative power as exist outside of the constitution, the judiciary can rarely, if ever, be called upon to concern itself.

Cooley, Const. Lim. § 129.

But it is contended that the introduction of section 41, article 1, into the Constitution of 1868, changed the whole theory of the state government of South Carolina, struck down its sovereignty, and make it like the general government, a government of granted and enumerated powers; so that, in this debate, it is for us to show that the dispensary act comes within the grant of legislative power, and not for our opponents to show that the act is in violation of some prohibition of the constitution, expressed or implied. If this be so, it is 23 L. R. A.

passing strange that so radical and revolutionary a change has remained unnoticed until this late day. This court has not only been unaware of the change, but has, time and again, declared that the government of this state is as sovereign as that of any one of her sister states, and that it is possessed of full legislative power, except in so far as that power is limited by constitutional prohibitions, express or implied.

Pelzer v. Campbell, 15 S. C. 593, 40 Am. Rep. 705; *Ex parte Lynch*, 16 S. C. 35; *Columbia & G. R. Co. v. Gibbs*, 24 S. C. 60.

The question, however, is of very little practical importance, in view of the admitted fact that the legislature is vested with full legislative power, except as restricted by constitutional limitations. The court, in construing it, will look first to the whole instrument, and will not permit a single clause to defeat its whole nature and design.

Southern Pac. R. Co. v. Orton, 6 Sawy. 157.

The right to pursue a business, and the right to acquire and hold property, are rights subject to the necessities of civil government.

Re Ferrier, 103 Ill. 367, 42 Am. Rep. 18.

Our Constitution, art. 1, § 36, says: "Each individual of society has the right to be protected in the enjoyment of life, liberty, and property according to standing laws." In *Crosby v. Warren*, 1 Rich. L. 387, the town council of Walterboro was held justified, as a police measure, in having hogs running at large in the streets, seized and sold by the marshal.

Summerville v. Prossley, 8 L. R. A. 354, 33 S. C. 63.

It is not only within its power, but it is the duty, of the state, to undertake a business called for by the needs of the people, where it cannot, consistently with the public welfare, be left to the voluntary efforts of individuals.

Granted that the purpose is good and constitutional, the court has no right to pass upon the necessity and propriety of the use of such extraordinary means.

Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77.

In *State v. Brennan's Liquors*, 25 Conn. 278, the court, referring to the propriety of legislation as a police regulation of evils, said: "Courts of justice have nothing to do with them, other than to discharge their legitimate duties in carrying into execution such laws as the legislature may establish, unless, indeed, they find that the legislature in making a particular law, has disregarded the restraints imposed upon it by the constitution of this state or of the United States."

Messrs. Oamund W. Buchanan, Atty. Gen., J. M. Johnson and P. H. Nelson also for appellants.

Mr. C. A. Woods, for respondents:

Judge Field says, in *Slaughter-House Cases*, 83 U. S. 111, 21 L. ed. 419: "The state may prescribe such regulations for every pursuit and calling of life as will promote the public health, secure the good order, and advance the general prosperity of society, but when once prescribed, the pursuit or calling must be free to be followed by every citizen who is within the conditions designated and will conform to the regulations. This is the fundamental idea upon which our institutions rest; and unless adhered to in the legislation of the country our government will be a republic only in name."

All license laws and all these regulations are based upon the idea, that while the traffic in spirits should not be denied to the citizens, yet it is so dangerous that safeguards should be thrown around it, and restrictions put upon it, neutralizing as far as possible its evil effects.

These laws cannot be sustained upon the ground that the traffic in itself is a nuisance; for if it be a nuisance, in the legal acceptance of the term, then the state must abate and destroy it, and not recognize or legalize it. The state may prohibit absolutely the sale of liquor, and this is based upon the idea that the sale of liquor is in itself a nuisance, and that no citizen has any natural right reserved from under the constitution or the law to engage in it.

These two theories do not stand together; the state cannot prohibit the sale by all of its citizens, except one, and grant him the exclusive privilege to sell, for the legislature cannot deny to its citizens the privilege of selling liquors, on the ground that it is an evil, and, therefore, there can be no personal right to engage in the trade, and at the same time allow to any one citizen the exclusive privilege of maintaining such nuisances.

Hudson v. Thorne, 7 Paige, 261, 4 L. ed. 148; *Chicago v. Rumpff*, 45 Ill. 90, 92 Am. Dec. 208.

This act is contrary to all governmental precedents in this country.

In discussing whether a tax was levied for a private or public purpose, *Justice* Miller says, in determining the question: "The courts must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether state or municipal."

Citizens Sav. & L. Asso. of Cleveland, Ohio v. Topeka, 87 U. S. 20 Wall. 655, 23 L. ed. 455. The enumeration of rights in this Constitution shall not be construed to impair or deny others retained by the people, and all powers not herein delegated remain with the people.

Art. 1, § 41.

The general propositions laid down by the authorities must be modified in passing upon the statutes of this state, to the extent, at least, of sustaining the following propositions: (1) The legislature of this state may exercise the full legislative function of government, but it cannot extend and widen those functions to an extent not expressed or necessarily implied in the constitution, and it follows as a conclusion from this proposition that it cannot engage the state in trade, which is not a function of government at all, and certainly could not be claimed to be a necessary or even a usual function of government. No similar effort has ever been made in this country before, except once in the state of Indiana, and the statute was not held constitutional.

Herman v. State, 8 Ind. 545.

(2) In passing on the constitutionality of the statute, this section of the constitution shifts the burden which usually rests upon those who deny the constitutionality of the statute to those who affirm it, and requires them to show the author-

ity of the legislature, expressed or necessarily implied in the constitution, to take from the people a business and confer upon the state a monopoly.

When, in addition to this, we find that the Constitution of 1868, in article 1, section 41, expressly declares that "the enumeration of rights in this constitution shall not be construed to impair or deny others retained by the people, and all powers not herein delegated remain with the people," we think there can be no doubt that even in the absence of any express restriction upon the taxing power of the legislature, such power can only be exercised for some public purpose, and that whenever it is attempted to be exercised for a private purpose, it is the duty of the courts to declare such legislation void.

Feldman v. Charleston, 23 S. C. 68, 55 Am. Rep. 6.

This constitutional provision means, the legislature may exercise the usual and commonly understood functions of legislation, but may not take to itself or the state, and deny to the citizen, that which has been regarded in all the history of the English law outside of the scope of governmental activity, and peculiarly within the sphere of individual enterprise and endeavor.

So far from such a creation being the exercise of a legislative function, as understood in this republic, it is an effort upon the part of the legislature to add to the legislative, executive, and judicial departments of the government a commercial department involving the state in all the perils of trade.

Adam Smith says: "No two characters seem more inconsistent than those of trader and sovereign."

Wealth of Nations, 646.

Experience proves that the depositories of power who are mere delegates of the people—that is, of a majority—are quite as ready (when they think they can count on popular support) as any organs of oligarchy, to assume arbitrary power and encroach unduly on the liberty of private life.

The present civilization tends so strongly to make the power of persons acting in masses the only substantial power in society that there never was more necessity for surrounding individual independence of thought, speech, and conduct with the most powerful defenses in order to maintain that originality of mind, and individuality of character, which are the only source of any real progress, and of most of the qualities which make the human race much superior to any herd of animals.

Hence it is no less important in a democratic than in any other government that all tendency on the part of public authorities to stretch their interference and assume a power of any sort which can easily be dispensed with, should be regarded with unremitting jealousy.

Mills, Political Economy, 561-563.

These ideas of the functions of government in a free country are held in England, though they are not enforceable as law, because an act of parliament, as Blackstone says, "is the exercise of the highest authority that the kingdom acknowledges upon earth." Even then, such judges as Coke, Hobart, and Holt held that an

act of parliament must, notwithstanding, be declared void, when contrary to common right and reason.

It has always been found impossible to fix the limits of legislative power by a constitutional article.

It has been decided many times in this state and others that a municipal corporation cannot, even under express authority conferred by an act of the legislature, engage in a business venture of any kind, either directly or by loaning its credit or money to an individual, for the purpose of increasing the prosperity of such town, and that the courts, and not the legislature, must ultimately determine what is a public purpose.

Allen v. Jay, 60 Me. 124, 11 Am. Rep. 185; *State v. Osaukee Twp.* 14 Kan. 419, 19 Am. Rep. 99; *Lowell v. Boston*, 111 Mass. 454, 15 Am. Rep. 39; *Weisner v. Douglas*, 64 N. Y. 91, 21 Am. Rep. 586.

Trade is not appropriate to government but is an appropriate occupation of the people; and it is not a function of the government, but a right of the citizen; the citizen may be prohibited from exercising it, when it is in itself injurious to the people, but the government cannot prohibit the citizen, and monopolize the trade to itself. The courts, and not the legislature, must determine whether these views of the legislative function be correct.

1 Kent, Com. p. 450.

There are limitations upon the power of the legislature besides those expressed in the constitution.

Tiedeman, Pol. Powers, p. 827; *Citizens Sav. & L. Asso. of Cleveand, Ohio v. Topeka*, 87 U. S. 20 Wall. 655, 22 L. ed. 455; *Whiting v. Sheboygan & P. du L. R. Co.* 25 Wis. 184, 3 Am. Rep. 30; *Cooley*, Const. Lim. 129, 175, 487; *Dill. Mun. Corp.* 597; *Bowman v. Middleton*, 1 Bay, 254; *Ham v. McClaws*, Id. 98; *Cooley*, Const. Law, p. 327; *State v. Neely*, 3 L. R. A. 672, 20 S. C. 604; *Wilkinson v. Leland*, 27 U. S. 2 Pet. 657, 7 L. ed. 538; *Bartemeyer v. Iowa*, 85 U. S. 18 Wall. 129, 21 L. ed. 929; *Mugler v. Kansas*, 123 U. S. 659, 31 L. ed. 209; *Gardner v. Neuburgh*, 2 Johns. Ch. 162, 1 L. ed. 332, 7 Am. Dec. 526.

The boundary line of legislative activity, it is agreed on all hands, must be fixed by the courts.

Origin & Scope of American Doctrine of Const. Law; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 8 Inters. Com. Rep. 209; *Feldman v. Charleston*, 23 S. C. 62, 55 Am. Rep. 6.

Questions of power do not depend on the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed.

Brown v. Maryland, 25 U. S. 12 Wheat. 439, 6 L. ed. 685; *Mauldin v. Greenville*, 8 L. R. A. 291, 33 S. C. 21.

A citizen and taxpayer may maintain a bill in behalf of himself and all other taxpayers of the state, to enjoin a state treasurer from issuing bonds of the state in aid of a subscription to a railway, under an act of the legislature, held to be unconstitutional.

2 High, Inj. § 1294; *Rippe v. Becker* (Minn.) 22 L. R. A. 857; *Orampton v. Zabriskie*, 101 U. S. 601, 25 L. ed. 1070; 1 Pom. Eq. Jur. 260. 23 L. R. A.

Mr. J. P. K. Bryan, also for respondents: This act is unconstitutional in the main principle thereof, in that it provides for the conduct of the whole business of liquor dealing in the state of South Carolina by and through the state commissioners, agents, and employes. In other words, it puts the state into the liquor trade, and the same with its business risks and revenues is assumed by the state, wholly and exclusively conducted by the state with the public funds of the public treasury, and through officers, agents, and employes paid by the state out of the public treasury.

The right to trade, the commercial power, is nowhere delegated in the constitution, and is reserved by the people.

The affirmative system and the specific enumeration of the constitution imply a limit to the power of the legislature, and the legislature had no power to go further than the constitution had provided.

Duncan v. Barnett, 11 S. C. 337, 32 Am. Rep. 476.

When the emperor of Rome was asked to trade, he replied, "I am emperor, would you make me master of a galley? By what means should a Roman citizen gain his livelihood, if we take their trade out of their hands?"

1 Montesquieu, Spirit of Laws, chap. 19, bk. 22.

For the government to seize on a trade and monopolize it is an invasion of the right of the citizen.

Say, Political Economy, p. 103.

The character of sovereign and trader is inconsistent.

3 Adam Smith, Wealth of Nations, 357.

Under the Declaration of Independence, one of the enumerated rights was the "trade" of the subject; and one of the enumerated grievances was "the cutting off of our trade with the world."

See Declaration of Independence; *Butchers Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 757, 758, 28 L. ed. 591; *Slaughter-House Cases*, 83 U. S. 16 Wall. 102-105, 119, 120, 21 L. ed. 417, 418, 422.

This question as to whether a state has the right to monopolize and engage in a trade, where it is denied to the individual, has occurred only once in the history of this country, and it was when the state of Indiana attempted to do with the liquor trade exactly what the state of South Carolina has, by its legislature, attempted to do in this case, that is, to engage in and monopolize the business, and conduct it with the public funds, through its officers and agents, taking its profits for the state, county, and city. And this attempt was decided by the supreme court of Indiana as unconstitutional, null, and void.

See *Beels v. State*, 6 Ind. 501, 63 Am. Dec. 391.

The state cannot go into trade because it is opposed further to the whole system of "finance and taxation," as set forth in article 9 of the Constitution, which is the financial policy of the state, and which has adopted taxation as the affirmative system of raising the revenue and meeting the burdens and expenses of government.

The state legislature cannot divert public funds by making advances to the county dia-

penser to buy and sell liquors, such advances to be regarded as loans, to be refunded out of the profits.

See Dispensary Act, § 18.

And this is an unconstitutional diversion of public funds.

Feldman v. Charleston, 23 S. C. 62, 55 Am. Rep. 6; *Mauldin v. Greenville*, 8 L. R. A. 291, 33 S. C. 24.

The police power of the state, in its largest extent, does not authorize a state itself to engage in a business.

Rippe v. Becker (Minn.) 23 L. R. A. 857.

The state cannot in any trade establish a monopoly either for an individual or for itself by engaging in it, though it may restrict, regulate, or prohibit it altogether under the police power.

Slaughter-House Cases, 83 U. S. 16 Wall. 86, 31 L. ed. 894.

The liquor trade, as to the exercise of police power, is like all other trades and employments.

Cooley, Const. Lim. pp. 714, 725, 726; *Bowman v. Chicago & N.W. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823; *Brimmer v. Reiman*, 138 U. S. 82, 34 L. ed. 862, 3 Inters. Com. Rep. 485.

Messrs. Clarence S. Nettles, Melton & Melton, James Simons, Andrew Crawford and John McMaster also for respondents.

McIver, Ch. J., delivered the opinion of the court:

These cases all arise under an Act entitled "An Act to Prohibit the Manufacture and Sale of Intoxicating Liquors, as a Beverage, within This State except as herein Provided," approved 24th of December, 1893 (21 Stat. at. L. 62), and were, therefore, heard and will be considered together; for, while there are certain subordinate questions presented in some of the cases which do not arise in others, yet they all present the question of the constitutionality of the act. To that question, as one of overshadowing importance, we propose first to direct our attention. Before doing so, however, it may be proper to state that just before the commencement of the argument the attorney-general, deeming it due to the court so to do, presented a suggestion in writing, calling the attention of the court to the fact that at the recent session of the general assembly (1893) another act on the same subject had been passed, which might possibly be regarded as repealing or superseding the Act of 1892, under which these cases arise, and, if so, might deprive the questions presented in these cases of any practical character, leaving them only as speculative questions, which the court might not be willing to hear. But, as no motion to dismiss the appeals was made, and no application on the part of the counsel for the state to abandon the appeals upon any such grounds was presented, this court will not, of its own motion, decline to hear the cases, but, on the contrary, will assume, for the purpose of this discussion, that these cases are not in any way affected by the passage of the Act of 1893, but do present practical questions which this court is bound to decide. Recurring, then, to the question of

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the constitutionality of the act, it may be as well to say in the outset that we freely concede that the presumption is always in favor of the constitutionality of an act of the legislature; and hence, as is said by Shaw, *Ch. J.*, in *Ex parte Wellington*, 16 Pick. 95, 26 Am. Dec. 681, referred to with approval by *Judge Cooley* in his great work on Constitutional Limitations, at page 132 of the second edition (which it may be well to say here is the edition referred to throughout this opinion): "When courts are called upon to pronounce the invalidity of an act of legislation, passed with all the forms and ceremonies requisite to give it the force of law, they will approach the question with great caution, examine it in every possible aspect, and ponder upon it as long as deliberation and patient attention can throw any new light on the subject, and never declare a statute void unless the nullity and invalidity of the act are placed, in their judgment, beyond reasonable doubt." A reasonable doubt must be solved in favor of the legislative action, and the act be sustained. Or, as was said by Marshall, *Ch. J.*, in *Fletcher v. Peck*, 10 U. S. 6 Cranch, 128, 8 L. ed. 175, likewise quoted with approval by *Judge Cooley*, in the same connection: "The question whether a law be void for its repugnancy to the constitution is at all times a question of much delicacy which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station could it be unmindful of the solemn obligation which that station imposes; but it is not on slight implications and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other." These views have been fully recognized in this state, as is most fully, clearly, and forcibly set forth by *Mr. Justice McGowan* in *Ex parte Lynch*, 16 S. C. 32, and have been approved in many other cases. We also freely concede that in considering the question whether an act of the general assembly of this state is in conflict with the constitution, either state or federal, the inquiry is whether there is anything in either of those instruments forbidding the passage of such an act, either in express terms or by necessary implication; whereas, in considering the question of the constitutionality of an act of congress, the inquiry is whether there is anything in the Federal Constitution which, either in express terms or by necessary implication, confers upon congress the power to pass the act in question.

Fully impressed with these conceded principles, we approach the consideration of the question whether the Act of the 24th of December 1892, which for convenience will be designated throughout this discussion as the "Dispensary Act," is in conflict with any constitutional provision, either state or federal. In considering this question the first inquiry which naturally presents itself is, What are the general nature, scope, and ob-

jects of the act, as disclosed by its terms? Without going into a detailed consideration of the numerous sections of the act, we think it is safe to say that it is an act forbidding the manufacture or sale of intoxicating liquors as a beverage, within the limits of this state, by any private individual, and vesting the right to manufacture and sell such liquors in the state exclusively, through certain designated officers and agents. (We may say here that in the further discussion of this subject we will drop the word "manufacture" and speak only of the sale or keeping for sale of intoxicating liquors as a beverage. Not only for convenience of phraseology, but for the better reason that in none of these cases which we are called upon to decide does the question of the manufacture of intoxicating liquors arise, but they all relate to the sale or keeping for sale of such liquors). It seems to us that the view which we have presented as to the nature, scope, and object of the act is manifest, not only from the title of the act, but also from the provisions found in almost every section. The title declares it to be "an act to prohibit the sale of intoxicating liquors, except as herein provided," and the various sections show beyond dispute that the only exception made is the state, which is expressly authorized to engage in the sale of intoxicating liquors for any purpose whatsoever, either as a beverage or otherwise. Indeed, the body of the act goes further than the title, for, while the language used in the title seems to indicate that the purpose of the act was only to forbid the sale of intoxicating liquors "as a beverage," yet in the body of the act it is very manifest that a sale of such liquors for any purpose, and not simply "as a beverage," is forbidden, except when made by the state, through certain designated officers and agents. Licensed druggists must buy such intoxicating liquors as may be necessary in compounding their medicines and tinctures only from the designated agents of the state. Even wine for sacramental purposes can only be bought from such agents. In other words, the manifest object of the act is that the state shall monopolize the entire traffic in intoxicating liquors, to the entire exclusion of all persons whomsoever, and this, too, for the purpose of profit to the state and its governmental agencies, counties, and municipal corporations; for the act, after appropriating the sum of \$50,000 from the state treasury for the purpose of purchasing a supply of liquors with which to begin the business, provides that the liquors so purchased by the state commissioner shall be sold by him to the various county dispensers, at a profit not exceeding 50 per centum of the net cost thereof, and that the proceeds of such sales shall be paid into the state treasury, upon which the commissioner may draw from time to time the amounts necessary to meet the expenses incurred in conducting the business; and also provides that the county dispensers may sell such liquors to consumers at a profit not exceeding 50 per centum above the cost thereof, except in sales to licensed druggists, where the profit is limited to 10 per centum, and that all profits, after paying the expenses

of such dispensary, shall be divided equally between the county and the municipal corporation within which such dispensary is located. It is also provided that the state commissioner may sell intoxicating liquors so purchased by him to persons outside of the state.

This being the nature, scope, and object of the dispensary act, our next inquiry is whether it conflicts with any provision of our state constitution. There are at least two of the provisions of that instrument with which the dispensary act conflicts. The first section of the first article of the constitution reads as follows: "All men are born free and equal, endowed by their Creator with certain inalienable rights, among which are the rights of enjoying and defending their lives and liberties, of acquiring, possessing and protecting property, and of seeking and obtaining their safety and happiness." And in section 14 of the same article it is explicitly declared that "no person shall be . . . despoiled or dispossessed of his property, immunities, or privileges, . . . or deprived of his life, liberty, or estate, but by the judgment of his peers or the law of the land." Here, then, we have not only an explicit declaration that every person in this commonwealth has certain rights, derived, not from the government, but from the Creator, which are declared to be inalienable, but also an expressed declaration that he shall not be deprived of them except in one of two ways: First, by the judgment of his peers; or, second, by the law of the land. So sacred was this right of property regarded that the framers of the constitution, not content with the general provisions above referred to, declaring the right and forbidding an interference with such right, proceeded in the twelfth section of the first article to declare explicitly that "no person shall be . . . prevented from acquiring, holding, and transmitting property." Now, then, what are these inalienable rights of personal liberty and private property thus emphatically asserted and carefully guarded, and what do they necessarily involve? As is said by Earl, J., in *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 686: "The constitutional guaranty that no person shall be deprived of his property without due process of law may be violated without the physical taking of property for public or private use. Property may be destroyed, or its value may be annihilated. It is owned and kept for some useful purpose, and it has no value unless it can be used. Its capability for enjoyment and adaptability to some use are essential characteristics and attributes, without which property cannot be conceived; and hence any law which destroys it or its value, or takes away any of its essential attributes, deprives the owner of his property. The constitutional guaranty would be of little worth if the legislature could, without compensation, destroy property or its value, deprive the owner of its use, deny him the right to live in his own house, or to work at any lawful trade therein." Blackstone (in 1 Com. 138) says: "The third absolute right inherent in every Englishman is that of property, which consists in the free

use, enjoyment, and disposal of all his acquisitions, without any control or diminution save only by the laws of the land." To the same effect, see what is said by Miller, *J.*, in *Pumpelly v. Green Bay & M. Canal Co.*, 80 U. S. 13 Wall. 177, 178, 20 L. ed. 560, also what is said by Comstock, *J.*, in *Wynehamer v. People*, 13 N. Y. 398, and also by Andrews, *J.*, in *People v. Otis*, 90 N. Y. 48. See, also, what is said by the same judge in *Bertholf v. O'Reilly*, 74 N. Y. 509, 80 Am. Rep. 523.

Again, it is said in the case of *Re Jacobs*, *supra*: "So, too, one may be deprived of his liberty, and his constitutional rights thereto violated, without the actual imprisonment or restraint of his person. Liberty, in its broad sense, as understood in this country, means the right not only of freedom from actual servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or vocation." See also, to the same effect, what is said by *Mr. Justice Field* in his concurring opinion in the case of *Butchers' Union, S. H. & L. S. L. Co. v. Crescent City, L. S. L. & S. H. Co.* 111 U. S. 756, 757, 28 L. ed. 591; and what is said by *Mr. Justice Bradley* in his concurring opinion in the same case, in which he was joined by *Mr. Justice Harlan* and *Mr. Justice Woods* (page 764, 111 U. S. and page 589, 28 L. ed.); and as was said in *Livestock, D. & B. Asso. v. Crescent City, L. S. L. & S. H. Co.* 1 Abb. U. S. 388, 398, Fed. Cas. No. 8,408. "There is no more sacred right of citizenship than the right to pursue un-molested a lawful employment in a lawful manner. It is nothing more nor less than the sacred right of labor." If, then, it can be shown that the traffic in intoxicating liquors is not in itself unlawful, but, on the contrary, that intoxicating liquor is a lawful subject of commerce, then it follows from what has been said that the dispensary act, in so far as it undertakes to forbid every person in this state from engaging in such traffic, conflicts with the above-mentioned constitutional provisions, and is therefore null and void, unless such legislation can be defended as an exercise of what is known as the "police power,"—a question which will be hereinafter considered. We do not see how it can be denied that such a traffic is lawful. *Judge Cooley*, in his work on Constitutional Limitations, at pages 583, 584, says in express terms that it is lawful, and every one of the numerous cases decided by the Supreme Court of the United States, involving questions whether state legislation designed to prohibit the sale of intoxicating liquors is affected by the interstate commerce clause of the Constitution of the United States, necessarily implies that intoxicating liquor is a subject of lawful commerce, for otherwise such questions could not arise. It was only upon this ground that the decision in the case of *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 86, was or could be defended. There the question was whether such liquor, imported into the state of Iowa from the state of Illinois, could be lawfully sold,

in the unbroken packages in which they were imported, within the limits of the state of Iowa, and the court held that, notwithstanding the stringent provisions of the Iowa prohibitory law, such liquors could be sold by the importer, as long as the original packages remained in his hands unbroken; and that the Iowa statute, in so far as it purported to forbid such a sale, was in conflict with that clause of the United States Constitution conferring upon congress the power to regulate commerce with foreign states and between the several states. In that case *Fuller, Ch. J.*, in delivering the opinion of the court, cites with approval certain language used by *Mr. Justice Matthews* in delivering the opinion of the court in the case of *Bowman v. Chicago & N. W. R. Co.*, 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, involving the same principle, where he draws a distinction between articles not in a merchantable condition, and therefore not legitimate subjects of commerce,—for example, rags likely to spread infectious diseases,—and other articles which are the legitimate subjects of commerce, among which intoxicating liquors must have been classed, or the decision could not possibly have been what it was. Even in the case of *Re Rahrer*, 140 U. S. 558, 35 L. ed. 574, *Fuller, Ch. J.*, recognizes the same doctrine, although that case arose after the passage of what is commonly known as the "Wilson Bill," which was doubtless passed with a view to obviate the effect of the decision in *Leisy v. Hardin*, *supra*. Indeed, the whole course of legislation, both state and federal, demonstrates that the sale of intoxicating liquors is a legitimate subject of commerce and trade; for otherwise it would be absolutely impossible to vindicate the United States internal revenue law, and the very numerous statutes which have been passed in this state ever since the foundation of the government permitting the sale of intoxicating liquors, under such regulations as the lawmaking power may have from time to time deemed necessary, either to secure a revenue from such traffic, or to surround it with such restrictions as have been thought necessary or expedient to prevent evils apt to grow out of such traffic. To say, therefore, that the sale of intoxicating liquors belongs to that class of wrongs denominated as "*mala in se*," would be to cast a grave imputation upon the lawmaking department of the government, both state and federal; and this we are very far from being willing to do. Indeed, the very highest of all authority might be cited to show that the manufacture and sale of spirituous liquors is not *malum in se*. Indeed, the most ardent prohibitionists, so far as their wishes have taken the shape of law, must be regarded as admitting the proposition for which we contend; for every prohibition law which has fallen under our notice contains provisions recognizing this proposition by excepting from its operation sales of liquors for certain purposes, namely, medical, scientific, mechanical, or sacramental purposes, thereby expressly admitting that the mere sale of intoxicating liquors is not only not wrong, but actually necessary or useful for certain purposes.

The very act now under consideration—the dispensary law—by its express terms shows beyond all dispute that the general assembly did not intend to put its seal of condemnation upon the sale of intoxicating liquors as morally wrong, or even as subversive of the public welfare, for it makes ample provision for the sale of such liquors to an unlimited extent for any purpose whatsoever, and makes specific provision for the sale of liquor in just such quantities as would suit all classes of consumers. Before, therefore, the sale of intoxicating liquors can be declared unlawful, there must be some valid statute declaring it to be so; and we must say that we have been unable to find any such statute on the statute books of this state. Of course, we can find many statutes forbidding such sale except upon certain prescribed conditions, but none making the sale absolutely unlawful, unless it be in certain specified localities, under what are called “local option laws,” which are exceptional in their character, and need not be considered here. While, therefore, without permitting ourselves to indulge in any sentimental declamation as to the evils flowing from an unregulated and unrestricted traffic in intoxicating liquors, which, however appropriate elsewhere, we do not regard as becoming in a judicial opinion, we freely admit all that can properly be said on the subject, and therefore we fully concede the power on the part of the legislature to throw around such traffic all safeguards necessary and proper to prevent, or at least minimize, such evils; and while we may further admit, for the purposes of this discussion, that the legislature may go further, and absolutely prohibit the sale of intoxicating liquors within the limits of this state,—yet the practical question still remains whether the dispensary act falls within either of these classes. It does not seem to us possible to regard the dispensary act as a law prohibiting the sale of intoxicating liquors. On the contrary, it not only permits, but absolutely encourages, such sale to an unlimited extent; for by its profit feature it holds out an inducement to every taxpayer to encourage as large sales as possible, and thereby lessen the burden of taxation to the extent of the profits realized. If the act, instead of confining the privilege of selling liquor to the state, had undertaken to confer such exclusive privilege upon one or more individuals, or upon a particular corporation, could there be any doubt that such an exercise of legislative power would be unconstitutional? We can see no difference in principle between the two cases. Even the *Slaughter-House Cases*, as they are called (88 U. S. 16 Wall. 86, 21 L. ed. 394), decided by a bare majority of the court, and which must be regarded as having gone to the extreme limit, did not go to the extent of holding that an act forbidding all other persons except the favored corporation from pursuing the lawful occupation of a butcher, or from carrying on any other lawful business or trade, would be constitutional, for the opinion of the majority of the court was rested expressly upon the ground that the act there in question did not forbid any person who

might desire to do so from pursuing the avocation of a butcher, but only required him, as a measure of police regulation, to have his slaughtering done at a specified place, upon paying reasonable charges described by the act to the corporation for the use of the conveniences for that purpose, which such corporation was bound, under a heavy penalty, to furnish any one who desired to use them. It is very obvious, therefore, that the act there under consideration differed very widely from the act which we are now called upon to consider.

If, then, the dispensary act cannot be defended as a prohibitory law, it is contended that it may be sustained as a law regulating the sale of intoxicating liquors, under what is called the “police power,” which, it is claimed, practically is unlimited in its scope by constitutional provisions; and its exercise depends solely upon the legislative will, which cannot be controlled or restricted by the judiciary. It seems to us that such a claim is not only utterly at variance with any just conception of a constitutional government, but is entirely inconsistent with the numerous cases in which the courts, both state and federal, have undertaken to limit and restrict the exercise of such a power by state legislation; and what is more to the point in this particular case our own court has distinctly repudiated the idea that the exercise of what is claimed to be the police power is beyond judicial control. In the case of *McCandless v. Richmond & D. R. Co.*, 38 S. C. 103, 18 L. R. A. 440, *Mr. Justice Pope*, as the organ of the court, after referring to the fact that the circuit judge had held that the statute there in question was a valid exercise of the police power, uses this language: “But a careful consideration of the latest official declarations of this law by the Supreme Court of the United States has led us to modify our conceptions of what is involved in what is called the ‘police power’ of a state in this union of states. The fundamental idea in ascribing such potency to this principle of the law is based upon the immutable principles of self-defense.” And upon this point of the case the court was unanimous, though there was a dissent upon another point. Indeed to hold that every act of the general assembly passed under the guise of an exercise of the police power, or sought to be defended upon that ground, is beyond judicial control, would render every guaranty of personal rights found in the constitution of little or no value. See, also, what is said by *Mr. Justice Harlan* in the case of *Mugler v. Kansas*, 123 U. S. 661, 31 L. ed. 210, where, after recognizing the existence of and the necessity for the police power, and after admitting that such power belongs to the legislative department of the government, he uses this language: “It belongs to that department to exert what are known as the ‘police powers’ of the state, and to determine primarily what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety. It does not at all follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a

legitimate exertion of the police powers of the state. There are, of necessity, limits, beyond which legislation cannot rightfully go. While every possible presumption is to be indulged in favor of the validity of a statute, *Sinking Fund Cases*, 99 U. S. 700, 25 L. ed. 496, the courts must obey the constitution, rather than the lawmaking department of government; and must, upon their own responsibility, determine whether, in any particular case, these limits have been passed. 'To what purpose,' it was said in *Marbury v. Madison*, 5 U. S. 1 Cranch, 137, 2 L. ed. 60, 'are powers limited, and to what purpose is that limitation committed to writing, if these limits may at any time be passed by these intended to be restrained?' . . . *The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relations to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution.* (Italics ours). See, also what was said by our own court in the case of *Whaley v. Gaillard*, 21 S. C. 578, where the same principle was applied to a totally different subject,—the limitation of the power of the legislature to contract a public debt. It seems to us, therefore, that it is not only our right, but our duty, to inquire whether the dispensary act was intended to be an exercise of the police power to regulate the sale of intoxicating liquors, and, if so, whether its terms have any real or substantial relation to that object.

Now, it is quite certain that the act does not, in terms, purport to be an act to regulate the sale of intoxicating liquors by persons who may be engaged, or who may desire to engage, in such traffic. On the contrary, its declared purpose is to absolutely prohibit such sale by private individuals; and this is made more manifest by the numerous provisions found in the body of the act. Now, while the power of the legislature to enact such laws as may be deemed necessary and proper to regulate the sale of intoxicating liquors by any person within the limits of the state, in order to prevent, or at least reduce as far as possible, the evils which are apt to flow from such a traffic, is conceded, yet we cannot regard the dispensary law as such an act. Indeed, it would be a contradiction in terms to speak of an act of such a character as this is as an act to regulate the sale of liquor by the people of the state, for it is difficult to see how an act forbidding a sale can be regarded as an act regulating such sale. That which is forbidden cannot well be regulated. But it may be said that the dispensary act, while forbidding all private persons to sell intoxicating liquors, does permit such sale to be made by the state itself, through its authorized officers and agents, and that these sales may be and are

regulated by the numerous provisions of the dispensary act. But when it is remembered that all restrictions upon or regulations of sales of any lawful article of commerce can be vindicated only as an exercise of the police power, we do not see how such a view can be accepted. The police power can only be resorted to for the government and control of the people of the state, and cannot with any propriety be appealed to for the purpose of controlling the action of the state itself; and, as the state can only act through its authorized officers or agents, the police power cannot be resorted to for the purpose of controlling such officers and agents, if for no other reason, because it is wholly unnecessary, as the state has ample means of controlling its own officials, without resorting to the undefined, and therefore dangerous, power, known as the "police power." But, even if this view be not sound, and this provision of the dispensary act whereby the state assumes to itself the exclusive right to engage in the sale of intoxicating liquors, taking to itself and its subordinate governmental agencies the entire profits of such a traffic, to the utter exclusion of all private individuals, could, with any propriety, be regarded as a police regulation for the protection of the public health or public morals, there would still remain the question whether such an exercise of the police power was necessary to effect these important purposes; for, after all, the exertion of the police power, especially where it abridges or destroys the constitutional rights of the citizen, can only be vindicated as a measure of self-defense, as it is expressed by *Mr. Justice Pope, supra*, or as it is expressed by other authorities, by some overruling necessity. If the various restrictions and regulations as to the sale of intoxicating liquors by the officers and agents of the state be designed only for the protection of the public health or the public morals, and are fit and appropriate to that end, we do not see why such restrictions and regulations could not be applied to the sale of such liquors by private individuals; and, if so, then certainly there was no necessity for any such sweeping act, whereby the constitutional rights of the citizen, hereinbefore referred to, have been absolutely destroyed, but these rights would be reserved to the citizen, and only restricted by such regulations as may be necessary for the public good.

But, in addition to this, we are compelled to say, without in the slightest degree intending to impeach the motives or to criticize the intentions of the members of the legislature by which this act was passed, and, on the contrary, freely according to them the best motives and the purest intentions, that, judging the act from the terms employed in it (the only way in which a court is at liberty to form an opinion), it cannot be justly regarded as a police regulation, but simply as an act to increase the revenue of the state and its subordinate governmental agencies. This is apparent from the profit features of the act, from the various stringent provisions designed to compel consumers of intoxicating liquors to obtain them only from the officers

and agents of the state, and notably by the provision authorizing the state commissioner to sell such liquors to persons outside of the limits of the state, which certainly cannot be regarded as bearing the faintest resemblance to a police regulation for the purpose of protecting the public health or the public morals of the people of this state. But it is earnestly contended by the attorney-general that if the power to prohibit absolutely the sale of intoxicating liquors be conceded, it follows necessarily that the state may assume the monopoly of such a trade; and in support of this view he cites Tiedeman on the Limitations of the Police Power (page 818), where that author uses the following language: "There is no doubt that a trade or occupation which is inherently and necessarily injurious to society may be prohibited altogether; and it does not seem to be questioned that the prosecution of such a business may be assumed by the government, and managed by it as a monopoly." But the only authority which the author cites to sustain this rather extraordinary proposition is the case of *State v. Brennan's Liquors*, 25 Conn. 278, overlooking entirely the case of *Beebe v. State*, 6 Ind. 503, 63 Am. Dec. 391, which holds an opposite view, and which had been previously cited by the same author at page 197 and quoted from, apparently with approval; but, in addition to this, we are unable to perceive how the right to prohibit a given traffic carries with it the power in the state to assume the monopoly of such traffic. If the right to prohibit the sale of intoxicating liquors rests upon the ground that such a traffic "is inherently and necessarily injurious to society," as is involved in the statement by the author of this proposition, then it seems to us that the logical and necessary consequence would be that the state could not engage in such traffic, for otherwise we should be compelled to admit the absurd proposition that a state government established for the very purpose of protecting society could lawfully engage in a business which "is inherently and necessarily injurious to society." We must prefer, then, to follow the case of *Beebe v. State*, rather than *State v. Brennan's Liquors*; for while it has been said that the case of *Beebe v. State* has been overruled (though the case to that effect has not been brought to our attention), yet we do not cite the case as authority, for it is not authority here, but it is only referred to for the reasoning contained in the opinion. Indeed, neither the Indiana nor the Connecticut case could constitute authority in this case, for the reason that the statute which we are called upon to construe contains very different provisions from those found either in the Indiana or Connecticut statutes. But in this connection we are enabled to cite a very recent case, which the research of counsel for respondents has furnished us with, which, it seems to us, is as conclusive of this whole matter as any case from abroad can be. That is the case of *Rippe v. Becker* (Minn.) 22 L. R. A. 857, in which one of the points distinctly decided is thus stated in the syllabus, prepared by the court: "The police power of the state to regulate a business is to be exercised by the

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adoption of rules and regulations as to the manner in which it shall be conducted by others, and not by itself engaging in it." In that case the question was as to the constitutionality of an Act entitled "An Act to Provide for the Purchase of a Site and for the Erection of a State Elevator or Warehouse at Duluth for Public Storage of Grain," and one of the grounds upon which it was sought to sustain the constitutionality of the act was that it was an exercise of the police power. But the court held that, while "the right of the state, in the exercise of its police power, to regulate the business of receiving, weighing, inspecting, and storing grain in elevators and warehouses, as being a business affected with a public interest, is now settled beyond all controversy" by the case of *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77, and others on the same line, yet that the act there in question could not be regarded as a police regulation of the business, and that the police power of the state to regulate a business does not include the power to engage in carrying it on. It would extend this opinion to an unwarrantable length to make further quotations from the opinion of the court in that case, which might be instructive and profitable. It seems to us, therefore, that in no view of the case can the dispensary act be regarded as a police regulation of the business of selling intoxicating liquors, and, even if it could be, that such police power does not include the power on the part of the state to engage in carrying on such business.

Finally, the constitutionality of the dispensary act is assailed upon the ground that the legislature have undertaken thereby to embark the state in a trading enterprise, which they have no constitutional authority to do: not because there is any express prohibition to that effect in the constitution, but because it is utterly at variance with the very idea of civil government, the establishment of which was the expressly declared purpose for which the people adopted their constitution; and therefore all the powers conferred by that instrument upon the various departments of the government must necessarily be regarded as limited by that declared purpose. Hence when, by the first section of the second article of the constitution, the legislative power was conferred upon the general assembly, the language there used cannot be construed as conferring upon the general assembly the unlimited power of legislating upon any subject, or for any purpose, according to its unrestricted will, but must be construed as limited to such legislation as may be necessary or appropriate to the real and only purpose for which the constitution was adopted, to wit, the formation of a civil government. In this connection it is noticeable that the word "all" is not used in the section above referred to, but the language used is, "the legislative power," meaning such legislative power as may be necessary or appropriate to the declared purpose of the people in framing their constitution and conferring their powers upon the various departments constituted for the sole purpose of carrying into effect their declared purpose. It is manifest from the numerous express restric-

tions upon the legislative will found in the constitution that the people were not willing to intrust even their own representatives with unlimited legislative power, but, as if not satisfied with these numerous express restrictions, and perhaps fearing that some important right might have been overlooked, a general clause, not usually found in state constitutions, was inserted, apparently designed to cover any such omissions, for in section 41 of article 1 it is expressly declared that "the enumeration of rights in this constitution shall not be construed to impair or deny others retained by the people, and all powers not herein delegated remain with the people." Now, upon well-settled principles of constitutional construction we are not at liberty to disregard this clause, but must give it some meaning and effect. It seems to us that the true construction of this clause is that, while there are many rights which are expressly reserved to the people, with which the legislature are forbidden to interfere, there are other rights reserved to the people, not expressly but by necessary implication, which are beyond the reach of the legislative power, unless such power has been expressly delegated to the legislative department of the government. These views have not only the support of the highest authority in this country, as may be seen by reference to the cases of *Citizens Sav. & L. Assn. of Cleveland v. Topeka*, 87 U. S. 20 Wall. 655, 22 L. ed. 455, and *Parkerburg v. Brown*, 106 U. S. 487, 27 L. ed. 238, but have been distinctly adopted by the supreme court of the state in *Feldman v. Charleston*, 28 S. C. 57, 55 Am. Rep. 6, as well as by the courts of Massachusetts and Maine, as may be seen by reference to *Allen v. Jay*, 60 Me. 124, 11 Am. Rep. 185; and *Lowell v. Boston*, 111 Mass. 454, 15 Am. Rep. 39, and, what is more, they were applied to the vital power of taxation,—a power absolutely essential to the very existence of every government. These cases substantially hold that, although there may be no express restrictions contained in a state constitution forbidding the imposition of taxes for any other purpose than a public purpose, yet such a restriction must necessarily be implied from the very nature of civil government; and hence the legislative department, under the general power of taxation conferred upon it, cannot impose any tax except for some public purpose. Upon the same principle it seems to us clear that any act of the legislature which is designed to, or has the effect of, embarking the state in any trade which involves the purchase and sale of any article of commerce for profit, is outside and altogether beyond the legislative power conferred upon the general assembly by the constitution, even though there may be no express provision in the constitution forbidding such an exercise of legislative power. Trade is not, and cannot properly be, regarded as one of the functions of government. On the contrary, its function is to protect the citizen in the exercise of any lawful employment, the right to which is guaranteed to the citizen by the terms of the constitution, and certainly has never been

delegated to any department of the government.

We do not deem it necessary to go into any extended consideration of the fearful consequences of recognizing the power of the legislature to embark the state in any trade, arising from the hazards of all business of that character, or to comment upon the danger to the people of the monopoly of any trade by the state,—for if it can monopolize one it may monopolize any or all other trades or employments,—although it is permissible for a court, when called upon to construe an act, to consider its effects and consequences; for it may be said—indeed, has been said—that the good sense and patriotism of the members of the general assembly may be safely relied upon to protect the people from such apprehended dangers. But that great luminary of the law, *Chief Justice Marshall*, did not seem to think that this was a sufficient protection, as may be seen by what he said in *McCulloch v. Maryland*, 17 U. S. 4 Wheat. 316, 4 L. ed. 579; and in *Brown v. Maryland*, 25 U. S. 12 Wheat. 419, 6 L. ed. 678. Nor did the Supreme Court of the United States in later days seem to think that this confidence in the good sense and patriotism of the legislative department was a sufficient safeguard against exercise of a power which might become dangerous, for while, on the one hand, in the case of *Dobbins v. Erie County Comrs.*, 41 U. S. 16 Pet. 485, 10 L. ed. 1022, it was held that a state cannot tax the salary of a United States officer, on the other hand, in the case of *Buffington v. Day*, 78 U. S. 11 Wall. 113, 20 L. ed. 122, it was held that the United States could not tax the salary of a state officer, although in the case last cited, in his dissenting opinion, *Mr. Justice Bradley* took the ground that such confidence would be a sufficient safeguard against a dangerous exercise of the taxing power. These two cases were decided upon the principle that, inasmuch as "the power to tax involved the power to destroy," as has been said by *Marshall, Ch. J.*, in *McCulloch v. Maryland*, *supra*, the only adequate protection was to deny the power of the state government to tax the means and instrumentalities employed by the United States government to carry into operation the powers granted to it; and for a like reason the power of the United States government is denied to tax the means and instrumentalities employed by the state government to carry into effect its powers, although both of these governments were established for the protection and preservation of the rights of the same people; and this was held although there is no express provision in either of the constitutions of these two governments forbidding the imposition of such a tax, for, as was said by *Mr. Justice Nelson* in delivering the opinion of the court in the case last cited: "It is admitted that there is no express provision in the constitution that prohibits the general government from taxing the means and instrumentalities of the states, nor is there any prohibiting the states from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication,

and is upheld by the great law of self-preservation." It is urged, however, that in the past the state engaged in the business of banking and in the establishment of a state college, and these furnish a precedent for the state engaging in any other business which may be deemed by the legislative department of the government conducive to the public welfare. In the first place, these institutions were established under the Constitution of 1790, which contained no such provision as that found in the forty-first section of the first article of the Constitution of 1868. In the second place we are not informed of any instance in which the constitutionality of the acts establishing either of those institutions was ever brought to the test of judicial decision, and therefore they can form no precedent for our guidance in this case. In the third place, the establishment of a bank may be, and has been, most ably defended, upon the ground that such an institution is necessary to the proper control and management of the fiscal affairs of the government, and is therefore a proper governmental instrumentality, though we must not be understood as indorsing the proposition thus ably defended, for that question is not now before us, and we do not propose now to intimate any opinion upon the subject. As to the college, we do not regard that institution, in any proper sense of the term, as a business, certainly not as a trade, and it bears no analogy whatever to the business of buying and selling intoxicating liquors, or any other article of commerce. And as to the business of school teaching, if such an occupation can be characterized as a business, in the sense in which that term is used in this opinion, the very fact that the framers of the present constitution saw fit to incorporate in the present constitution an express mandate requiring the establishment of public schools, is not only destructive of any argument drawn from analogy as to the power of the state to engage in any business, but also warrants the inference that without such express mandate the state would not have the power to engage in such so-called business.

Finally, it seems to us that the question as to the right of the state to engage in any trade or business for the purpose of gain has been practically determined adversely to such right in the recent case of *Mauldin v. Greenville*, 33 S. C. 1, 8 L. R. A. 291. There one of the questions raised was as to the power of the city council to purchase and hold an electric light plant for the purpose of lighting the streets and public buildings and offices of the city, and also for the purpose of furnishing lights to the people at proper charges therefor. The court held that, while the city council was invested with power to provide for lighting the streets and public buildings in the mode proposed, yet they had no power to engage in the business of furnishing lights to private individuals in their residences or places of business, for the reason, as it was pointedly expressed by *Mr. Justice McGowan* in delivering the opinion of the court: "As we understand it, all the powers given to the city council were for the sole and exclusive purpose of government, and not to enter
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into private business of any kind, outside of the scope of the city government." And this was said although the charter of the city—its constitution, so to speak—conferred upon the city council the broadest and most extensive powers for the good government of the city. So here we may say that the legislative power conferred upon the general assembly by the constitution of the state was given to them "for the sole and exclusive purpose of government, and not to enter into private business of any kind, outside of the scope of the [state] government." Although the counsel for appellant very properly did not rely upon the case of *State v. Chester* (S. C.) 17 S. E. Rep. 752, as any authority whatever, upon the questions presented in the present case, yet it may not be amiss for us to say that the questions here presented were not there decided or considered, for the obvious reason that they were not necessary to the decision of that case, and therefore, under the well-settled rule (*Cooley, Const. Lim.* 163) that a court will not, and ought not to, pass upon a constitutional question, and declare a statute to be invalid, unless a decision upon that very point becomes necessary to the determination of the cause, in the *Chester Case* the court did not feel at liberty to consider the general question of the constitutionality of the dispensary act, and, on the contrary, carefully guarded against even any intimation of opinion as to the general question. Now, however, the question is squarely presented, and has been fully and ably argued on both sides and we are compelled to meet it. After the fullest and most careful and deliberate consideration, we feel constrained to say that the act is clearly unconstitutional, except in so far as it forbids the granting of licenses to retail spirituous liquors beyond the 30th of June, 1893. Under this view, all subordinate questions presented in all the cases, except the first named, lose all practical importance, and need not, therefore, be considered.

In the case first mentioned in the title of this opinion, however, there are other questions presented, some of which it is necessary to decide, although the necessity for the consideration of others is superseded by the conclusion which we have reached on the main question of the constitutionality of the dispensary act. It may be stated in general terms that this was an action instituted by certain taxpayers of the county of Darlington in behalf of themselves and other taxpayers of said county, who are too numerous to be made parties, for the purpose of enjoining and restraining the defendants from establishing a dispensary in the town of Darlington, upon several grounds, mainly upon the ground that the act providing for such establishment is unconstitutional, null, and void. It will be well, however, for a full understanding of this branch of the case, that the pleadings in the case, without the accompanying affidavits, should be incorporated in the report of the case. Without considering at any length this question of mere procedure, it seems to us that the remedy by injunction is appropriate in the case as presented by the pleadings. The real object of the action is to prevent certain persons

from engaging in a business involving the use of public funds derived from taxation under an act of the legislature claimed to be unconstitutional, and we think the authorities cited by the counsel of record for the plaintiffs, especially Cooley on Taxation, 764, and 1 Pomeroy on Equity Jurisprudence, 277, together with our own case of *Mauldin v. Greenville*, *supra*, are amply sufficient to sustain the view taken by the circuit judge. All the other exceptions in this case present questions which, in our judgment, it becomes unnecessary to consider, under the view which we have taken as to the unconstitutionality of the act.

The judgment of this court is that the judgments and orders appealed from in each of the cases mentioned in the title be affirmed.

McGowan, J., concurs.

Pope, J., dissenting:

These six cases, separately tried on circuit, though differing in some particulars, inasmuch, however, as each one involved constitutional questions of similar import, were heard together in this court, by common consent, and under an order duly passed here for that purpose.

The first case—that of *McCullough et al.* against *Brown et al.*—involves this point which is not contained in the questions raised by the other five cases, viz., whether, in an action on the equity side of the court of common pleas, an injunction can issue to restrain a special tribunal, created by law for a well-defined purpose, from the performance of the duties confided to its discretion, while acting within its jurisdiction. We are of opinion that such a remedy cannot avail the plaintiffs. The only way the errors of such a tribunal, while acting within its special jurisdiction, can be corrected, is under the writ of certiorari. This point has recently been considered and decided by this court in the case of *State v. Kirkland* (S. C.) 19 S. E. Rep. 215. The next five cases differ from the first case—*McCullough et al.* against *Brown et al.*—in this: These being indictments against the respective defendants in the court of general sessions for a violation of what is known as the “Dispensary Act,” in the sale of beer against the provisions of that statute, the defendants demurred because such act creating the offense provided no punishment therefor; and it was claimed that by section 2653 of the General Statutes, which provides that in case of a conviction, where no punishment is provided by statute, the court shall award such sentence as is conformable to the common usage and practice in this state, according to the nature of the offense, and not repugnant to the constitution, the selling of liquor without a license is made a misdemeanor. The punishment affixed to misdemeanors should have been applied. This ruling of the circuit judge was erroneous. Besides, it is far from being clear that section 21 of the Dispensary Act does not apply to the offense charged in the indictment. Section 21 is complete, in defining the offense, and providing a punishment, in express terms. Thus the way is cleared, and

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it becomes necessary to consider the constitutional questions raised in these cases, they being the same in each of the six cases.

The majority of this court has reached the conclusion that the whole act is unconstitutional. I am unable to agree with the other members of the court in such conclusion, and I propose to state my reasons for holding just the opposite views to those expressed by them. Now, this is a court. Therefore, the expression of any opinion on the merits of prohibition or anti-prohibition, license or no-license, is no part of my business. The justice or injustice of an act of the legislature, its wisdom or improvidence, belong exclusively to the legislature, and the people, whose servants they are. If the law is unwise or improvident, let an appeal be made to the ballot box. Neither this court nor any other court has a right, under the constitution, to meddle with the legislature in regard to the foregoing matter. I make these remarks because it is very palpable that, in effect, such interference is sometimes made, and there is a growing tendency on the part of the courts to assume a power which the law has never given them, under the guise of some philosophical abstraction that there is some power in them, by reason of some mysterious something, called, for the want of a better name, “the social compact.” This country has been made to drink the cup of sorrow to its bottom by reason of their abstractions, and it is fully time that the good sense of judges shall stamp such a vague and shadowy claim—having for its basis nothing in the organic law to support it—out of existence; and if they do not, or will not, it is very sure they are leading the way to incalculable mischief, for the mutterings of a coming storm by reason thereof are plainly distinct. “An ounce of prevention is worth a pound of cure.” The opinion of the majority is very explicit in its admission that all the presumptions are in favor of the constitutionality of an act of the general assembly, and that it is the duty of any one assailing such an act as unconstitutional to point out, by specific objections, wherein it is unconstitutional. In the cases at bar, we have more than presumptions as to its constitutionality, for this court, in the case of *State v. Chester* (S. C.) 17 S. E. Rep. 752, have, among other things, held that the dispensary act was duly passed by the general assembly, and approved by the governor, as far as a compliance with the constitutional requirements relating to and governing the mode of enacting laws by the legislature are concerned. The respondents, in the court below, recognized this duty to specify the constitutional defects in this law, and have sought to comply with it by assailing the power of the general assembly to enact such a law, by reason of certain sections of the state constitution restricting the legislative power, or, by necessary implication, denying its exercise. I think I fully recognize the gravity of the suggested difficulties to enable me to discharge my duty in their consideration. I have endeavored to realize my solemn oath of office to uphold, protect, and defend the Constitution of the United States

and this state, and, for this purpose, to close my ears to popular clamor, or expressions of opinion by others than members of this court, after the arguments of counsel had been heard. It will be a sad day for constitutional liberty, in this state or country, when cases are to be decided here in haste, and without a thorough consideration by the members of this court, or when a decision here reached is the result, not of investigation of legal and constitutional principles, but of partisan influences or dictation. A moment's reflection will establish it as a truth that a judge who is made to vary his honest conclusions of the law by a popular demand for such variance is to be pitted as well as condemned. He is not justly entitled to be ranked with O'Neill, Johnston, Wardlaw, and others.

Let me now direct my attention to the points here raised, which, in my judgment, may be considered in the form of the following questions: (1) What is the legislative power of this state, as defined in the constitution, our own decisions, those of the Supreme Court of the United States, those of other states of this Union, and by text-writers of acknowledged authority? (2) What restrictions are placed, by the sections of our constitution relied upon here, fixing limits to the exercise of legislative power? (3) To what class of legislation do restrictions refer, or the denial of the right to sell intoxicating liquors belong? And herein a brief sketch of our legislative history touching the traffic in intoxicating liquors as a beverage. (4) Is the exercise of the police power attempted under the provisions of this act inhibited by the sections of the constitution, either in their terms, or by necessary implication from the terms actually used?

The preamble of our constitution declares: "We the people of the state of South Carolina, in convention assembled, grateful to Almighty God for this opportunity, deliberately and peaceably of entering into an explicit and solemn compact with each other, and forming a new constitution of civil government for ourselves and posterity, and recognizing the necessity of the protection of the people in all that pertains to their freedom, safety, and tranquillity, and imploring the direction of the Great Legislator of the Universe, do agree upon, ordain and establish the following declaration of rights and form of government as the constitution of the commonwealth of South Carolina." In the twenty-sixth section of the declaration of rights it is provided: "In the government of this commonwealth, the legislative, executive and judicial powers of the government shall be forever separate and distinct from each other and no person exercising the functions of one of said departments shall assume or discharge any other." Section 27: "The general assembly ought frequently to assemble for the redress of grievances, and for making new laws as the common good may require." I will not transcribe the other sections in this declaration of rights, but will content myself with giving the effect of other sections thereof bearing on the general assembly. Section 4 prevents any leg-

islation looking to a dissolution of the American Union. Section 6 provides that no law shall be passed to prevent the people from peaceably assembling to consult for the public good, and petition any department of the government. Section 7 prohibits the enactment of any laws to abridge the liberty of speech or of the press. Section 9 prohibits any law interfering with the liberty of conscience. Section 10 prohibits any legislation establishing religious worship. Section 11 preserves the right of trial by jury. Section 13 preserves personal rights from legislative interference, except such as are made to apply upon others under like circumstances. Section 14 prevents interference with full protection of the law to all, and the enactment of any laws *ex post facto*. Section 15 requires that all courts shall be public. Section 17 secures the right of habeas corpus. Section 18, that no man shall be put twice in jeopardy of his life. Section 19 regulates petit crimes and the grand jury. Section 20 provides an estate in homestead, and regulates imprisonment for debt. Section 21 provides that no bill of attainder, *ex post facto* law, nor any law impairing the obligation of a contract, shall be enacted,—no corruption of blood, or forfeiture of estate. Section 23 prescribes that no warrant for search and seizure shall be issued but in cases, and with the formalities, prescribed by the laws.

Section 28 regulates the enactment of laws under eminent domain. Section 24 prescribes that the general assembly shall alone provide for the suspension of the laws. Section 25 restricts the authority to declare martial law to the authority of the general assembly. Section 23 restricts the interference with the right to bear arms to the general assembly. Section 29 relates to quartering soldiers, in times of peace, in any house, without the consent of the owner, except in a manner prescribed by law. Section 33 provides that the right of suffrage shall be protected by laws regulating elections. Section 34 relates to representation, and forbids any interference therewith, except by a trial by jury, or a law of the land. Section 36 relates to taxation, and requires *ad valorem* taxation. Section 37 requires that no subsidy, impost tax, or duties shall be levied without the consent of the people, or their representatives lawfully assembled. Section 39 relates to letters of nobility or distinctions. Section 40 relates to the navigability of waters within the state. Section 41 provides that the enumeration of rights in this constitution shall not be construed to impair or deny others retained by the people, and all powers not herein delegated remain with the people. By the first section of article 2 of our Constitution, it is provided: "The legislative power of this state shall be vested in two distinct branches, the one to be styled the 'Senate' and the other the 'House of Representatives' and both together the 'General Assembly of the State of South Carolina.'" By section 1 of article 1 of the Constitution of South Carolina, adopted in June, 1790, it was provided: "The legislative authority of this state shall be vested in a general assembly, which shall consist of a senate and a house

of representatives." 1 Stat. at L. 184. The constitution adopted in 1790 virtually was of force until April, 1868, when the present constitution was adopted. So we will speak of the former as the "Old Constitution," and the latter as the "New Constitution." Prior to the formation of the national government, and after this state had ceased to be a colony of Great Britain, the state of South Carolina was one of the sovereign states of the world. Its power of legislation was as unlimited as the parliament of Great Britain. Having entered the union of states, it parted with as much of its sovereign power as was vested, by the Constitution of the United States and its amendments, in the government of the United States. These grants of power so parted with were enumerated in the constitution of the general government, but all the balance of the sovereign powers were retained by the people, and were confided by them to the governmental agencies created in the organic law,—the state constitution. One of these governmental agencies, as we have seen, was the legislature. It became necessary for the courts to define the constitutional provision creating this department, and we propose to show that, both under the old and the new constitution, the words used in both instruments have been determined by the courts of last resort in this state to mean that the whole legislative power of the state of South Carolina was devolved upon the general assembly, limited only by restriction upon the exercise of such legislative power by the Federal Constitution on the one hand, and by the state constitution upon the other. In *Osborne v. Huger*, 1 Bay, 206, speaking of the power of the legislature of this state, Mr. Justice Bay said: "To suppose that the supreme legislature of a sovereign country has no right to regulate the conduct of its officers and the mode of business, would be straining the matter very far indeed." Judge Richardson said in *State v. Hutson*, 1 McCord, L. 242: "But, by the constitution of this state, all legislative authority, with very few restrictions, is given to the legislature or general assembly. A law, then, when enacted by that body, must be deemed constitutional, unless it comes plainly within some constitutional exception to the general power of legislation." Judge David Johnson said in *State v. Williams*, 2 McCord, L. 304: "The constitution confers on the legislature a general power to legislate with only two classes of limitations; those that are directory, and those that are prohibitory; you shall do this, and you shall forbear to do that." Chief Justice John Belton O'Neill said in *State v. Charleston*, 10 Rich. L. 491: "I know no restrictions on legislative power, which in this state is vested by the constitution in the general assembly, except those which deny certain powers, or which, by implication, arise because certain powers are conferred on congress. So far as legislative power is concerned, I agree that, subject to the restrictions which I have suggested, the general assembly has all the powers of the parliament of Great Britain."

So much for the decisions of our court of last resort upon the grant of power to the

legislature rendered prior to the 16th of April, 1868. Let us see what this court has laid down since that date. Chief Justice Willard, as the organ of the court, said in the case of *State v. Hayne*, 4 S. C. N. S. 420: "Although the particular office of this section [section 1 of article 2 of our Constitution] is to fix certain important features of the body through which the functions of legislation is to be exercised, yet it describes in an authoritative way the nature of the power thus vested. It is no less than the legislative power of the state. It is not such and so much of the legislative powers of the state as were intended to be used by that particular body, but it was the whole legislative power of the legislature of this state,—its whole capacity for making laws, and providing a means for their enforcement. It was not intended that the legislature should exercise power without limitation or restraint, for the constitution that uses these words of grant imposes many such restrictions and limitations, affecting the extent to which it may be effectually exercised." So, too, Mr. Justice McGowan, in *Peleur v. Campbell*, 15 S. C. 592, 40 Am. Rep. 705, said: "The legislature is a lawmaking power of this state upon all subjects not prohibited by the constitution, every part of which should, if possible, be so construed as to allow full force to section 1 of article 2, which vests the full legislative power of the state in the general assembly. The English parliament, in a political sense is omnipotent; but with us it is the people, and the people speak through the legislature, except when restricted by the Constitution of the United States or this state. No statute can be disregarded, unless a constitutional violation can be pointed out." Equally as explicit is the same justice in *Ex parte Lynch*, 16 S. C. 33, and the justice who delivered the unanimous opinion in *Utsey v. Charleston, S. & N. R. Co.* 38 S. C. 399.

But what says the United States Supreme Court on this subject? Said Mr. Justice McLean in the *License Cases*, 46 U. S. 5 How. 587, 12 L. ed. 293. "Before the adoption of the constitution [United States] the states possessed respectively, all the attributes of sovereignty. In their organic laws, they had distributed their powers of government according to their own views, subject to such modifications as the people of each state may sanction. . . . The federal government is supreme, within the scope of its delegated powers; and the state governments are equally supreme in the exercise of those powers not delegated by them to the United States, nor inhibited to them." I am sorry that the extended references to our own decisions, and those of other states, in relation to the extent of the legislative power in the states, will forbid my resorting, at this point, to more extended notice of the decisions of the Supreme Court of the United States. Upon investigation it will be found that no decisions rendered by that court assert any greater restrictions upon the legislative power in the states than I have already admitted, except an *obiter dictum* of Chief Justice Marshall in *McCulloch v. Maryland*, 17 U. S. 4

Wheat, 383, 4 L. ed. 595; in a dissenting opinion by Mr. Justice Brewer (*Budd v. New York*, 143 U. S. 551, 36 L. ed. 258,) and the guarded language of Mr. Chief Justice Fuller in *Giozza v. Tiernan*, 148 U. S. 661, 37 L. ed. 601, when he says: "Irrespective of the operation of the Federal Constitution, and restrictions asserted to be inherent in the nature of American institutions, the general rule is that there are no restrictions upon the legislative power of the legislature of a state, except those imposed by its written constitution." It will be noticed that Chief Justice Fuller does not admit the existence of the social-compact theory. He merely says it is asserted. A very pungent article on this subject by Richard C. McNortin, Esq., in the *American Law Register and Review*, of December, 1893, uses these words: "Could there be found one man that would consent to thus transfer the sovereignty of the nation from its representatives to a court, by enacting that all legislation contrary to the said compact shall be void? And what that compact is, the judges shall be the final arbitrators, and they are to ascertain it from their own notions as to what it ought to be assumed to have been." This legal heresy had disappeared, from early in this century until recently.

What do some of the other states of this Union hold? Unquestionably, the supreme court of Pennsylvania, announced by that splendid jurist, Chief Justice Jeremiah S. Black, in *Sharpless v. Philadelphia*, 21 Pa. 169, 59 Am. Dec. 759, has been recognized by the Supreme Court of the United States and the courts of the different states of the Union as the leading authority on this subject. I can recall at least four instances where this decision has been recognized in this state: *State v. Charleston*, *State v. Hayne*, *Pelzer v. Campbell*, and *Utsey v. Charleston, S. & N. R. Co. supra*. This judge said: "The powers bestowed on the state government were distributed by the constitution to the three great departments: the legislative, the executive, and the judicial. The power to make laws as granted in section 1 of article 1 by the following words: 'The legislative power of this commonwealth shall be vested in a general assembly, which shall consist of a senate and house of representatives.' It is plain that the force of these general words, if there had been nothing elsewhere to qualify them, would have given to the assembly an unlimited power to make all such laws as they might think proper. They would have had the whole omnipotence of the British parliament. But the absolute power of the people themselves had been previously limited by the Federal Constitution, and they could not bestow on the legislature authority which had already been given to congress. . . . The jurisdiction of the assembly is still further confined by that part of the constitution called the 'Declaration of Rights,' which, in twenty-five sections carefully enumerates the reserved rights of the people, and closes by declaring that 'everything in this article is excepted out of the general powers of the government, and shall remain forever inviolate.' The general assembly cannot, there-

fore, pass any law to conflict with the rightful authority of congress, nor perform a judicial or executive function, nor violate the popular privileges reserved by the declaration of rights, nor change the organic structure of the government, nor exercise any other power prohibited in the constitution. If it does any of these things, the judiciary claims, and in clear cases has always exercised, the right to declare such acts void.

We are urged, however, to go further than this, and to hold that a law, though not prohibited, is void if it violates the spirit of our institutions, or impairs any of those rights which it is the right of a free government to protect, and to declare it unconstitutional if it be wrong and unjust. But we cannot do this. It would be assuming a right to change the constitution, to supply what we conceive to be its defects, to fill up every *casus omissus*, and to interpolate into it whatever, in our opinion, ought to have been put there by its framers. The constitution has given us a list of what the legislature may not do. If we extend that list, we alter the instrument; we become ourselves the aggressors, and violate both the letter and spirit of the organic law as grossly as the legislature could. If we can add to the reserved rights of the people, we can take them away. If we can mend, we can mar. If we can remove the landmarks which we find established, we can obliterate them. If we can change the constitution in any particular, there is nothing but our own will to prevent us from demolishing it entirely." See also, *People v. Flagg*, 46 N. Y. 404; *Stewart v. Polk County Suprs.* 30 Iowa, 9. But space bids us to desist.

Now, as to the opinions of text-writers: Mr. Bishop, in his work on the Written Laws, at section 92, says: "The Constitution of the United States consists chiefly in a grant of enumerated powers. Hence, in interpreting it, the courts presume the existence of no powers not expressly or impliedly conferred. On the other hand, a state constitution proceeds on the idea that all legislative functions are in the legislature. Therefore, in its interpretation, the powers not taken away by the United States Constitution are preserved, excepting as expressly or by implication denied." Mr. Cooley, in his work on Constitutional Limitations (page 307), says: "All legislative power is conferred on the senate and assembly; and, if an act is within the legitimate exercise of that power, it is valid, unless some restriction or limitation can be found in the constitution itself. The distinction between the United States Constitution and our state constitution is that the former confers upon congress certain specified powers, only, while the latter confers upon the legislature all legislative powers. In the one case, all legislative powers not prohibited may be exercised." I might go forward, and quote other text-writers, but Mr. Cooley is recognized as standard authority.

Thus, our own state courts, those of the United States Supreme Court, the supreme courts of other states, and standard text-books on constitutional law, plainly show that this modern dress to an exploded idea is not

sustained by authority, and that the authority of the legislature of this state to enact laws is only restricted by our constitution and that of the United States, as is in each instrument actually specified, or necessarily implied from such restrictions there plainly expressed.

We are now prepared, as the next step in our investigations, to see wherein the dispensary act violates the constitution of this state. I say "state," for the opinion prepared by the majority of this court is exceedingly careful to confine the discussion to the state constitution, so as not to include the question suggested in the court below as to federal questions.

It is suggested that this act violates at least two of the sections of the state constitution. What are these? It may be as well to quote these sections from the text of the constitution itself. Section 1 of article 1 provides: "All men are born free and equal, endowed by their Creator with certain inalienable rights, among which are the rights of enjoying and defending their lives and liberties, of acquiring, possessing, and protecting property, and of securing and obtaining their safety and happiness." Section 12 provides: "No person shall be disqualified as a witness or be prevented from acquiring, holding, and transmitting property, or be hindered in acquiring education, or be liable to any punishment for any offense or be subjected in law to any other restraints or disqualifications in regard to any personal rights than such as are laid upon others in like circumstances." Section 14 provides: "No person shall be arrested, imprisoned, despoiled or dispossessed of his property immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land, and the general assembly shall not enact any law that shall subject any person to punishment without trial by jury, nor shall he be punished but by virtue of a law already established or promulgated prior to the offense and legally applied." Section 41 provides: "The enumeration of rights in this constitution shall not be construed to impair or deny others retained by the people, and all powers not herein delegated remain with the people." I have thus taken the pains to reproduce the text itself, so far as these sections are concerned. Let us now take the pains to investigate the claims set up in the opinion of the majority of this court as to the inalienable rights of the citizen.

I submit that the true office of section 1 of article 1 has been obscured. It is true it is there stated that life, liberty, property, tranquillity, or safety and happiness are therein set up as inalienable rights. What is meant by these terms? Surely, no one for a moment will contend that these inestimable boons of a wise Providence, in a civilized community, mean that life is to be preserved to an individual, no matter how many other lives are ruthlessly destroyed by him; that the liberty of a man is to be preserved as an inalienable right, when he has lost his senses, and endangered the lives of others; that the prop-

erty of a man is to be preserved as an inalienable birthright if that man recklessly destroys the property, reputation, or liberty of his fellow man, or that others must guarantee him safety if he is a murderer. No, for we find that, under this very constitution, laws may be enacted to hang the murderer, the man guilty of arson or rape; to imprison for life a man guilty of certain crimes, or one found guilty of fraud, or that even steals a chicken for food; to sell his property, and every part of it, to pay taxes due the government, and sell everything, except a homestead, for debt. Let us cease these assertions of inalienable rights, in the connection in which they are so frequently, and with such unction, lauded. The true view of this section is to lay down, in the first place, enumerated rights, that individuals, acting in their own behalf, cannot disregard or destroy; and, in the second place, to call on the government, in its different agencies, to promote all the blessed rights of free men. These four sections of our constitution should be construed together, and when this is done all is made clear and consistent, the one clause with the other, and to accord with what we see taking place around us in governmental affairs, both in the state and nation. Certainly, the grand, central thought, in government, is to secure the happiness, and promote the welfare, of the entire body of the citizens, and it was for this purpose the people established government. The courts have construed these provisions in the sections of article 1 of our state Constitution. The meaning to be attached to the terms "privileges and immunities" was construed many years ago by Mr. Justice Washington in *Corfield v. Coryell*, 4 Wash. C. C. 371, Fed. Cas. No. 3,230, as follows: "They may all, however, be comprehended under the following heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue happiness, subject, nevertheless, to such restraints as the government may justly prescribe for the general good of the whole." This definition has been accepted by the United States Supreme Court and by the courts of the states. So far as government is concerned, no rights may be said to be absolute. They all are held subject to such restraints as the government may impose for the general good of the whole. In regard to land, by our state constitution, in addition to the general restrictions upon its enjoyment by its owner as his property, its ultimate ownership is in the people. Therefore, wherever the rights enumerated in *Corfield v. Coryell*, *supra*, and which appear in our declaration of rights, are involved, it may be regarded as settled in accordance with the view that they can be subjected to such restraint as the government may justly prescribe for the good of the whole. An examination of sections 12 and 14 plainly declares that personal rights shall not be ruthlessly or capriciously or unnecessarily or partially invaded by the government for "the good of the whole," but that the same shall only be interfered with (in the twelfth) in the same manner "as are

laid upon others under like circumstances," and (in the fourteenth section) no interference with personal rights, except "by the judgment of his peers or the law of the land." By the term "judgment of his peers" is meant trial by jury; and "the law of the land" has been carefully considered, in this state, in the cases of *Zylstra v. Charleston*, 1 Bay, 884; *White v. Kendrick*, 1 Brev. 471; *State v. Maxey*, 1 McMull. L. 502; *State v. Simons*, 2 Speers, L. 761; *Faust v. Bailey*, 5 Rich. L. 115; *State v. Tax Collector of St. Philips & St. Michaels*, 2 Bail. L. 677; *Charleston v. Stegels*, 10 Rich. L. 440. Chief Justice O'Neill, in *State v. Simons*, *supra*, said: "There can be no hesitation in saying that these were the common law and the statute law existing in this state on the adoption of our Constitution (1790). Altogether, they constitute the body of our law, prescribing the course of justice to which a free man is to be considered amenable in all times to come." Bear in mind that the making of a constitution is always preceded by the existence of a society of people who make it. Our forefathers, as before remarked, had not only the common law of the mother country, but also statutes they had previously enacted, and had lived under. The idea, in forming a new constitution, is always to correct, by enlargement, modification, or negation of laws previously existing, by the people of the state. Thus, we find, in 1868, when our present constitution was adopted, it eliminated very carefully laws that were objectionable. For example, "slavery," "corporate privileges," "restrictions upon banks," etc. The same terms, "the laws of the land," which were used in the old constitution, were retained in the new Constitution of 1868. So the definition of these words, and the others I have quoted, which were used in both instruments, are to be construed by us to mean what the decisions I have quoted declared them to mean. Thus, it is made manifest that what has been declared to be the meaning of the 1st, 12th, and 14th sections of the one article of our constitution cannot legitimately be construed as has been contended. Now, as to section 41. When that section is examined, it will be seen that it does not cover the case of rights and powers, as expressed in the instrument, for these words are used not "to impair others retained by the people," that are not set out in the instrument. "And all powers not herein designated are reserved for the people." The full legislation had been and was granted by this very instrument. But we need not cast about for the meaning of this section. It has already been construed by this very court in *State v. Hayne*, 4 S. C. N. S. 421, where Chief Justice Willard uses this language: "The true effect of this declaration [forty-first section of article 1] is that it reserves to the people whatever is not granted by the instrument; as, for instance, the right to make changes in the form of government is not granted, and, under this clause, remains in the hands of the people, capable of exercise when they may see fit so to do. As the legislative power is granted in express terms, importing a grant of general powers, such general powers of legisla-

tion cannot be regarded as reserved to the people under this section. Such general language as that contained in section 41 of article 1 cannot be allowed such force and effect as to change entirely the nature of the legislative power, and to introduce anomalous ideas in the structure of the government." And this decision has been affirmed by several other decisions of this court. Mr. Cooley, in his great work on Constitutional Law, at page 63, says: "A cardinal rule in dealing with written instruments is that they are to receive an unvarying interpretation, and that their practical construction is to be uniform. A constitution is not to be made to mean one thing at one time, and another at some subsequent time, when the circumstances may have so changed as, perhaps, to make a different rule in the case seem desirable. A principal share of the benefits expected from written constitutions would be lost, if the rules they establish were so flexible as to bend to circumstances, or be modified by public opinion."

Having thus fixed ideas as to the meaning of these four sections of our constitution, let us patiently examine the dispensary act, to ascertain what is its nature, scope, and object, to the end that we may justly apply other principles of law duly involved.

It may be as well to settle definitely what is the nature, scope, and object of the Act of 1892. Its title declares it to be "An Act to Prohibit the Manufacture and Sale of Intoxicating Liquors as a Beverage within This State except as herein Provided." Now, what was the law in this state regulating the manufacture and sale of intoxicating liquors as a beverage on the 24th day of December, 1892? "It shall be unlawful for any person or persons to sell spirituous or intoxicating liquors without a license so to do." "No license for the sale of spirituous or intoxicating liquors shall be granted in South Carolina outside of the incorporated cities, towns, and villages of this state." Gen. Stat. S. C. § 1731. Not only so, but all citizens living in certain towns, cities, and counties, under local option laws of this state, were not allowed to sell, under license or otherwise, such spirituous or intoxicating liquors. An exception was also made under an act allowing the counties of Charleston, Beaufort, Colleton, Berkeley, and Hampton to allow licenses to sell such liquors outside of such incorporated cities and towns, so that, by the title to this act, its declared purpose was to revoke all powers to license the sale of intoxicating liquors as a beverage if the same were not recognized in the body of the act. Pause, first, a few moments longer before we dissect the provisions of this act, and remember some other pregnant truths. For intoxicating liquors to be sold under license in this state required that such applicant or such licensee should, as a condition precedent to such permit, enter into a bond in the penalty of \$1,000, conditioned that he would obey the laws of the state pertaining to the conduct of the sale of spirituous liquors as a beverage. The force of public opinion was so great that many good men dared not face the obloquy of engaging in the business.

Some of the greatest of our churches incorporated it into their organic laws that he who sold liquors as a beverage should not be received or retained in their membership. The evils of the business were so great as to gambling in such places, as to the sale to minors, as to the sale to habitual drunkards, and as to the losses to families by reason of the heads of such families drinking too much, that special statutes had been enacted to punish the saloon keepers for sales to such persons. But, towering above all these evils, a more dreadful one still struck terror into the breasts of all good men. The sanctity of the honor of our women was constantly jeopardized by the inflammation of the brutal passions of the low and vicious among us by strong drink. Under these circumstances and others—notably the experience at the ballot box in November, 1892, by a majority of more than 10,000 votes, the people had demanded the passage of a law prohibiting the sale of intoxicating liquors. The experience of the other states where prohibitory laws had been enacted had failed to convince this country that as yet such laws accomplished their most beneficent aims.

Under all these circumstances, the legislature of this state passed this act whereby the manufacture and sale were prohibited to the citizens as such. It undertook to confine the sale to the agents of the state, to be selected for such work because of their well-known sobriety and character for uprightness of life. The general agent was called the "commissioner," who, under a board of control, consisting of the governor, the comptroller general, and attorney general, should purchase all intoxicating liquors, and should have each and every part of the same analyzed by the state chemist, and declared by him pure and unadulterated. Such commissioner should sell such liquors to the county dispensers at not greater profit than 50 per cent above the net cost thereof. The commissioner was required to execute a bond in the penalty of \$10,000, conditioned for the faithful discharge of his duties. He was to pay all moneys received from sales into the state treasury monthly. Such commissioner was required, when his duties were not fixed by law, to obey such rules and regulations as were prescribed by the state board of control. He was paid a stated salary, and was commissioned by the state. County dispensers might be appointed in this state, except in those counties and towns in the state where an act of the legislature had declared licenses to sell liquors should not exist. These county dispensers were to be selected by county boards of control, to be appointed by the governor. Such county boards of control could not issue permits to such county dispensers until the city or town where such dispensary was to be established should, by a petition signed by a majority of the freehold voters of such city or town or township, request the same, and certify in such petition to the good character and sobriety of the applicant, which applicant should enter into a bond in the penalty of \$3,000, conditioned for the faithful discharge of his duties under this law. His duties under the

law were: (1) To obey the regulations of the county and state boards of control. (2) To sell liquors at a profit not greater than 50 per cent of their cost, and for cash. (3) To keep open his place of business in the exact building designated in his permit from the county board of control. (4) To retain the packages of liquor as received from the state commissioner without any seals being broken; to sell such sealed packages ranging from a half pint to five gallons without any seal being broken, and such seal not to be broken in the building used for such sale, and no part of such liquor shall be drunk at the place of such sale. (5) No sale shall be made by the county dispenser or his clerk unless upon a printed or ink written application, to be signed by the applicant himself, and witnessed by the signature of the county dispenser or his clerk, on blank forms to be furnished by the county auditor, wherein shall appear the true date of the sale, the place of residence of the applicant, the kind and quantity of liquors so sold; nor shall such sale be made unless the county dispenser knows the applicant personally, or has such applicant identified by a responsible person, not to be a person who is drunk at the time of the purchase, or who is a minor, or who is addicted to drink in excess. (6) Every county dispenser shall report his sales each month, shall file a report thereof with the proper officer, and shall keep a book wherein is enumerated the purchase of any kind and all kinds of liquor, which shall always be open to the public. (7) Every county dispenser shall file with the county auditor the applications for the sale of liquors, and make affidavit that he filed such applications as made therein, and no other, and that no more than one sale was made under each application. (8) No county dispenser shall be allowed to sell any other intoxicating liquors than such as he may purchase from the state commissioner, nor shall he adulterate, nor cause to be adulterated, any intoxicating, spirituous, or malt liquors which he or they may keep for sale under this act, by mixing with the same any coloring matter or any drug or ingredient whatever, or shall mix the same with other liquors of different kinds or quality or with water, or shall sell or expose for sale liquor so adulterated, knowing it to be such, under the pain of being tried for a misdemeanor, and subject therefor to a fine of not less than \$200, or imprisonment in the county jail for not less than six months. (9) No county dispenser could hold his office as a right, but as a trust reposed in him, and with the liability to have his permit canceled at any time within the discretion of the county board of control. (10) He should be liable to suit for any civil damage accruing to a wife, child, parent, guardian, employer, or other person under the provisions of law, and his bond should be the basis of such suits, if any. (11) His permit could in no case extend beyond one year from its date. (12) Sales could also be made by county dispensers to licensed druggists or manufacturers of proprietary medicines of intoxicating liquors (except malt liquors), for the

purpose of compounding medicines, tinctures, and extracts that cannot be used as a beverage. Such sales should only be at a profit of not over 10 per cent net profit for liquors so sold. (18) All profits accruing to the business so conducted by the county dispensers should be paid, after providing for all the expenses of the county dispensary, one half to the county treasury, and one half to the municipal corporation in which it was located. By the eighteenth section it is provided that the sum of \$50,000, if so much be necessary, be appropriated for the purpose of purchasing and supplying liquors to be distributed to county dispensers under the provisions of this act, to be expended by the state treasurer upon the requisition of the state commissioner, with the approval of the state board of control: provided, that the amounts advanced to each county dispenser shall be considered loans to be refunded out of the profits derived from the sales of liquors by the county dispensers. By the sixth section of the act it is provided "that on and after the first day of July, 1893, no person, firm, association or corporation shall manufacture for sale, sell, keep for sale, exchange, barter, or dispense any intoxicating liquors for any purpose whatever, otherwise than is provided in this act: . . . provided that no license for the sale of spirituous liquors now authorized to be granted by municipal authorities shall be of any force or effect after the 30th day of June, 1893, but licenses may be issued or extended to said 30th day of June, 1893, upon payment of one half of the annual license required by the municipal and county authorities in cities or towns where such licenses are or may be authorized to be issued: provided, further, that manufacturers of distilled, malt, or vinous liquors who are doing business in this state shall be allowed to sell to no person in this state except to the state commissioner, and to parties outside of the state. Every package, barrel, or bottle of such liquors shipped beyond the limits of the state shall have thereon the certificate of the state commissioner, allowing the same and otherwise it shall be liable to confiscation, and the railroad carrying the same shall be punished as in section 2: and provided that any person shall have the right to make wine, for his or her own use, from grapes or other fruit." Section 21 provides: "Every person who shall directly or indirectly, keep or maintain by himself, or by associating or combining with others, or who shall in any manner aid, assist or abet in keeping or maintaining any club room or other place in which intoxicating liquors are received or kept for the purpose of barter or sale as a beverage, or for distribution or division among the members of any club or association, by any means whatever, and any person who shall barter, sell, or assist or abet another in bartering or selling, any intoxicating liquors so received or kept shall be deemed guilty of a misdemeanor, and upon conviction thereof be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, and by imprisonment in the county jail not less than ninety days nor more than one year." Section 22

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provides: "All places where intoxicating liquors are sold, bartered, or given away in violation of this act, or where persons are permitted to resort for the purpose of drinking intoxicating liquors as a beverage, or where intoxicating liquors are kept for sale, barter, or delivery in violation of this act, are hereby declared to be common nuisances, and if the existence of such nuisance be established, either in a criminal or an equitable action upon the judgment of a court or judge having jurisdiction, finding such place to be a nuisance, the sheriff, or his deputy, or any constable of the proper county or city where the same is located shall be directed to shut up and abate such place by taking possession." etc.

Now, in view of these features, distinctly supplied by the provisions of the act in question, can it be fairly inferred that the nature, scope, and object of the act was to raise revenue for the state and its municipal corporations, as is contended in the opinion of the majority of this court? Notice that the sales provided for are not so fixed as to raise a revenue, although it is not denied that a revenue may result from its enforcement. Sales by the state commissioner are not to be made at a profit of 50 per cent over cost, but shall not exceed that sum. Sales by county dispensers are not fixed at 50 per cent above cost, but they shall not exceed that limit. Would it not be a strange and unusual construction of a provision in a criminal law which provided \$20 as a minimum and \$500 as a maximum fine, as a punishment, to say the judge who passed sentence must affix \$500 as the fine? These matters are merely left to the discretion of the state board of control in the state commissioner's case, and to the county board of control in the case of county dispensers. Nor are the provisions of this law such as to induce generous buying by the community. No man prefers to sign his name to an application to be allowed to buy intoxicating liquors as a beverage. No man prefers that such testimony shall be preserved in a permanent form. Besides, is it not one of the most potent objections to the traffic in intoxicating liquors that they are adulterated? All this is prevented under this act. Is it not admitted that the strongest temptation to drink in bar-rooms is the social feature of men drinking together? Is it not the experience of the world that intoxicating liquors are not so liable to be taken to excess except when obtained in the barroom? We submit, therefore, that it is unjust to the act in question to ascribe to it as its leading and controlling feature the receiving of a revenue for the state and its municipalities. The proper construction is that, in the exercise of the state's undoubted police power, in order to promote sobriety, preserve the health, and provide for the safety of her citizens, the state has passed this law prohibiting the sale of spirituous liquors by private persons; but, recognizing the demand for pure unadulterated liquors, she has created a governmental agency under strict regulations to sell these liquors, with enough profit thereon to pay the expenses of the purchase of these liquors,

the expenses of conducting the business, and to police the state to prevent infractions of her laws in this act provided.

We will next consider what power has been applied in this state and the other states of this Union, as fixed by our own decisions, those of the Supreme Court of the United States, and other state courts, and as supported by eminent text-writers, in the suppression altogether or the regulation of the liquor traffic. In the beginning, it is admitted that the legislature of this state has never hitherto exercised the power, by its direct enactments for that purpose, to prohibit the sale of intoxicating liquors as a beverage throughout the entire state. What effect the local option laws may have in this direction may be considered presently. These local option laws were enacted in 1882. See 17 Stat. at L. 898. The state, however, as before remarked, has always had and enforced the license as a prerequisite to the retail of spirituous liquors. Among the cases decided before the new constitution are found *Hickembridge v. Charleston*, 2 McMull. L. 286; *Charleston v. Ahrens*, 4 Strohh. L. 257. Since the year 1868, among these decisions may be found: *State v. Thornburg*, 16 S. C. 484; *State v. Mancke*, 18 S. C. 84; *State v. Turner*, Id. 105; *State v. Chester*, Id. 468; *State v. Berlin*, 21 S. C. 296, 53 Am. Rep. 677; *State v. Neece*, 38 S. C. 261. In *State v. Thornburg*, *supra*, Mr. Justice McGowan delivered the opinion upholding the conviction of a citizen for selling a small quantity of whiskey to be used as a medicine for a consumptive, the sale having been made outside of an incorporated city, town, or village, where alone it was lawful to sell intoxicating liquors. In the case of *State v. Mancke*, *supra*, Mr. Justice McGowan, delivering the opinion of the court, held that the Act of 1880 (17 Stat. at L. 459), requiring a license fee to be paid for the use of the county in addition to the municipal license, was constitutional. In the case of *State v. Turner*, *supra*, Mr. Chief Justice McIver delivered the opinion of the court, and said: "We presume, however, from the course of the argument here, that the main object of this ground [of appeal] was to assail the constitutionality of the Act of 1880. The power of the legislature to regulate the sale of spirituous liquors has been too long and too well settled to admit of question at this late day. Experience has demonstrated that the unrestrained traffic in spirituous liquors is dangerous to the peace and welfare of society, and therefore it has long been settled that the lawmaking power may throw such restraints around that traffic as, in the judgment of that department of the government, may be necessary to secure the peace and welfare of society, and persons who wish to deal in such an article must conform to the regulations prescribed, or they cannot claim the right to do so. [Italics mine.] There is nothing in the Constitution of the United States or of this state which forbids the legislature from exercising this power." In *State v. Chester*, *supra*, Mr. Chief Justice Simpson held, in delivering the unanimous opinion of this court in passing upon the constitutionality of the

Act of 1892 (17 Stat. at L. 893),—known as the "Local Option Act," which provides that, upon the petition of one third of the citizens who voted at the next preceding municipal election of any incorporated city, town, or village, the council of such city, town, or village was authorized and required to submit the question of license or no license to the qualified electors of said city, town, or village, at a special election to be holden, and, if a majority voted for no license, it should be unlawful to issue any licenses for the sale of spirituous liquors within the limits of such city, town, or village (this act was assailed as unconstitutional, because in violation of the twelfth section of article 1 of our Constitution),—that the local option law did not infringe upon the said twelfth section, nor any other provision of that instrument, alleged in that case. In the case of *State v. Berlin*, *supra*, when the unanimous opinion was delivered by Chief Justice McIver, it was held (quoting from the syllabus of the case) that the act of the legislature prohibiting the sale of spirituous liquors outside of incorporated cities, towns, and villages, while permitting such sale under license within cities, towns, and villages, does not violate section 12, article 1, of the Constitution of this state, nor the 14th Amendment of the United States Constitution. Laws regulating the sale of liquors are police regulations, and the legislature may prescribe different regulations in different localities, but such laws must apply equally to all persons within the territorial limits affected. Chief Justice McIver used, *inter alia*, these words: "It must also be remembered that laws regulating the sale of spirituous liquors are to be regarded as police regulations, over which the state has absolute control, limited only by some constitutional prohibition. The state, therefore, in the exercise of this police power, may pass laws absolutely prohibiting the sale of spirituous liquors, except unbroken packages while in the hands of the importer, and except, perhaps, where the rights of property existing at the time of the passage of the law might be destroyed; or it may throw around such traffic such restraints as, in the judgment of the legislature, may be most conducive to the peace and good order of society, by preventing the evils which might flow from an unrestrained traffic in such articles. *Licenses Cases*, 46 U. S. 5 How. 504, 12 L. ed. 256; *Bartemeyer v. Iowa*, 85 U. S. 18 Wall. 129, 21 L. ed. 929, and two state cases. Mr. Justice McGowan concurred in this opinion, as did Chief Justice Simpson. So much for our own state decisions. Every state in the American Union admits the right of the legislature to control by regulations and license the sale of spirituous liquors, and ascribes this power in the state governments to the police power; and only two states, by the decision of their courts of last resort, have decided against the right of prohibition, and these by divided courts. See *Wynehamer v. People*, 13 N. Y. 373, and *Beede v. State*, 6 Ind. 501, 68 Am. Dec. 891. In the first of these cases just cited, it will appear that this right of prohibition had some side features—

property on hand—to control the judgment of some members of the court of New York, and in the Indiana case it has been either overruled or modified by a late judgment of that state, according to a note in Tiedeman on Limitations of Police Powers. I have only space to quote a few of the state decisions. *Our House No. 2 v. State*, 4 G. Greene, 172; *Lincoln v. Smith*, 27 Vt. 328; *State v. Wheeler*, 25 Conn. 290; *State v. Robinson*, 83 Me. 568; *State v. Barrels of Liquor*, 47 N. H. 369; and many others.

Mr. Cooley, at page 718, 6th ed., sums up very admirably the decisions of the United States Supreme Court affirming the right of the states to prohibit or to regulate "these state laws, known as 'prohibitory liquor laws,' the purpose of which is to prevent altogether the manufacture and sale of intoxicating drinks as a beverage, so far as legislation can accomplish that object, cannot be held void as in conflict with the 14th Amendment. . . . The same laws have also been sustained when the question of conflict with state constitutions or with general fundamental principles has been raised. They are looked upon as police regulations established by the legislature for the prevention of intemperance, pauperism, and crime, and for the abatement of nuisances." In a note at this page he adds: "If the state so determines, it may forbid the manufacture, sale, and use of liquor as prejudicial to public health, safety, and morals, even though thereby existing property be depreciated in value without compensation." *Mugler v. Kansas*, 123 U. S. 623, 81 L. ed. 205; *Kidd v. Pearson*, 128 U. S. 1, 82 L. ed. 846, 2 Intera. Com. Rep. 232; *Bartemeyer v. Iowa*, 85 U. S. 18 Wall. 129, 21 L. ed. 929; *License Cases*, 46 U. S. 5 How. 504, 12 L. ed. 256, and many other cases. All of these decisions ascribed the control of the sale of liquor to the exercise of the police power of the state. Mr. Cooley, at page 706, quotes with decided approval the language of *Chief Justice* Redfield in the famous case of *Thorpe v. Rutland & B. R. Co.*, 27 Vt. 140, 63 Am. Dec. 635. "By this general police power of the state, persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state, of the perfect right in the legislature to do which no question ever was, or upon acknowledged general principles ever can be, made, so far as natural persons are concerned; and neither the power itself nor the discretion to exercise it can be bargained away by the state." *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989; *Boyd v. Alabama*, 94 U. S. 645, 24 L. ed. 802. Thus, too, the recent work of Parker and Worthington on Public Health and Safety, at page 24: "The police power of the state is fully competent to regulate the business [sale of intoxicating liquor], to mitigate its evils, or to suppress it entirely. There is no inherent right in a citizen to make or sell intoxicating liquor. Inasmuch as it is a business attended with danger to the community, it may, as already said, be entirely prohibited, or be permitted under such conditions as would limit to the utmost

its evils. . . . Consequently, statutes prohibiting the manufacture or sale, or keeping for sale, of intoxicating liquors as a beverage, and declaring all places where such liquors are manufactured or kept for sale in violation of the statute to be common nuisances, and forbidding their future use for the purpose, and authorizing courts to restrain violations of the law by injunctions, and to punish the disregard of their injunctions as a contempt by fine or imprisonment, or both, do not impinge any right, privilege, or immunity of the citizens secured by the Constitution of the United States. They do not deny to the citizens whom they affect the equal protection of the law, nor deprive them of property without due process of law. . . . Intoxicating liquors are but an example of a class of things that may be made subject to state regulations such as these just mentioned." Mr. Tiedeman, in his extended work on Limitations of Police Power, is quite as distinct in his recognition of the foregoing views being established as fixed legal principles in this country.

Lastly, we will consider some of the specific objections set out in the opinion of the majority of this court in this case to the dispensary act as being in excess of or beyond the limitations of law. It is objected to as interfering with the inalienable rights of the citizen. I propose to show that this court, and notably the justices who unite in the opinion in this case, are inconsistent by reason of this opinion being at variance with other opinions they have given officially. It must be understood that I am dealing in personal kindness with them, for I am actuated by these feelings. But my duty to the whole people of this commonwealth, whose servant I am, requires that I shall not permit such, to my mind, glaring inconsistency to pass without exposure, especially as it so nearly concerns the welfare of this people. In a previous part of this opinion I have quoted cases in which both took an active part, where it was held by them that the inalienable rights of citizens are not affected by the restraints placed upon the liquor traffic, even where the people whose right it is to labor, to have freedom, etc. I refer to the decisions of *State v. Thornburg*, *State v. Mancke*, *State v. Turner*, *State v. Chester*, and *State v. Berlin*, *supra*,—where they held that the citizens of South Carolina living outside incorporated cities, towns, or villages had no constitutional right to sell intoxicating liquors, and that the denial by the state of such right did not impinge upon any rights of the citizen, as sustained by an appeal to the twelfth section of article 1 of our Constitution. They may attempt to escape from this dilemma that the act which forbade any person to sell liquors outside an incorporated city, town, or village was general in its application to all the citizens who lived outside those limits. The dispensary act applies to every citizen of the state, and they think this act unconstitutional. So, too, as to the local option laws. They were declared to be constitutional, and as not trenching upon the rights of the citizen, when he appealed for protection to the twelfth section of article 1

of our Constitution; and yet they hold the dispensary act—which, as I before said, applies to the whole state—unconstitutional as denying the right of the citizen to sell spirituous liquors, in violation of this very section 12 of article 1 of our Constitution. They have not only virtually overruled those cases I have quoted, but in doing so they not only transcend their powers under our state constitution, but such a course of conduct is opposed to decision after decision of the United States Supreme Court. In the *Licenses Cases* the court not only decided that the state had the right to legislate liquor up and down,—either to license its sale or to prohibit its sale,—but also that such laws did not trench upon any inalienable right of a citizen. Here is the language (McLean, J.): “No one, it is presumed, can claim a license to sell liquors as a matter of right.” In *Mugler v. Kansas*, *supra*, Mr. Justice Harlan said: “Such a right does not inhere in citizenship. Nor can it be said that government interferes with or impairs any one’s constitutional rights of liberty or of property when it determines that the manufacture and sale of intoxicating drinks for general or individual use as a beverage are, or may become, hurtful to society, and constitute, therefore, a business in which no one may engage.” Mr. Justice Field, in *Owley v. Christensen*, 137 U. S. 91, 84 L. ed. 623, said: “Their sale in that form may be absolutely prohibited. It is a question of public expediency and public morality, and not of federal law. The police power of the state is fully competent to regulate the business, to mitigate its evils, or to suppress it entirely. There is no inherent right in a citizen to sell intoxicating liquors by retail. It is not a privilege of a citizen of the state or of a citizen of the United States. . . . The manner and extent of regulation rests in the discretion of the governing authorities.” These quotations might be multiplied, but time is precious, and I must forbear. I repeat it, these conclusions of the majority of this court as to inalienable rights are not only disapproved by decisions previously made by them, but are in direct conflict with the judgments of the United States Supreme Court. Not only so, but I assert that there never was in South Carolina any inalienable right in the citizen to sell liquor as a beverage. It was always a privilege extended by government, surrounded by restrictions. No right can be said to be an inalienable one that is not inherent, like life, liberty, etc. Nor is the power in the citizen to sell liquor as a beverage interfered with by the legislature because done so by “a law of the land,” for by the decisions of the court of last resort in this state such a term includes the right either to license or to decline to license. If this be so, how can a law duly enacted by the legislature declining to license any and all citizens be opposed to the twelfth and fourteenth sections? The chief justice held, in *State v. Berlin*, *supra*, that neither restrictions on the sale of liquors, nor even prohibition itself, invaded any of the personal rights of the citizen under the twelfth section of article 1 of our State Constitution. In this 23 L. R. A.

Mr. Justice McGowan concurred. Contrast their utterances then with those announced to-day. In a previous part of this opinion I have shown that section 41 has already been construed by this court (*State v. Hayne*, *supra*), and that the views herein suggested by the opinion of the majority virtually overruled that decision. Surely, twenty-six years of acquiescence in a decision on a constitutional question ought to commend it to us; but it seems nothing is too sacred to be uprooted.

Again, it is objected that under the provisions of this act the state is embarking in trade to the exclusion of her citizens. In 10 Rich. L. 491, in the case of *State v. Charleston*, the question of the power of the state to confer upon one of her municipal corporations the right to embark in business was denied upon the ground that the state did not possess that power herself. The gravity of the question was so great that it was submitted to the court of errors, composed, as it was, of the whole judiciary of the state law judges and chancellors; and hear what O’Neill (afterwards chief justice), as the organ of the court, said: “That the general assembly have all the powers which the corporation [city of Charleston] have exercised in their corporation in and for the whole state, I have no doubt. If they [the general assembly] thought proper, they could build a railroad with just as much propriety as a granite state house. Both might lead to an extravagant waste of money, but still the power cannot be questioned. They have dug canals and built roads, and I have no doubt they will do so again. . . . The powers of the general assembly in all these respects seem to me to be undoubted, and, if so, why may they not clothe a municipal corporation with the same powers, to be exercised for the benefit of the people of their charge? It seems to me clear that they can.” This became the unanimous judgment of the court, concurred in by *Chancellors* Jobe, Johnstone, Duncan, Dargan, and Wardlaw, and by *Judges* Withers and Whitner. This decision has been at least twice recognized by this court as law since the new constitution went into effect. This court also has recognized the power of the legislature to clothe its municipal corporations with like powers, and affirm their constitutionality.

Again, on this point we have shown that by our own decisions, as well as those of the United States Supreme Court the right to sell intoxicating liquors as a beverage is not an inalienable right in the citizen; in other words, that such a business is not of common right. Hence what Mr. Cooley says on this subject. At page 342 (6th ed.) in his work on Constitutional Limitations he says: “As every exclusive privilege is in the nature of a monopoly, it may at some time become a question of interest whether there are any, and if so what, limits to the power of the state to grant them. In former times, such grants were a favorite resort in England, not only to raise money for the personal uses of the monarch, but to reward favorites; and the abuse grew to such enormous magnitude that parliament in the time of Elizabeth, and

again in the time of James I., interfered and prohibited them. What is more important to us is that in 1602 they were judicially declared to be illegal. *Darcy v. Allein* (Case of Monopolies) 11 Coke, 84. These, however, were monopolies in the ordinary occupations of life, and the decision upon them would not affect the special privileges most commonly granted. Where the grant is of a franchise which would otherwise not exist, no question can be made of the right of the state to make it exclusive unless the constitution forbids it, because, in contemplation of law, no one is wronged when he is only excluded from that in which he never had any right. An exclusive right to build and maintain a toll bridge, or set up a ferry, may therefore be granted; and the state may doubtless limit, by the requirements of a license, the number of persons who shall be allowed to engage in employments, the entering upon which is not a matter of common right, and which, because of their abuse, or their liability to abuse, may require special and extraordinary police supervision. The business of selling intoxicating drinks and of setting up a lottery are illustrations of such employments." Is there any consistency in denying to the present legislature the power to protect the health, the morals, and the safety of our people by regulating, and under proper agencies conducting, the business of providing pure and unadulterated liquors, when this court has repeatedly declared legislation for building railroads by county or city aid constitutional? Very ingeniously it is suggested, how can the state regulate itself?

This is specious and unsound. The people are the state; government is their agency. Does not the state run the health department, furnishing the plant necessary to conduct that beneficent work, and pay all its expenses, under a system of regulation? So, too, the state penitentiary, the lunatic asylum, the deaf and dumb institute. Look at the post-office of the general government. Then it is, again, suggested that this is a monopoly created by the state as to this matter. It may be suggested that such a term as "monopoly," as applied to a sovereign state, is a misnomer. Monopolies at the common law, and against which all Englishmen protested, were grants to individual citizens. Here the state operates the business for the benefit of all her citizens. The people are the state; the government is their agent; and any benefits under the act are enjoyed by the whole people. It will be found on an analysis that the act of Minnesota referred to in the leading opinion is right because there the state sought to absorb one of the ordinary avocations of life. The laws of the state of Connecticut were right because concerned in the liquor trade, which no citizen enjoys as a common right. So, the law of Indiana as cited in *Beebe v. State*, 6 Ind. 501, 63 Am. Dec. 391, being concerned as to the liquor traffic, was right. Hence *Beebe v. State*, adverse to the state in the exercise of this right, has been overruled. But there must be a close to this discussion. A conclusion opposite to that held by the majority of this court is inevitable. Hence I must dissent.

MISSOURI SUPREME COURT (In Banc).

C. P. ELLERBE, Superintendent of
State Insurance Department, *Recept.*,
v.

Charles E. BARNEY, *Appt.*

(.....Mo.....)

A member of a mutual benefit society is personally liable for assessments reg-

ularly made during his membership, although there is no express promise on his part to pay them, where his certificate recites that it is in consideration, among other things, of his payment of such assessments, although it is made on the express condition for the forfeiture of all his rights and that the contract shall be null and void if he fails to pay any assessment when due.

(Black, Brace, and Burgess, JJ., dissent.)

NOTE.—*Liability of member of benefit society to action for assessment.*

The cases are very few in which the enforceability by action of assessments by a mutual benefit society has been discussed, although there are numerous cases in which the effect of a default to cause a forfeiture of membership has been decided. The case above decided is of much importance, and more fully presents the question than any other has done.

In *Fogg v. Supreme Lodge Order of Golden Lion*, 50 Mass. 9, the court held, where payment of an assessment had been interrupted by legal proceedings, that a part of the assessment making an amount sufficient to pay creditors, might be collected from those who had not paid, and a receiver was required to proceed with the collection; but there was no question decided in the case as to the right of members to suffer a forfeiture by nonpayment, although the law applicable to the case provided for a forfeiture on thirty days' default.

In *Prochett v. Schaefer*, 11 Phila. 166, it was held 23 L. R. A.

that members of an unincorporated association, known as the Knights of Pythias, formed for mutual benefit and advantage, were jointly and severally liable for the amount of sick benefits due to another member, unless their liability was restricted by the law of the order.

The same doctrine was declared in *New Era Life Assn. v. Rositter*, 132 Pa. 314, but the questions raised in this case did not include that of the right of a member to suffer a forfeiture of membership and thus escape payment.

In *Mutual Ben. L. Ins. Co. v. French*, 2 Cin. Sup. Ct. Rep. 321, it was held that the giving of a premium note, stating "if not paid at maturity, said policy to be void," and taking a receipt for the premium, made the policy merely voidable at the election of the insurer in case of default of payment, but did not allow the maker to defend the note, and on this ground the mere non-payment of the note, without any demand of payment, was held insufficient to forfeit the policy, the maker being still solvent.

(February 12, 1894.)

APPEAL by defendant from a judgment of the St. Louis Circuit Court in favor of plaintiff in an action brought to compel payment of certain assessments made by a benefit insurance society. *Affirmed.*

Messrs. F. H. Bacon and Lubke & Muench, for appellant:

The association in question was doing a life insurance business on the assessment plan and its contracts are those of life insurance, just as much as the policies issued by the regular life insurance companies, hence the same rules applicable to life insurance contracts should be applied to this contract so far as possible.

Com. v. Weatherbee, 105 Mass. 149; *Farmer v. State*, 69 Tex. 561; *Berry v. Knights Templars & Masons Life Indemnity Assn.* 46 Fed. Rep. 439, affirmed, *Knights Templars & Masons Life Indemnity Assn. v. Berry*, 4 U. S. App. 553, 50 Fed. Rep. 511; *Masonic Aid Assn. v. Taylor* (S. Dak.) 21 Ins. L. J. 695; *Bolton v. Bolton*, 73 Me. 299; *State v. Miller*, 86 Iowa, 26; *Rensenhous v. Seeley*, 72 Mich. 603.

A contract of life insurance is a peculiar contract in that its obligations are unilateral. It contains no undertaking of the assured to pay premiums but simply gives him an option to pay or not, and thus continue the obligation of the association.

New York L. Ins. Co. v. Statham, 93 U. S. 86, 23 L. ed. 793; *Worthington v. Charter Oak L. Ins. Co.* 41 Conn. 399, 19 Am. Rep. 495; *Dungan v. Mutual Ben. L. Ins. Co.* 46 Md. 492.

The nature of the association and of kindred

organizations is voluntary and the members join with that understanding. The levying of an assessment places them under simply a necessity of choosing whether they will pay it, or allow their certificate to lapse. The penalty for non-payment being a cessation of the obligation of the contract.

Re Protection L. Ins. Co. 9 Biss. 188; *Rood v. Railway Pass. & Freight Conductors' Mut. Ben. Assn.* 31 Fed. Rep. 62; *Burden v. Massachusetts Safety Fund Assn.* 147 Mass. 360.

The consideration for the payment of an assessment is the continuance of the protection afforded by the association until the next assessment matures. The company becoming insolvent before the time for the payment of assessments arrives made it impossible for it to give any consideration for the assessment levied.

Re Protection L. Ins. Co. and Burdon v. Massachusetts Safety Fund Assn. supra; *Atty-Gen. v. Guardian Mut. L. Ins. Co.* 82 N. Y. 336; *Atty-Gen. v. Continental L. Ins. Co.* 83 Hun, 138.

These life insurance organizations must not be confounded with the mutual fire insurance corporations where the obligation is to pay a *pro rata* on such losses as shall be sustained by the association. If this distinction is observed it explains the only case opposed to the views herein set forth which is—

McDonald v. Ross-Lewin, 29 Hun, 87.

The doctrine concerning liability of members of mutual fire insurance organizations is very different from that which applies in this case.

May, Ins. § 658.

In the case of *McDonald v. Ross-Lewin*, 29 Hun, 88, where the certificate entitled the member to its benefits, provided he continued to comply with the regulations, and that if he did not comply his payments should be forfeited, while his application contained an agreement "to accept and pay for the same subject to all the conditions of the by-laws and regulations of the association," one of which said it should be the duty of the secretary to notify members of assessments, and that each should pay within thirty days, or forfeit his membership, a member was held to have no right to escape payment of an assessment by accepting a forfeiture for non-payment of it, and that in case of such forfeiture he must also pay all assessments levied to pay losses which occurred before his forfeiture of membership became complete by expiration of the thirty days, in which he was required to pay the assessment.

A member is also held liable in a co-operative assessment insurance company to make by monthly payments of dues required by his contract, in addition to a payment made on entering the association. *Smith v. Bown*, 75 Hun, 281. But the court in this case, although basing its decision in part on that of *McDonald v. Ross-Lewin*, holds that such by-monthly dues are not in reality assessments.

Again in *Re Globe Mut. Ben. Assn.*, 65 Hun, 263, the general term of the supreme court in holding that infants could not become members of a co-operative or assessment insurance company laid stress on the case of *McDonald v. Ross-Lewin*, as showing that the nature of the contract creating a personal liability on the member was such that an infant could not make it.

But the court of appeals in affirming the case, 17 L. R. A. 547, did not touch this point, but mentioned the character of the association as one in

which the members held meetings and acted upon reports of management and considered and passed upon by-laws, and which was therefore such that adult persons only were contemplated by the statute as entitled to membership.

In *Chicago Mut. L. Indemnity Assn. v. Hunt*, (Ill.) 2 L. R. A. 549, in which the right of infants to become members of the association was upheld, the court declared that while the certificate of membership was a contract, the contract was purely unilateral and that payment of assessments was wholly in the discretion of the member, with mere cessation of membership in case of failure to pay. This was declared, however, merely by way argument in respect to the eligibility of infants to membership.

A peculiar kind of policy was involved in *Re Protection L. Ins. Co.*, 9 Biss. 188, which was not the case of a mutual benefit society or of a mutual insurance company, but one in which a policy was issued on the so-called contributory plan, by which a policy holder, having no voice in the management of the business, was to pay a specified sum on the death of another policy holder, and in default thereof forfeit his rights. The court held that there was no right in the company to enforce such payment, and, so far as the report shows, there was no agreement on the part of the policy holder to pay.

Notwithstanding the very large number of mutual benefit societies and the considerable body of decisions that have been made concerning them, the above cases are all that have been found on the question involved. Decisions as to the liability of members of mutual fire insurance companies to pay their assessments have not been here considered.

B. A. R. ,

Messrs. James E. Hereford and M. W. Huff for respondent.

Martin, Special Judge, delivered the opinion of the court :

This is an action brought by the superintendent of the insurance department of the state, as receiver of the Masonic Mutual Benefit Society of Missouri (a mutual insurance organization), to recover the amount of certain assessments levied upon the members of the association to pay death losses. The defendant was a member of the organization. Shortly before the receiver took charge, the directors of the company regularly levied against defendant assessments amounting to \$140.80, which assessments he refused to pay. The regularity of the assessments is admitted. The suit was originally before a justice of the peace, where judgment was rendered against defendant, who then appealed to the circuit court. There an amended statement was filed, to which appellant demurred for the reason that it did not set forth a cause of action. The demurrer was overruled, and defendant declined to plead further, but appeared at the trial and demurred to plaintiff's evidence. The court gave judgment for plaintiff. After unsuccessfully moving for a new trial, defendant appealed to the supreme court. The case is, in effect, an agreed one, as all the facts are conceded.

Defendant became a member of the society in 1885, accepting two certificates (one in division B, the other in division C), in the nature of policies, the material parts of which follow, viz.: "This certificate of membership witnesseth that the Masonic Mutual Benefit Society of Missouri, in consideration of the representations made to it in his application for membership, and the sum of six dollars to be paid by Charles E. Barney, of St. Louis, state of Missouri, and the further sum to be paid by him to this society within twenty days after the notice, duly mailed or delivered to him, of a death occurring in the membership of division C of this society, of one dollar and sixty cents for each such death, as assessments therefor may be made, so long as he may be a member thereof, promises and agrees to and with the said Charles E. Barney well and truly to pay or cause to be paid to his children, within sixty days after due notice and satisfactory proof of the death of said Charles E. Barney have been filed in the office of the secretary of the society, for every member in good standing in said division of this society, as follows: For each member in said division of the first class, seventy cents; of the second class, seventy-five cents; of the third class, eighty-five cents; of the fourth class, ninety-five cents; of the fifth class, one dollar and five cents; of the sixth class, one dollar and twenty cents; of the seventh class, one dollar and forty cents; and of the eighth class, one dollar and fifty cents: provided, however, that the aggregate amount of the sums so paid shall in no case exceed the sum of three thousand dollars. Upon this condition, however, that, if the said Charles E. Barney shall fail to pay any assessment when the same becomes due and payable by him according to

the by-laws of this society and the terms of this certificate, then this contract and agreement shall be null and void and of no effect, and the said Charles E. Barney and the beneficiary therein shall forfeit all rights accruing under this certificate. This certificate is issued by the society, and accepted by the holder and beneficiary therein, upon the following express conditions and agreements: 1st. That the same is issued and accepted subject to the provisions of the articles of association and by-laws of this society," etc. The certificates were duly executed by the president and secretary of the society. No question as to their form is raised. Afterwards, the name of the company was changed to "United Masonic Benefit Association of Missouri;" and its internal laws were amended so as to fix the sum to be paid on each certificate at \$2,000, and the amount of assessment for each death of a member at \$6.40. The by-laws of the society bearing on the present controversy provide that "upon the death of a member, or as soon thereafter as ordered by the executive committee, each member of the association, at the time such death occurred, may be assessed, and shall pay to the secretary of the association," the regular amount of the assessment above indicated. The by-laws then immediately proceed to declare it the duty of the secretary to notify, by mail, each member of each assessment upon his certificate, and then recite that "any member failing to pay such assessment within twenty days after the date of such notice which have been served upon, sent, or given to him, shall forfeit his membership in the association, and all benefits and interests therefrom and therein: provided, that the payment of assessments after such forfeiture, or any notice to pay or subsequent assessment by the association, shall not have the effect to restore the person notified or paying to membership, or to any rights under his certificates, until his application for reinstatement shall be presented and approved by the executive committee." The defendant paid assessments until those now in dispute were called. The latter were regularly made by the proper officers of the society to pay the amounts due upon deaths of members in good standing holding valid certificates. Defendant was duly notified of these assessments. Afterwards the insurance commissioner now plaintiff, took possession of the assets of the concern, under the laws of Missouri, because of the insolvency of the company, and now seeks to compel payment of these assessments as assets for the benefit of those properly entitled to share therein.

1. It is apparent from the foregoing statement, which was prepared by *Judge Barclay*, that the issue in this case is one of law, to be determined by a construction of the contract disclosed in the record. On the part of the appellant, it is contended that he never became indebted for the assessments levied against him, but that he had the option of forfeiting his rights under the certificate by declining to pay them, which forfeiture left the company without any right to collect them. If this is a proper construction of the contract, the judgment will have to be re-

versed. If, however, these assessments constituted a liability of the appellant from the date of their levy, payable after notice given according to the by-laws, then the action of the lower court will have to be affirmed. In his contention the appellant argues that the certificate held by him constituted a contract of life insurance, which, in a general sense, may be conceded, inasmuch as it provides for payment of an ascertainable sum upon the death of the holder. It is next argued that, being a contract of life insurance, it must necessarily possess the distinguishing features imputed to such a contract by the courts. In being a unilateral or one-sided undertaking of the assured, as to all future payments required of him. If he chooses to pay them the company is bound to continue the insurance. If he declines to make further payments, the insurance ends, without imposing on him any liability on account of them. I am sensible of the danger, in construing contracts, of attaching undue importance to particular words and phrases as controlling the intention of the parties, and overruling the presence and effect of other parts. All contracts should be construed with reference to the general object and purpose for which they were entered into by the contracting parties and a rational and harmonious effect given to all the parts, if possible. The construction that this is a unilateral contract, in like manner and effect as a policy of life insurance, I propose to consider briefly on principle, and not on the analogy of names, or accidental use of concurring phrases. The unilateral feature contended for in this contract has been very generally imposed upon the contract of the regular, old-line, premium-collecting life insurance companies. These companies were unable to commence business except upon capital paid in by the members, or stockholders, to be used in meeting death losses as they occurred. Until called for, the capital, along with all premiums not wanted for expenses, was required to be invested for profit and accumulation. The premiums were paid annually, and invariably in advance. Upon payment of the first premium, as a condition precedent, the assured received a policy covering him for one year, with the option to continue it by payment of other premiums. This payment constituted the full consideration of value to be paid during the year of insurance. Nothing in the shape of dues or assessments could be exacted from him for the period covered by the premium paid. If any of the old line companies should suddenly stop insuring, and decline to issue another policy, every policy outstanding would be paid from the accumulated capital as it matured. An inability to do so would put it out of line, in the business of insurance, and indicate that it had not been conducted and managed according to the principles upon which it was founded.

2. The certificate in controversy differs materially from the premium-paying policies of the old capital-stock companies. It is the undertaking of a corporation organized on an entirely different basis. The Masonic Mutual Benefit Society of Missouri belongs to that

class of life insurance companies known among insurance men by the name of "fraternal beneficiary associations." The prototype of these organizations is met with in the friendly benefit societies of England appearing more than a century ago, which made provision for the relief of members in sickness, and for payment of a small sum at death, generally for defrayment of funeral expenses. The organization of the modern fraternal beneficiary company consists of an association of members who agree to assist each other and their families on occasions of disability and death, by contributing money and means for aid and relief. On joining the association, each member becomes bound to assist the others in the mode and for the object pointed out in the articles and by-laws of the association. The managing officers, whether incorporated or not, represent the association, and discharge the function of enforcing and carrying out the purposes of the compact. Hence, the certificate of membership in such an organization is a contract with every member of it, to be enforced by the managing officers as representatives or trustees for all the members of the concern. When the member joins, he pays the admission fee, which is used to defray necessary expenses, but which is altogether too small to constitute a fund or capital wherewith to satisfy death losses. No fund or capital is kept on hand or invested for such a purpose. Indeed, the economy underlying the plan of the organization aims at doing away with the expense and loss incident to management, investment, and accumulation of capital. As a substitute therefore, each member promises to contribute an equal share with every other member upon occasion of every death in the membership, which is collected and paid over by the officers of the association to the wife or children of the deceased member, as the case may be. The ascertainment and declaration of death losses is left to the members of the association, and their action in that behalf is known as an assessment. They are bound to make these assessments on occasion of every death and the wife or children of the deceased member or other beneficiary have the right to compel them to make and collect the assessments inuring to their benefit. It is manifest that these assessments, in their nature, bear a near resemblance to the dues incident to membership in a friendly society, and constitute a consideration for the promised insurance of the association, materially differing from the annual premium stock companies. When considered in the light of society dues, it will be admitted that a person cannot, by discontinuing his membership, escape the obligation of paying those dues which accrued before the termination of his membership. I am not aware of anything in the organic structure of those organizations, as thus defined, and to which the one in question seems to belong, which could bring them in conflict with the policy of the law. On the contrary, it will be found that they have very generally merited the approbation of the public. It is only when they have substituted for their fraternity dues promises of endowment to living members, payable irrespective

of disability or death, that they have been justly subjected to the charge of departing from the principles upon which fraternal beneficiary associations can be safely conducted.

3. It is necessary next to consider whether or not the contract disclosed by the record in this case is in conformity with the avowed object of the association, to furnish aid and relief to the families of deceased members, and is sufficient in its phraseology and provisions to carry out that object, and made it beneficially effective as to all of them. Of course, the language of the certificate must be interpreted in connection with the by-laws and articles of association alluded to in its body. The certificate is expressly declared to be "issued and accepted subject to the provisions of the articles of association and by-laws of the society." Section 1 of article 7 of the by-laws provides that "upon the death of a member, or as soon thereafter as ordered by the executive committee, each member of the association at the time such death occurred may be assessed, and shall pay to the secretary of the association, a fixed sum, according to the class of which the assessed was a member at that time, based upon the aggregate amount of benefit to which he or the beneficiary named therein, or in section 1, article 6, of the by-laws, is entitled under his certificate or certificates of membership." The assessments in this case were at the rate of \$6.40 each, in behalf of the beneficiaries of fifty-eight members, who died while the appellant was a member of the association in good standing, amounting to the aggregate sum of \$140.80. The beneficiaries of the deceased members must have acquired a right to these assessments intended for their relief; otherwise, the primary object of the association as a society for the benefit of widows and orphans would fail. The assessments could have no value or meaning, if they conferred no right on the beneficiaries to collect the amount so assessed, and a corresponding obligation on the part of the members to pay them. The principal, if not the only, fund provided for payment of them consisted in the obligation imposed by the by-laws of the members. Their liability took the place of capital and accumulated funds, and constituted substantially the only assets provided by the members for securing the aid and relief contemplated in the compact of association. Thus we perceive that, independent of the language of the certificate of membership, the liability to pay assessments by the members was imposed, by the by-laws and articles of association, as a debt or burden incident to membership. This debt or burden, according to the by-laws recited, accrued as soon as the death occurred and the assessment was declared. It was payable at once, but, according to the third section of the same article of by-laws, the time for payment was extended to twenty days after notice. The time and manner of serving notice are definitely prescribed. It then proceeds to declare that "any member failing to pay such assessments within twenty days after the date of such notice which have been served upon, sent or given to, him, shall forfeit his mem-

bership in the association, and all benefits and interests therefrom and therein." There is nothing whatever in this language, providing, as it does, for the forfeiture of membership and discontinuance of the rights incident to it, which suggests or intimates a discharge from past society debts and dues. In the first section of the article the assessment is expressly declared to be binding as a demand which the members must pay. In the second section, he forfeits his membership and rights by failure to pay after a notice of twenty days. A condition of forfeiture of rights is a well-known feature added to many contracts, which does not in itself discharge the obligations which have already accrued under it. Such is the case of forfeitures in leases, and in most of the policies of mutual fire insurance companies. The natural effect of the forfeiture is to cut off the possibility of future obligations, but not to disturb the validity of past indebtedness. Something very positive would have to appear, either in the express declaration of the contract, or as a necessary implication from its nature, to give it a different effect. No such declaration appears, and I have endeavored to show that precisely the contrary is implied in the nature and purpose of the contract in question. Right here I may add that the fact that the obligations attempted to be enforced in this case rise, independently of the provisions of the certificate of membership, from the constitution and by-laws of the association, goes a great way, in my mind, to clothe them with the features and character of society dues, and to distinguish them from the premium of the old-line insurance companies.

4. In coming now to consider the language of the certificate itself, I think it will appear to be little else than a recital of the contract which we have found to be imposed on every member by the constitution and by-laws. It promises to pay to the children of the appellant, sixty days after notice of his death, a certain percentage on every member of the association in good standing, according to the class to which he belongs, provided that no payment of such percentage shall be permitted to exceed, in the aggregate, the sum of \$2,000. As we have seen that the organic structure of the association did not contemplate that this percentage on the membership should be paid from the accumulated capital, but from amounts to meet death losses, it is natural to expect some allusion in the certificate to the prevailing method of raising funds with which to make good the promised benefits of the association. Accordingly, we find it expressly provided in the certificate that the benefits inuring to the children of the appellant are agreed to be paid by the association "in consideration" of the admission fee "originally paid in by appellant, and the further sum to be paid in by him to this society," of the assessment made on him for every death occurring in the membership of the division to which he belonged, "so long as he shall be a member thereof." It thus appears that the obligation imposed on him by the by-laws to pay the assessments against him is expressly de-

clared to be of the consideration for the benefits promised to his children by the certificate. The only way that he can make good the consideration for the certificate is to keep his obligation to pay the assessments. And I may repeat that these obligations constituted the principal resources placed at the command of the association, to enable it to pay the death losses. It is true that the certificate repeats the provision in the by-laws which terminates membership by nonpayment of assessments. But it goes no further than to debar the appellant of his rights, thus leaving his liabilities as they existed at the date of the forfeiture. The declaration that the certificate, after forfeiture, shall be null and void, relates to its future, not its past, effect. Now, it appears from admitted facts that the appellant was in full possession of all the rights of membership at the date of these assessments, and that he continued to hold them up to the instant of forfeiture by his failure to pay such assessments. If he had died after the assessments against him, and before his failure to pay them, his children would have been entitled to the promised benefits of the certificate. Having during all that time had the benefits of the certificates upon consideration that he would pay his assessments, he is not in a position to withhold the consideration, by refusing to keep his obligation. I am not prepared to approve the startling proposition that the appellant should have the privilege of paying or withholding, at his pleasure, the consideration promised for carrying a risk, after the risk had been carried. I do not regard this contract unilateral, in the sense of relieving the assured from liability for insurance carried and consideration earned. No unilateral contract has ever been permitted to accomplish such an unjust result.

I am satisfied that *the judgment of the lower court is without error, and should be affirmed, and it is so ordered.*

Barclay, Gantt, and Sherwood, JJ., concur.

Macfarlane, J., not sitting.

Black, J., dissenting:

I do not agree to the majority opinion filed in this case. Each certificate, it will be seen, contains this stipulation: "Upon this condition, however, that if the said Charles E. Barney shall fail to pay any assessment when the same becomes due and payable by him according to the by-laws of this society and the terms of this certificate, then this contract and agreement shall be null and void and of no effect, and the said Charles E. Barney and the beneficiary therein shall forfeit all rights accruing under this certificate." After the certificates had been issued, and various assessments levied and paid by the defendant, the name of the association was changed to that of the "United Masonic Benefit Association of Missouri." The by-laws were also amended so as to make the amount to be paid by the association on each certificate the fixed sum of \$2,000, and so as to fix the amount to be paid by the insured for each death loss

at the sum of \$6.40. The amended by-laws which have any bearing upon this case are as follows: (1) "Upon the death of a member, or so soon thereafter as ordered by the executive committee, each member of the association shall pay to the secretary of the association a fixed sum, according to the class of which the assessed was a member at that time, based upon the aggregate amount of benefits to which he or the beneficiary named therein, or in section 1 of article 6 of these by-laws, is entitled under his certificate of membership." (3) By this by-law it is made the duty of the secretary of the company to notify each member of the assessment made upon him; and it then provides that "any member failing to pay such assessment within twenty days after the date of such notice which has been served upon, sent, or given to, him shall forfeit his membership in the association, and all benefits and interests therefrom and therein: provided, that any payment of assessments after such forfeiture, or any notice to pay a subsequent assessment by the association, shall not have the effect to restore the person notified or paying to membership, or to any rights under his certificates, until his application for reinstatement shall be presented to and approved by the executive committee." The defendant paid several assessments under and pursuant to these amended by-laws. An assessment of \$6.40 on account of each certificate was duly levied upon defendant on the 4th of December, 1891, of which he was properly notified by notice dated and mailed on the 20th of January, 1892; and on the 25th of January, 1892, twenty other assessments, of \$4.40 each, were duly levied, of which he was notified on the 1st of February, 1892. On the next day the company was adjudged insolvent, and was then placed in the hands of the superintendent of insurance. The defendant failed to pay the several assessments levied on the 4th of December, 1891, and on the 25th of January, amounting in all to \$140.80, and it is these assessments which the superintendent seeks to recover by this suit.

The question whether these assessments constitute debts, to recover which suits may be maintained by the company or the superintendent of the insurance department, must be determined by the contracts; for it is the duty of the court to give effect to the contracts which the parties have made, and it has no right to build up a contract for them. This court, in defining a life insurance contract, adopted and approved the language of *Mr. Justice Gray* in the case of *Com. v. Wetherbee*, 105 Mass. 149, where it is said: "This is none the less a contract of mutual insurance upon the life of the insured because the amount to be paid by the corporation is not a gross sum, but a sum graduated by the number of members holding similar contracts, nor because a portion of the premiums is to be paid upon the uncertain periods of the deaths of such members, nor because, in case of nonpayment of assessments by any member, the contract provides no means of enforcing payment thereof, but merely declares the contract to be at an end."

and all moneys previously paid by the assured, and all dividends and credits accruing to him, to be forfeited to the company." *State v. Merchants' Exch. Mut. Benev. Soc.*, 72 Mo. 160. There can be no doubt but these certificates issued to the defendant are life insurance contracts; and it accomplishes nothing to say they are in a general sense life insurance contracts. Being life insurance contracts, the principle applicable to such contracts in general is applicable to them, though the company denominates itself a "benefit association." Speaking of these associations, Mr. May says: "Their certificates of membership often resemble, both in form and substance, ordinary policies of life insurance; and the courts have, with great uniformity, treated them as substantially life insurance companies, applying to them and to the mutual relation of the members the rules and principles applicable to the contract of life insurance." 2 May, Ins. 3d ed. § 550a. According to the better authority, an ordinary contract of life insurance is an entire insurance for life, subject to forfeiture for non-payment of any premium. *New York Ins. Co. v. Statham*, 93 U. S. 24, 23 L. ed. 789; *Manhattan L. Ins. Co. v. Smith*, 44 Ohio St. 156, 58 Am. Rep. 106. In ordinary life policies, requiring payment of premiums at stated times, and providing for a forfeiture in case of non-payment of any premium, it is optional with the insured whether he will pay or not. Such contracts are unilateral, and the insured can pay, or forfeit all that he has paid, as he may elect. The premiums do not constitute an indebtedness against him in favor of the insurer. *Worthington v. Charter Oak L. Ins. Co.* 41 Conn. 379, 19 Am. Rep. 495; *Goodwin v. Massachusetts Mut. L. Ins. Co.* 73 N. Y. 485. "The payment of the premium is optional with the insured, and if he make default the insurer has no other remedy than the avoidance of the policy. If the policy be payable only at the option of the insurer, it may be different." 2 May, Ins. 3d ed. § 841a. The same principle applies to certificates issued by mutual benefit societies. *Re Protection L. Ins. Co.* 9 Biss. 188, Fed. Cas. No. 11,444; *Niblack, Mut. Ben. Soc.* § 276. The law on this subject is correctly stated in *Bacon on Benefit Societies and Life Insurance*, at section 357, where it is said: "In a contract of life insurance there is generally no absolute undertaking of the insured to pay the premiums or assessments, and consequently no personal liability therefor. The payment of the premium or assessments is only a condition precedent of the liability of the company. The insured does not promise to pay the premiums, and the company only promises to pay if it has received the agreed consideration. Therefore, the insured may pay or not, as he pleases. He has the perfect right to do either, and need give no excuse for his choice. If he does not pay, the contract is ended. It follows, therefore, that the premium or assessment is only a debt when there is an absolute promise to pay embodied in the contract."

Now, if we turn to the certificates issued to the defendant, it will be seen there is no obligation imposed upon him to pay the as-

sessments. Payment of the assessments within the designated time after notice is simply a condition to the continuation of the insurance. The condition written in the contract is that, if the said Charles E. Barney fail to pay any assessment when due and payable, "then this contract and agreement shall be null and void, and of no effect; and the said Charles E. Barney and the beneficiary therein shall forfeit all rights accruing under this certificate." Void as to whom? Not as to Barney alone, but as to the insurer and the insured. Such is the plain language of the contract. That this is the legal effect of the contract, as expressed in the certificates themselves, seems clear to the writer.

But stress is laid upon the amended by-laws, which charge the amount of the assessment for each loss from \$1.60 to \$6.40, and the amount to be paid on each certificate to the fixed sum of \$2,000. We cannot see that these charges affect the question in hand in the least. If the assessments are to be regarded as an indebtedness from the defendant to the association, it is because of the second amended by-law, which provides that upon the death of a member each living member may be assessed, and shall pay to the association, a fixed sum, according to the class of which the assessed was a member. This by-law must be taken in connection with the third, which provides that any member failing to pay the assessment within the designated time shall forfeit his membership in the association, and all benefits therefrom. These by-laws point out what the association and its officers are to do upon the death of a member. They prescribe the procedure to be pursued, and that is their object and purpose. They are to be taken together, and in connection with the certificates. When this is done, they do not change the terms of the contract from that expressed in the certificate, so far as concerns the liability of the insured to pay the assessments. It is still optional with the insured, whether he will pay, or suffer a forfeiture. This case is wholly unlike those cases where mutual insurance companies insure property against loss or destruction, and in consideration therefor receive the note or notes of the insured; the policy containing a provision that it is to be void in case of a failure of the insured to pay the note or notes at maturity, or in case of a failure to pay any assessments made thereon. In many cases of that character, it is held that neither the insolvency of the company nor the cancellation of the policy deprives the company of the right to make and collect assessments to pay losses which accrued while the policy was in force. In such cases the policy and the notes are but parts of one transaction, and, taken together, constitute mutual agreements to be performed by each party. It is manifest that such cases have no bearing on the question now in hand. In the case of *New Era Life Assn. v. Rositter*, 182 Pa. 814, the assignee of the company sued the defendant to recover certain assessments levied upon a life policy. The case shows that the defendant signed an application in which it was stated: "The members and beneficiary shall be jointly and severally liable for all death claims ac-

cruing during life membership, which shall become due within thirty days after mailing a notice showing a statement of the death," etc. The policy lapsed by reason of non-payment of an assessment, and the insured ceased to be a member. The defendant was held liable for assessments levied to pay death losses which accrued while he was a member, and he was held liable for the reason that such were the plain terms of his express agreement. As to the case of *McDonald v. Ross-Lewin*, 29 Hun, 88, it is sufficient to state that the defendant there also signed an application for membership, in which he, in terms, promised and agreed to accept the certificate, and pay therefor as provided by the by-laws and regulations of society. The two cases last cited are much relied upon by the plaintiff, but they are unlike this one; for, while the certificates issued to this defendant recite the fact that he made representations in an application for membership, still the applications are not in evidence, and there is nothing in the recitals from which it can be inferred that he agreed to be personally liable for any assessment. The

certificates issued to the defendant, and the by-laws, taken together, show—and they only show—that the company agreed, in each case, to pay the children of the defendant, at his death, the sum of \$2,000, provided he made payment for each assessment within the designated time after notice; and a failure to pay any assessment is, by the terms of the contract, made to operate as a forfeiture of all that has been paid. The contracts are unilateral, and in respect of the liability of the insured to pay, and thereby keep them in force and effect, do not differ from an ordinary life policy requiring the payment of premiums at stated times. The payment of all assessments up to a given date continued the insurance until the expiration of twenty days after date of notice of another assessment, and it was entirely optional with the defendant whether he would pay the further assessment, or suffer a forfeiture. It follows that the defendant was not liable to the company in a suit by it to recover the assessments, nor is he liable to the plaintiff.

Brace and Burgess, JJ., concur.

MINNESOTA SUPREME COURT.

Sarah Jane GALLOWAY, *Resp't.*,

CHICAGO, MILWAUKEE & ST. PAUL
R. CO., *App't.*

(.....Minn.....)

*1. While a railway company has no right to interfere with a United States mail agent in the discharge of his official duties, yet it has the right, and it is its duty, to prevent him, while on its trains, from continuing any dangerous practice, of which it has notice, which is liable to cause injury to passengers and others lawfully on its premises; and, if the practice is one from which such injury might be reasonably anticipated, it is not necessary, in order to charge the company with this duty, that on some former occasion a like injury had occurred.

*2. Evidence considered, and held sufficient to justify the jury in finding that the mail agents on defendant's trains had been so long and so frequently in the habit of throwing mail sacks from moving trains upon the station platform, used and occupied by passengers and others lawfully there, as to charge the defendant with notice of the fact; also, in finding that this practice was one from which such injuries as those sustained by plaintiff by being struck by a mail sack might have been reasonably anticipated; also, in finding that the part of the platform where the injury was sustained was one which was in the habit of being used by passengers and others by the license or implied invitation of the company.

*3. Held, also, that the damages awarded are not so large as to warrant this court in setting aside the verdict as excessive.

*Headnotes by MITCHELL, J.

(January 30, 1894.)

APPEAL by defendant from an order of the District Court for Ramsey County overruling a motion for a new trial after verdict in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Mr. F. W. Root, with Messrs. W. H. Norris and Flandrau, Squires & Cutcheon, for appellant:

The grossest negligence of the mail agent on this occasion only will not charge the railway company. No one is bound to anticipate, or can be held responsible for not anticipating, what has never yet happened.

Schultz v. Chicago & N. W. R. Co. 67 Wis. 616, 58 Am. Rep. 881.

Distinguishing between domestic animals and animals *fera natura* as to the impossibility of the owner, a distinguished judge held that every dog is entitled to one bite, because it takes something like this to give his owner notice that he is a biting dog.

Lawson, Leading Cases Simplified, 318.

This was not an accident likely to happen, and there is no negligence in failing to guard against an unlikely possibility.

Schultz v. Chicago & N. W. R. Co. *supra*; *Loftus v. Union Ferry Co.* 84 N. Y. 455, 88 Am. Dec. 538.

The exoneration of the appellant in this case rests upon the fact that it never had reason to apprehend an accident like this; that its arrangements were such as all experience had,

NOTE.—The liability of a railroad company for negligence of mail clerks in the employ of the United States is we believe a novel question without precedents.

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For liability of carrier to such agents, see *note* to *Cleveland, C. C. & St. L. R. Co. v. Ketcham* (Ind.) 19 L. R. A. 332.

up to this time, shown to be safe, suitable, and ample to meet all requirements of its duty.

Dougan v. Champlain Transp. Co. 56 N. Y. 1; *Buffin v. Buffalo & S. W. R. Co.* 106 N. Y. 136, 60 Am. Rep. 438; *Cleveland v. New Jersey S. B. Co.* 68 N. Y. 306; *Hubbell v. Yonkers*, 104 N. Y. 434, 58 Am. Rep. 522; *Blackman v. London, B. & S. C. R. Co.* 17 Week. Rep. 769; *Muster v. Chicago, M. & St. P. R. Co.* 61 Wis. 325, 50 Am. Rep. 141; *Nitro-Glycerine Case*, 83 U. S. 15 Wall. 534, 537-539, 21 L. ed. 210-213.

If the appellant is responsible for this accident, any damages beyond a merely nominal sum are excessive, and the manifest result of the proclivity of the jury against a railroad company and of sympathy, without expense to themselves, provoked and kept in tension by the dramatic display of the respondent's invalid condition.

For breach of duty, a negligent wrongdoer, as distinguished from a willful wrongdoer, is not liable for all remotest consequences, however distinctly traceable to his wrong.

Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 469, 24 L. ed. 256; *Scheffer v. Washington City, V. M. & G. S. R. Co.* 105 U. S. 252, 26 L. ed. 1071; *Nelson v. Chicago, M. & St. P. R. Co.* 30 Minn. 76.

Messrs. Davis, Kellogg & Severance, for respondent:

The plaintiff is, as a matter of law, entitled to recover if she establishes: First, the dangerous practice; second, the injury by reason thereof; and third, that she is suffering as a result of said accident.

See *Carpenter v. Boston & A. R. Co.* 97 N. Y. 494, 49 Am. Rep. 540; *Snow v. Fitchburg R. Co.* 136 Mass. 552, 49 Am. Rep. 40; *Dean v. St. Paul Union Depot Co.* 5 L. R. A. 442, 41 Minn. 360; *Chicago & A. R. Co. v. Pillsbury*, 123 Ill. 9; *Stewart v. Brooklyn & C. R. Co.* 90 N. Y. 568, 43 Am. Rep. 185; *Flint v. Norwich & N. Y. Transp. Co.* 34 Conn. 554.

This testimony abundantly justifies the finding of the jury with reference to the injuries of the plaintiff, and is of such a character that a verdict for a much larger amount could not be deemed excessive.

Tierney v. Minneapolis & St. L. R. Co. 83 Minn. 311, 53 Am. Rep. 35; *Sobieski v. St. Paul & D. R. Co.* 41 Minn. 169; *Hall v. Chicago, B. & N. R. Co.* 46 Minn. 489; *Bishop v. St. Paul City R. Co.* 48 Minn. 26; 1 Sutherland, Damages, 2d ed. p. 947.

Mitchell, J., delivered the opinion of the court:

This was an action for personal injuries occasioned to the plaintiff by being struck by a mail bag thrown by a United States mail agent from a mail car belonging to the defendant on one of its passenger trains at the station on its road at Durand, Wis. At this station the railway track runs north and south, and the depot and platform adjoin it on the west. The platform is of the width of 12 feet on all sides of the depot, and, of the width of 8 feet, extends along the track in two wings,—one to the south about 75 feet, and one to the north about 100 feet, to the south line of a street which crosses the railway at right angles. The principal part

of the village lies north and west of the station. The passenger train run on this road consisted of an engine and tender, mail and express car, baggage car, and two passenger coaches, in the order named; the mail end of the combination car being next the tender, the entire length of the train being about equal to the entire length of the platform. Trains from the south usually stopped so that the nose of the engine would be 10 or 15 feet beyond the north end of the platform, out on the street crossing. On the day in question the plaintiff came from the village to the station, accompanying a young girl, for the purpose of seeing her safely upon the north-bound passenger train. Approaching the station from the north, she stepped up on the north end of the platform just as the train was pulling in from the south, and walked hurriedly along towards the south end of the platform, where the passenger coaches would be when the train stopped; and, as she claims, when she had reached a point on the platform some 20 or 25 feet from the depot, she was struck by a mail sack thrown from the mail car while the train was still in motion. Inasmuch as the mail agent was not the servant of the defendant, it is not claimed that the railway company would be liable for his negligence, however gross, on this occasion only. To render it liable, as negligent, for the negligence of the mail agent, this government employé must have practiced a dangerous method of discharging mail sacks on the platform at this station so habitually, or so frequently, as to charge the company, as part of its duty to its passengers and others occupying its depot platform by its invitation or license, with notice, actual or implied, of his negligence or recklessness. While the railway company had no power to interfere with the mail agent in the discharge of his official duties, yet it was its right, as well as duty, to prevent him, while on its cars and on its premises, from continuing any negligent practice, of which it had notice, which was liable to cause injury to passengers and others lawfully there. The case comes fully within the rule which enjoins care, not only on the part of the company's servant, but also like care in preventing injury from the wrongful act of others whom it permits to come upon its premises. The negligence charged against the defendant is that it had notice of a long-continued custom of the mail agents of throwing heavy mail bags from the cars, while still moving at a high rate of speed, onto the platform occupied by persons lawfully there, in such a reckless and negligent manner as to endanger their safety, and that, notwithstanding such notice, it took no steps to prevent this negligent practice, or to warn people of the danger. The answer admitted that the platform is a public place for the purposes of railway travel to and from the station, and for the transaction of railway business with the defendant, but denied all the allegations of negligence in the complaint. On the trial the defense was that mail bags were never thrown from the car upon the platform while the train was in motion and the plaintiff, instead of being struck by the mail bag,

walked against it, and stumbled over it, while lying on the platform; and, so far as plaintiff's right to recover was concerned, the case was tried squarely and exclusively upon this issue.

We are satisfied that the evidence justified the jury in finding that plaintiff was struck by a mail bag thrown from the cars while still in motion, and that the practice of throwing mail bags upon the platform before the train had come to a stop had been so frequent and long continued as to charge the defendant with notice of it. It is not claimed that the company had ever made any attempt to stop this practice, and it is expressly admitted that no notice or warning had been given, either to the plaintiff or the public, that it was the habit of mail clerks to throw out the mail bags while the train was in motion. Leaving out of account extreme instances testified to, the fair import of the evidence produced in behalf of the plaintiff is that it had for a long time been the practice of the mail clerks to throw out the mail sacks while the train had still sufficient speed to run from 10 to 30 feet after they had thrown the sacks. Hence, in view of the evidence as to where the head of the engine usually stood when brought to a full stop, and as to the length of the engine and tender, the jury was warranted in concluding that the act of the mail clerk on this particular occasion was not an exceptional one, but that the sack or bag was thrown out upon a part of the platform where he had been in the habit of throwing it. It follows that, if this platform was used by passengers and others rightfully there by defendant's invitation or license, and that this practice of throwing out mail sacks from a moving train might reasonably be apprehended to result in injury to such persons, then the defendant was guilty of negligence which was the proximate cause of plaintiff's injuries. It was not necessary to charge defendant with negligence to show that on some former occasion a like injury had happened. The practice of throwing loaded mail bags out of a moving train upon a platform occupied by the public is itself a dangerous act, and the accident which did happen on this occasion was just such a one as might be reasonably anticipated; at least, the jury had a right to so find. *Carpenter v. Boston & A. R. Co.* 97 N. Y. 494, 49 Am. Rep. 540; *Snow v. Fitchburg R. Co.* 186 Mass. 552, 49 Am. Rep. 40.

Defendant's main contention, however, is that, upon the arrival of a train from the south, this north end of the platform was not used by passengers, and that it had no reason to anticipate that it would be so used. Of course, it stands to reason that on such occasions that part of the platform would be used in part for the purposes of receiving and delivering mail, baggage, and express matter; but it was nowhere suggested, either in the pleadings, or on the trial, or in the requests to charge, that the plaintiff was not rightfully on this part of the platform, or that it was not rightfully used by the public, or that there was any distinction, in that respect, between this and any other part of 23 L. R. A.

the platform. On the contrary, it seems to have been assumed and conceded throughout the trial that this part of the platform was rightfully used by passengers and the public generally, precisely the same as any other part of it. Moreover, while there is very little direct evidence as to the use of this part of the platform by passengers on the arrival of trains from the south, yet it appears all through the testimony that it was used by bystanders by the license of the defendant, and by customers by its implied invitation, and it is conceded that plaintiff was lawfully there on this occasion. All persons having duties to perform incidental to the departure and arrival of passengers, and all persons having business with the company on its premises at a station, are entitled to the same protection as passengers, or intended passengers, while there. The plaintiff was a customer of the defendant, within the essence and spirit of the rule, and was entitled to protection as such.

It is claimed that the damages (\$10,000) are excessive. The verdict is certainly a large one. The immediate injury—a wound on the knee—seems, in and of itself, a comparatively small one. But it is claimed, and the evidence tended to prove, that this caused a nervous shock, which resulted in the development of heart disease, and in what the physicians called "traumatic neurosis," which, being translated from Greek into English, simply means a disease of the nerves caused by a wound; that these injuries are permanent, and have rendered the plaintiff a helpless invalid. The cause might seem inadequate to produce such serious consequences. It is one of the class of cases where there is a chance for "malingering," and where about the only available evidence tending to prove the connection of cause and effect, aside from chronological coincidence, is that of medical experts, which, it must be admitted, is often subject to the suspicion of dealing largely in doubtful speculation and surmise. But it is well known that there are many genuine cases of serious and permanent injuries resulting from what at first seem very trivial causes. In this case the evidence tended to show that the plaintiff was, prior to this accident, a healthy, active woman; that immediately after the accident she was compelled to take to her bed, and has ever since been almost helpless, and has grown worse, rather than better; and, while suggestions were made that she was shamming, no substantial evidence was produced to support these assertions. The expert evidence on behalf of the plaintiff was to the effect that these ailments were real, that they were the result of the injury complained of, and that they were permanent; and the defendant produced practically no evidence to rebut this. If the plaintiff's alleged present diseases are real, and are the proximate result of the injury (and under the evidence we cannot say that such are not the facts), the damages awarded are not so large as to warrant this court in saying that they are excessive.

A new trial was also asked on the ground

of newly discovered evidence, but, as this point is not argued, it must be deemed abandoned. We may say, however, that we have examined the affidavits on the subject, and

are clearly of opinion that there was no error in refusing a new trial on that ground.

Order affirmed.

OHIO SUPREME COURT.

ROOT & McBRIDE BROS., *Plffs. in Err.*,
v.
Owen T. DAVIS *et al.*

(51 Ohio St.—)

*1. A mortgagee of personal property, in possession after condition broken, is the legal owner, entitled to retain the possession, subject to a liability to account for the surplus of its value after the satisfaction of his own claim.

2. The liability of the mortgagee, in possession after condition broken, to account for the surplus, is a credit of the mortgagor, and may be attached, as such, by the process of garnishment.

3. In a proceeding in attachment commenced by a plaintiff residing in one county against a defendant residing in another county of this state, a debtor of the defendant, residing in the county where the suit is commenced, may be garnished on the ground of the nonresidence of the defendant, and required to pay the money owing by him to the defendant into court, although service by publication, only, has been made on the defendant.

4. The proceedings of a justice of the peace after jurisdiction of the subject-matter has attached are to be liberally construed. Therefore, an order made by a justice of the peace upon a garnishee, in a proceeding in attachment, after service of notice upon him, and the rendition of judgment for the plaintiff, to pay the money owing by him to the defendant into court, presupposes a finding that the garnishee is so indebted, and cannot be collaterally attacked on the ground that the transcript fails to show that such finding has been made.

(*Dickman and Spear, JJ., dissent.*)

(January 23, 1894.)

ERROR to the Circuit Court for Lucas County to review a judgment affirming a judgment of the Court of Common Pleas in favor of defendants in an action brought to recover possession of certain personal property claimed by plaintiffs under a bill of sale, but which defendants claimed to hold by reason of garnishment; proceedings instituted to secure a claim against the one who executed the bill of sale. *Affirmed.*

The facts sufficiently appear in the opinion. *Messrs. Harris & Thurston*, for plaintiff in error:

A justice of the peace in this state has limited and inferior jurisdiction. The proceedings in the cases before the justice were special statutory proceedings.

*Headnotes by the Court.

NOTE.—The nonresidence of a creditor as affecting the power of the courts to subject his demand to claims against him has been recently presented in a *note* to Illinois Cent. R. Co. v. Smith (Miss.) 19 L. R. A. 577; also in the more recent cases of *Douglas v. Phenix Ins. Co.* (N. Y.) 50 L. R. A. 118; *Bragg* 23 L. R. A.

The necessary jurisdictional facts do not appear in the records of the justice.

The record alone must show jurisdiction, and cannot be aided by extrinsic evidence of any kind.

Ohio & M. R. Co. v. Shultz, 81 Ind. 150; *Benn v. Borst*, 5 Wend. 292; *Little v. Currie*, 5 Nev. 90; *Ricketson v. Richardson*, 26 Cal. 149; *McCleary v. McLain*, 2 Ohio St. 888; *Godfred v. Godfred*, 80 Ohio St. 53; *Robbins v. Clemmens*, 41 Ohio St. 285; *McCurdy v. Baughman*, 48 Ohio St. 78.

Proceedings in attachment and garnishment are special statutory proceedings. In the exercise of such powers the record must show affirmatively compliance with the statute, even if the court is one of general common-law jurisdiction. Otherwise the judgments will be void.

Freem. Judgm. § 123, and *notes 1, 2*; *Waples*, *Attachm.* pp. 329-331, and *note 1*, p. 331; *Thatcher v. Powell*, 19 U. S. 6 *Wheat*, 119, 5 L. ed. 221; *Owen v. Jordan*, 27 Ala. 608; *Gunn v. Howell*, 27 Ala. 668, 62 Am. Dec. 785; *Danning v. Corwin*, 11 Wend. 647; *Adams v. Jeffries*, 12 Ohio, 258, 40 Am. Dec. 477; *Grieve v. Freytag*, 81 Ohio St. 147; *Robbins v. Clemmens*, and *McCurdy v. Baughman*, *supra*.

Recitals on the docket, such as "summons duly served," "proof of publication duly made," etc., are not sufficient. They are not the facts that are necessary to show jurisdiction. They are merely the conclusions or findings of the justice of the peace, which he has no authority to make. The facts must appear upon the record, and not conclusions.

Freem. Judgm. §§ 517, 519, 527, also cases before cited.

It is necessary that summons issue for the defendant and be returned not served, etc., before any steps can be taken to acquire or make constructive service, even if property is attached.

Rev. Stat. 6496; *Swan's Treatise*, 13th ed. pp. 49, 50.

The justice has power—jurisdiction—to continue the cause for publication, and further proceed in the case, only on the concurrence of two conditions: (1) That the summons has not been and cannot be served on the defendant in the county; and (2) when property of the defendant has been taken under the order of attachment and these jurisdictional facts must appear of record.

Without the concurrence of both of such conditions a continuance of the cause by the justice is unauthorized—a nullity.

Myers v. Smith, 29 Ohio St. 150.

v. Gaynor (Wis.) 21 L. R. A. 161; and *Neufelder v. German Am. Ins. Co.* (Wash.) 23 L. R. A. 277.

The question in the present case respecting a nonresident of the county in which suit is brought is somewhat novel.

If property or money in the hands of the garnishee is relied upon as a ground of jurisdiction, that fact must appear of record, and there must be a finding of the justice that the garnishee had property of the defendants in their possession, etc.

Without such finding no order can be made on garnishees, and no judgment can be rendered against defendants served only by publication, if the publication were sufficiently shown.

Drake, Attachm. § 449, and notes 3, 5, § 461; *Carlton v. Washington Ins. Co.* 85 N. H. 162; *Abbott v. Sheppard*, 44 Mo. 273; *Repine v. McPherson*, 2 Kan. 340; *Farwell v. Howard*, 26 Iowa, 881; *Nat. Bank of New London v. Lake Shore & M. S. R. Co.* 21 Ohio St. 221; *Myers v. Smith*, *supra*.

Liberality of construction and consideration does not apply to jurisdictional facts and matters.

Robbins v. Clemmens, *supra*.

Property not within the jurisdiction of the court, nor within reach of its process, cannot be bound by notice of garnishment any more than it can be taken by manual attachment.

If the property is not held by the garnishee within a jurisdiction where the process of the court may run, so that he may turn it out, if he shall so desire, to the officer holding the process, it is not bound, nor is the garnishee answerable for it, unless possibly by his own negligence or wrongful act.

Kneeland, Attachm. pp. 835, 836, § 407; Drake, Attachm. § 474, and note 3, p. 862, §§ 475, 477, 480-484; 2 Wade, Attachm. § 844; Waples, Attachm. pp. 194, 226-228; *Sawyer v. Thompson*, 24 N. H. 510; *Young v. Ross*, 31 N. H. 201; *Jones v. Comings*, 6 N. H. 497; *Carlton v. Washington Ins. Co. supra*; *Taft v. Mills*, 5 R. I. 393; *Cronin v. Foster*, 13 R. I. 196; *Pennycuik v. R. Co. v. Pennock*, 51 Pa. 244; *Wheat v. Platte City & Ft. D. R. Co.* 4 Kan. 370; *Illinois Cent. R. Co. v. Cobb*, 48 Ill. 402; *Plimpton v. Bigelow*, 93 N. Y. 592; *Straus v. Chicago Glycerine Co.* 46 Hun, 216; *Keating v. American Refrigerator Co.* 32 Mo. App. 293; *Lavrence v. Smith*, 45 N. H. 533, 86 Am. Dec. 183; *Nye v. Incombe*, 21 Pick. 263; *Bates v. Chicago, M. & St. P. R. Co.* 60 Wis. 296, 50 Am. Rep. 869; *Southland v. Second Nat. Bank of Peoria*, 78 Ky. 250; *Bowen v. Pope*, 125 Ill. 28; *Latimer v. Union Pac. R.* 49 Mo. 105, 97 Am. Dec. 373; *Carr v. Lewis Coal Co.* 96 Mo. 149.

Mr. Clayton W. Everett, for defendants in error:

The justice could not have made such an order as he made without finding there was property in the garnishee's hands. This kind of order is all that was made, and all that was done in the case of—

National Bank of New London v. Lake Shore & M. S. R. Co. 21 Ohio St. 221.

Acts done which presuppose the existence of other acts to make them legally operative are presumptive proof of the latter.

Ward v. Barrows, 2 Ohio St. 241.

Every reasonable intent should be made in favor of the record of the justice proceeding.

Austin v. Hayden, 6 Ohio, 388.

The question of jurisdiction of the justice of the peace on the motion of Stewart & Co. was determined and however erroneous cannot be impeached collaterally.

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National Bank of New London v. Lake Shore & M. S. R. Co. supra; *Sheldon v. Newton*, 30 Ohio St. 494.

Minshall, J., delivered the opinion of the court:

The action below was a suit in replevin brought in the common pleas of Lucas county by Root & McBride Bros. against Davis & Bros. for the possession of certain specific personal property, described as twenty-three cases of merchandise and some other articles, recently owned by A. J. Stewart & Co., of Crawford county. It appears from the answer and cross-petition of the defendants, and the testimony, that on August 23, 1888, Stewart & Co., being then the owners of the property, and residing and doing business at a town in Crawford county, this state, were indebted to Davis & Bros. in the sum of \$195.50, and, to secure this indebtedness, executed a chattel mortgage on the property, on which Davis & Co. made the proper affidavit, and duly filed it for record in the proper office, and on the same day, in pursuance of the provisions of the mortgage, took possession of the property. On August 28, Davis & Bros. boxed up the goods, and on the 29th shipped the same to their place of business, in Toledo, Lucas county. Previous to this, on August 27, Luce & Co. commenced an action before a justice of the peace of Lucas county, against Stewart & Co., to recover a claim of theirs, and caused an attachment to issue, on the ground of the nonresidence of the defendants, and caused notice of garnishment to be served upon Davis & Bros., mortgagees. On August 28, Shaw & Co. commenced two similar actions against Stewart & Co., before the same justice of the peace, and like proceedings were had as in the case of Luce & Co. On October 11, 1888, notice by publication having been given as required by law, the justice rendered judgments in the several cases, and ordered the garnishees, Davis & Co., to deliver the property of the defendants held by them into court, and also to pay the money due from them to the defendants into court. Before this, on August 29th, after the goods had been delivered by Davis & Bros. to the railroad agent at the depot in Crawford county, to be shipped to Toledo, but while still at the depot, Stewart & Co. made and delivered to Root & McBride Bros. a bill of sale of the property to secure a debt due them, of some \$800. On the next day they notified Davis & Bros. of their bill of sale, offered to pay the amount of their claim, and demanded the property. This was refused by Davis & Bros. because of the proceedings in garnishment against them. Luce & Co. and Shaw & Co. were made defendants, and filed answers and cross-petitions. The court found for the defendants upon the pleadings and evidence, and rendered judgment in their favor for the value of the property taken under the writ, and—the claim of the defendants, Davis & Bros. having been paid by the defendants during the pendency of the action—ordered the amounts due Luce & Co. and Shaw & Co. to be paid them according to priority. The judgment was affirmed on error by the circuit court.

The principal question in the case is whether the service of garnishment on Davis & Bros.

in Lucas county gave to Luce & Co., as well as to Shaw & Co., a lien upon the property covered by the mortgage to Davis & Bros., or on any indebtedness of the latter to the mortgagors, Stewart & Co.—the property being at the time of the service in Crawford county, the residence of the latter. We think it did. At the time of the service of process on the garnishees, they had, as mortgagees, taken possession of the property under the provisions of the mortgage, so that, irrespective of its physical location, they were the owners of it, subject only to a liability to account to the mortgagor for the surplus of its value after satisfying their claim. In other words, their relation had changed from that of creditor to that of debtor of the mortgagor for whatever this surplus might be. *Robinson v. Fitch*, 26 Ohio St. 659, 662; *Carty v. Fenstermaker*, 14 Ohio St. 457, 461; *Lindemann v. Ingham*, 36 Ohio St. 1, 9; *Morgan v. Spangler*, 20 Ohio St. 38; *Kingsbury v. Phelps*, Wright (Ohio) 871; 2 Story, Eq. Jur. § 1031. And this credit of the mortgagors was liable to be attached, and was attached by the service of the process of attachment upon the debtors, Davis & Bros., and made them liable to the attaching creditors for whatever might be found due from them on the value of the property after satisfying the amount of their own claim.

It is claimed, however, that, without a physical seizure of the property in Lucas county, the magistrate had no jurisdiction to order the payment of the amount due from the garnishees into court, as no personal service was obtained upon the defendants in the action. A number of cases are cited in support of this proposition. But they are all cases where the defendant was a nonresident of the state in which the action was commenced. It may be conceded that the credits of a nonresident debtor, without personal service upon him, cannot be attached, in this state, by simply serving the process of garnishment upon his debtor residing within the jurisdiction of the court issuing the process. That would be to give to the laws an extraterritorial effect. In *Baltimore & O. R. Co. v. May*, 25 Ohio St. 347, it was held that the indebtedness of the company to a person residing in this state could be attached in the courts of a sister state without personal service, but this seems opposed to the recent decision of the Supreme Court of the United States in *Cole v. Cunningham*, 133 U. S. 107, 33 L. ed. 688; *Reno*, Nonresidents, § 140. A number of the state courts take the same view. *Id.* § 216.

But as between citizens of the state, subject to its laws, the case is wholly different. While the *situs* of a credit is generally regarded as that of the creditor, it would be quite as reasonable to treat it as that of the debtor, for the debtor is the person from whom the money is derived that makes the credit available as a thing of value; so that there is nothing in the nature of things forbidding the place of the debtor being regarded as the *situs* of a credit. And hence it is competent for the legislature to enact, as has been done in this state, that the property and effects, of every kind, of a resident of one county, may be attached by his creditor in another, on the ground of his non-residence therein, by serving the process of garnishment upon a person having possession

of his property, or being indebted to him, in the county, and giving notice by publication of the proceeding; and such was the proceeding in this case. Conceding, then, that the transfer of the mortgagor's interest in the goods by bill of sale to Root & McBride to secure a debt due to them was good as against creditors, which may be doubtful under section 4151, Rev. Stat., as it was not recorded as therein required, still, it was subsequent in time to the liens created by the proceedings in attachment, and hence did not entitle them to recover the property in replevin against Davis & Bros., who were bound by those proceedings to account to Luce & Co. and Shaw & Co. for its value over and above their own claim, the claim of the plaintiff being postponed to what might remain after payment of these claims and that of the defendant.

But it is further claimed that the attachments were void on the ground of irregularities in the proceedings had before the justice. In so far as this claim is based on the ground that there was no physical seizure of the property by the constable, it has been answered by what has been already said. The thing attached in this case was not tangible, but intangible, property,—a chose in action,—which, under our law, may be attached by process of garnishment served on the debtor, where the defendant is a nonresident of the county in which the suit is commenced, service being made on him by publication.

The other objections are, at most, based upon such irregularities as can only be taken advantage of by a proceeding in error, and are not available in a collateral proceeding, as the justice had jurisdiction of the subject of the action, and power to issue a writ of attachment upon the affidavit that was filed therefor. "The rules," says Longworth, *J.*, in *Scioto Valley R. Co. v. Cronin*, 38 Ohio St. 122, "which govern pleading in courts of record at common law, and under the code of civil procedure, have never been strictly applied in proceedings before justices of the peace. From the earliest days, a very liberal practice has obtained, in this state, in reviewing proceedings had before these officers, when the question of their jurisdiction is not involved." Among the errors appearing, as claimed, upon the transcript of the justice, offered in evidence of the proceedings had before him, is its omission to show that he found, from the answer of the garnishees, that they had property in their possession belonging to the defendants, or that they were indebted to them. The transcript does, however, show that, on the day fixed for a hearing, by the publication of notice, the justice, after rendering judgment for the plaintiffs, made an order on the garnishees "to deliver the property of the defendants in their possession to the court, and to pay the money due from them to the defendants into court." This, we think, was sufficient. If a finding of the kind were necessary, the presumption from the order is that it was made, and an omission to enter such finding upon the docket cannot be taken advantage of in a collateral proceeding. The garnishees were served; and "the order of attachment binds the property attached from the time of service, and the garnishee stands liable to the plaintiff for all prop-

erty, moneys, and credits in his hands, or due from him to the defendant, from the time he is served with the notice." White, J., in *Carty v. Fenstermaker, supra*. See also *National Bank of New London v. Lake Shore & M. S. R. Co.* 21 Ohio St. 221, 229.

Exception was also taken to the admission in evidence of papers in the case, not entered upon the transcript of the justice. These simply showed that the statute regulating the proceeding had been complied with. Their

entry upon the docket is not required, nor usual. The transcript in evidence showed all that is material to the validity of the liens of the attaching creditors; and, while the papers offered and received might have been dispensed with, their admission in evidence was not prejudicial to the plaintiffs and cannot be well assigned as error.

Judgment affirmed.

Dickman and Spear, JJ., dissent

PENNSYLVANIA SUPREME COURT.

Celia McMULLEN, *Appt.*,
v.
CARNEGIE BROS. & CO., Limited.
(158 Pa. 518.)

The rule applicable to railroad companies, requiring them to inspect cars of other companies used for transporting freight, before permitting their employes to handle them, is not applicable to companies or persons on whose sidings cars are delivered for the purpose of permitting them to load or unload freight.

(November 14, 1893.)

A PPEAL by plaintiff from a judgment of the Court of Common Pleas, No. 3, for Allegheny County in favor of defendant in an action brought to recover damages for personal injuries resulting in death, and alleged to have been caused by defendant's negligence. *Affirmed.*

The facts sufficiently appear in the opinion of McCLEUNG, J., in the court below in refusing to take off the compulsory nonsuit which had been previously entered, as follows:

"There is no direct evidence in this case of actual notice to the defendants of the defective condition of the brake staff which probably caused the death of the plaintiff's husband. Nor does it appear that the car was in their possession for such length of

time that a jury could be permitted to find that, in the ordinary course of affairs, they should have noticed it. Plaintiff's case then depends upon the existence of a duty on the part of defendants to ascertain by inspection that cars delivered to them by the railroad company for the purpose of being unloaded or loaded, or both, are in good and safe condition, before permitting its employes to handle them for the purposes for which they are so delivered. The cars used by a railroad company for the purpose of transporting freight are appliances, as to the condition of which the company owes a duty to its employes working upon them, which cannot be filled without proper inspection. This, doubtless, applies as to cars borrowed or hired by the railroad company from another company. It does not, however, apply to companies or persons on whose sidings loaded cars are delivered for the purpose of permitting the owner of the siding to unload the freight. It follows that the nonsuit in this case was properly granted, and the motion to take it off must be refused."

Messrs. John B. Chapman and M. A. Woodward for appellant.

Messrs. G. D. Packer, Edwin W. Smith, and Knox & Reed for appellee.

Per Curiam:

We are satisfied, from an examination of the testimony in this case, that there was no error in refusing to take off the judgment of nonsuit; and, for the reasons given in the opinion of the learned judge of the court below, *the judgment should be affirmed.*

NOTE.—The above case, though decided without discussion, seems worth reporting in this series as presenting a point which is apparently new. 28 L. R. A.

MICHIGAN SUPREME COURT.

John W. DICKEY *et al.*
v.
George WALDO, *Pff. in Err.*
(97 Mich. 255.)

1. A contract by the owner of a homestead under which a third person is to set out

NOTE.—Sale or mortgage of future crops.

I. How assignable.

- a. Sales.
- b. Statute of frauds.
- c. Mortgages.
- d. Upon sale of the land.

II. General doctrine.

III. Necessity and effect of ratification.

IV. Necessity and effect of possession.

V. Potential interests.

VI. Equitable doctrine.

VII. Description.

- a. General rules.
- b. Sufficient.
- c. Insufficient.

VIII. Parol evidence to identify.

IX. Notice.

- a. General.
- b. Constructive.

X. Necessity and effect of recording.

XI. To what crop or part of crop it extends.

XII. Title of a mortgage.

XIII. Effect of.

- a. As against creditors.
- b. As against purchasers.
- c. As between husband and wife.
- d. Judgment against.

XIV. Severance of the property.

XV. Application of proceeds.

XVI. To secure crop advances.

XVII. Crops raised upon shares.

XVIII. Upon whom binding.

XIX. Landlord and tenant.

XX. Conversion.

XXI. Special state doctrines and laws.

I. How assignable.

a. Sales.

In *Coke upon Littleton*, 4 b. it is stated that if a man has twenty acres of land and by deed grant to another and to his heirs *vestura terre* and maketh livery of seisin *secundum formam charte*, the land itself shall not pass because he hath a particular right in the land and thereby he shall not have the houses, timber, trees, mines and other real things parcel of the inheritance, but he shall have the vesture of the land, that is the corn, grass, underwood, sweepage and the like, and he shall have an action of trespass *quare clausum fregit*.

This legal writer also states: "The same time if a man grant *herbagerium terre*, he hath a like particular right in the land and shall have an action *quare clausum fregit*, but by grant thereof and livery made, the soil shall not pass as aforesaid. If a man let to B. the herbage of his woods, and after grant all his lands in the tenure, possession, or occupation of B., the woods shall pass, for B. hath a particular possession and occupation which is sufficient in this case."

The law makes a pointed distinction between those profits which are the spontaneous products of the earth or its permanent fruits, and corn and other growth of the earth which are produced annually by labor and industry, and hence are called *fructus industriales*, the latter being regarded for

and cultivate peach trees in consideration of half the crop for any two years during a term of ten years, the trees to become the property of such owner, is not invalid because not signed by his wife as a conveyance of any homestead right or as an interruption of the possession of the homestead.

2. A contract by which one person is to

most purposes as personal chattels. *Brittain v. McKay*, 25 N. C. 235, 36 Am. Dec. 738.

Growing crops when *fructus industriales* are personal property. *Edwards v. Thompson*, 85 Tenn. 720.

A sale of such crops is good *inter partes* and as against third parties, even without a change of possession. *Bellows v. Wells*, 36 Vt. 599.

Crops produced by annual cultivation, growing or standing *fructus industriales*, ready for harvest, are personal estate, and may be transferred as chattels. *Willis v. Moore*, 59 Tex. 623, 46 Am. Rep. 284; *Silberberg v. Trilling*, 82 Tex. 523; *Cayce v. Stovall*, 50 Miss. 399; *Erskine v. Plummer*, 7 Me. 447, 22 Am. Dec. 216.

They are no part of the realty. *Silberberg v. Trilling*, *supra*; *Delaney v. Root*, 99 Mass. 548, 97 Am. Dec. 53; *Parsons v. Smith*, 5 Allen, 578; *Giles v. Simonds*, 15 Gray, 441, 77 Am. Dec. 873.

The law is well settled as to sales. *Crine v. Tifts*, 65 Ga. 644.

Grass in a condition to be cut was held to be the subject of a parol sale. *Cutler v. Pope*, 13 Me. 377.

And a parol contract for the sale of such a crop passes a title valid as against the vendor and all subsequent claimants. *Westbrook v. Eager*, 16 N. J. L. 81; *Green v. Armstrong*, 1 Denio, 556; *Shepard v. Philbrick*, 2 Denio, 175; *Harris v. Frink*, 49 N. Y. 24, 10 Am. Rep. 318.

So an interest in personal chattels may be created without a deed or conveyance in writing. *Green v. Armstrong*, 1 Denio, 550.

A license to do a particular thing upon another's land is valid without deed or writing, not transferring an interest in land, and if for value is not countermandable. *Clafin v. Carpenter*, 4 Met. 580, 38 Am. Dec. 381; *Taylor v. Waters*, 7 Taunt. 374, 2 Marsh. 551; *Liggins v. Inge*, 7 Bing. 682, 5 Moore & P. 712; *Mumford v. Whitney*, 15 Wend. 380, 30 Am. Dec. 60; *Whitmarsh v. Walker*, 1 Met. 313; *Woodbury v. Parshley*, 7 N. H. 237, 26 Am. Dec. 739.

In *Lewis v. McNatt*, 65 N. C. 65, a crop of turpentine was held to be *fructus industriales*, not being a spontaneous product but produced by labor and cultivation.

Grass owned by one not the owner of the freehold is personal estate and salable as such and may be mortgaged. *Smith v. Jenks*, 1 Denio, 580.

A grant of crops to be thereafter grown by the owner upon his land is valid, and the title thereto passes as soon as they come into existence. *Nestell v. Hewitt*, 19 Abb. N. C. 237.

In *Stambaugh v. Yeates*, 2 Rawle, 161, the court held that grain growing was so far personal property that it could be sold either privately by the owner, or by judicial process against him, and that such sale was an implied severance, and the grain did not pass by a sale of the land.

Where under a parol contract for purchase, the purchaser was let into possession and sowed a crop of oats with the consent of the vendor, and subsequently refused to perform the contract and ejected the plaintiff, it was held that the plaintiff was a tenant at will entitled to the crop. *Harris v. Frink*, 49 N. Y. 24, 10 Am. Rep. 318.

Where the vendee of land entered and sowed

plant and cultivate peach trees upon the land of another for a term of ten years and to receive half of the proceeds during any two years of such term which he may select, is not invalid in respect to the interest given in such crops as a mortgage of a thing having no potential existence, since the contract is executed by the setting out and delivery of title to the

trees and the crops are the subject of sale or mortgage in the same manner as crops to be raised from seeds already planted.

3. A contract by which one person is to set out and cultivate for ten years peach trees upon the land of another and to have half of the crops for any two years of such term which he may select, makes him a tenant in

crops under a parol contract for the purchase of the land with the consent of the vendor, the court held that the invalidity of the contract had no effect upon the purchaser's title to the crops which remained in him as personal chattels. *Ibid.*

b. Statute of frauds.

In *Bernal v. Hovious*, 17 Cal. 341, 79 Am. Dec. 147, the fifteenth section of the Statute of Frauds which declares that "every sale made by a vendor of goods and chattels in his possession or under his control, and every assignment of goods and chattels, unless the same be followed by an actual or continued change of possession of the things sold or assigned, shall be conclusive evidence of fraud as against the creditors of the vendor or the creditors of the persons making such assignment, or subsequent purchasers in good faith,"—was held not to apply to a case of growing crops, they not being goods and chattels within its meaning. *Bours v. Webster*, 6 Cal. 661; and *Visser v. Webster*, 13 Cal. 53, to the same effect.

Although growing crops are chattels and will pass by a verbal sale, yet they are not susceptible of manual delivery until harvested and therefore are not until harvested "in the possession or under control of the vendor within the meaning of the statute." *Davis v. McFarlane*, 37 Cal. 634, 99 Am. Dec. 340; *Bours v. Webster* and *Visser v. Webster*, *supra*; *Pacheco v. Hunsacker*, 14 Cal. 120; *Bernal v. Hovious*, *supra*; *Robbins v. Oldham*, 1 Duv. 28. Such a construction of the statute would make it an absolute interdiction upon the sale of growing crops, unless the vendor were willing to abandon the possession to the vendee at the same time. *Davis v. McFarlane*, *supra*.

There is nothing in the vegetable or fruit which has an interest in or concerning land when severed from the soil, whether trees, grass, or other spontaneous growth (*prima vestura*), or grain, vegetables, or any kind of crops (*fructus industriales*) the product of periodical planting and culture, they are alike, mere chattels, and the severance may be in fact as when they are cut and removed from the ground, or in law, as when they are growing, the owner in fee of the land by a valid conveyance sells them to another person or where he sells the land reserving them by expressed provisions. *Purner v. Piercy*, 40 Md. 212, 17 Am. Rep. 561.

As a general rule if the products of the earth are sold specifically, and by the terms of the contract to be separately delivered as chattels, the sale is not affected by the fourth section of the Statute of Frauds as amounting to a sale of an interest in land. *Ibid.*

If the contract when executed is to convey to the purchaser a mere chattel, though it may be in the interim a part of the realty, it is not affected by the statute. *Ibid.*

If, however, the contract is in the interim to confer upon the purchaser an exclusive right to the land for a time for the purpose of making a profit of the growing surface, it is affected by the statute and must be in writing, although the purchaser is at the last to take from the land only a chattel. *Ibid.*

When such is the character of the transaction, it matters not whether the product be trees, grass, and other spontaneous growth, or grain, vegeta-

bles, or other crops raised periodically by cultivation, and it is quite as immaterial whether the produce is fully grown or in the process of growing at the time of making the contract. *Ibid.*

The circumstances that the produce purchased may, or probably, or certainly will, derive nourishment from the soil, between the time of the contract and the time of the delivery, is not conclusive as to the operation of the statute. *Ibid.*

Such transactions take their character of realty or personality from the principal subject-matter of the contract and the interest of the parties, and therefore a sale of any growing produce of the earth in actual existence at the time of the contract, whether it be in a state of maturity or not, is not to be considered a sale of an interest in or concerning land. *Ibid.*

In *Purner v. Piercy*, *supra*, it was held to be a perversion of the object of the statute of frauds, to hold as invalid a sale, in other respects legal, of a growing crop of peaches without any intent of the parties to sell or purchase the soil, but conferring a mere license expressed or implied to the purchaser to go upon the land to gather the fruit and remove the same.

Where timber or other produce of the land, or any other thing annexed to the freehold, is specifically sold, whether it be severed from the soil by the vendor or to be taken by the vendee under a special license to enter for that purpose, it is still a sale of goods only and not within the statute. *Purner v. Piercy*, *supra*.

A sale of any growing produce of the earth in actual existence at the time of the contract, whether it be in a state of maturity or not, is not to be considered a sale of an interest in or concerning land. *Ibid.*

In *Boatwick v. Leach*, 3 Day, 476, a sale of property which would pass by a deed of land as such, without any other description, which is to be separated from the land, is not within the statute of frauds, where the subject-matter is capable of being separated.

A contract for the sale of growing crops raised by the industry of man and the cultivation of the earth is not within the statute. *Bloom v. Welsh*, 27 N. J. L. 177; *Green v. Armstrong*, 1 Denio, 550; *Davis v. McFarlane*, 37 Cal. 634, 99 Am. Dec. 340; *Flynt v. Conrad*, 61 N. C. 190, 93 Am. Dec. 538; *Brittain v. McKay*, 23 N. C. 265, 35 Am. Dec. 738; *Walton v. Jordan*, 65 N. C. 172; *Bond v. Coke*, 71 N. C. 100; *Cook v. Steel*, 42 Tex. 53.

In *Bank of Lansingburgh v. Cray*, 1 Barb. 542, the court waived the consideration of the question, whether or not a valid mortgage upon the produce of land not in actual existence at the time could be made to hold that a mortgage of growing trees, fruit, and grass must be in writing within the statute.

In *McIlvalne v. Harris*, 20 Mo. 457, 64 Am. Dec. 196, it was held that growing wheat was an interest in land and a contract concerning it within the statute of frauds, and must be in writing, and that parol evidence of the sale of the wheat was inadmissible.

c. Mortgages.

A conveyance which simply secures an antecedent debt is effective only as a mortgage. *Hamilton v. Maas*, 77 Ala. 233.

common with the owner of the land of the peaches for the years which he may select.

(October 27, 1893.)

ERROR to the Circuit Court for Allegan County to review a judgment in favor of plaintiffs in an action brought to recover dam-

ages for the alleged conversion of certain peaches which had been grown on defendant's land, but which plaintiff claimed under the terms of a certain contract. *Affirmed.*

The contract which was alleged to give plaintiffs their rights was as follows:

"Articles of agreement, made this 21st day

Under the Georgia Code, § 1955, no particular form is necessary to make a mortgage. *Stephens v. Tucker*, 55 Ga. 548.

The mortgage may be so drawn as to cover after-acquired property, if in existence at the time the mortgage was executed. *Hughes v. Wheeler*, 68 Iowa. 641.

A valid mortgage of personalty may be made by parol as under the common law. In the absence of statutory requirements and a contract and conveyance of personalty may be made without writing. *Morrow v. Turney*, 36 Ala. 131, 136.

This principle was distinctly recognized in *May v. Eastin*, 2 Port. (Ala.) 422.

And in *Deshazo v. Lewis*, 5 Stew. & P. (Ala.) 94; *Thrash v. Bennett*, 57 Ala. 156.

Even of a crop afterwards to be planted. *Stearns v. Gafford*, 56 Ala. 544.

In *Stewart v. Fry*, 3 Ala. 573, it was held that the profits arising out of the use of a personal chattel might be made the subject of a mortgage.

Such a mortgage is valid at common law, however immature the crop may be. *Booker v. Jones*, 55 Ala. 236.

In *Coeter v. Bank of Georgia*, 24 Ala. 49, the court went still further holding that a parol agreement to give a mortgage, money being advanced thereon, had the effect of a mortgage upon an estate consisting both of realty and personalty, the question of the statute of frauds not being noticed.

In *Brooks v. Ruff*, 37 Ala. 371, the court held such a mortgage good *inter partes*.

There must, however, be a debt, legal liability, or obligation actually existing or at the time proposed to be incurred, and afterwards actually incurred. *Stearns v. Gafford*, *supra*.

Where the liability on a note as surety, for which a mortgage of personal property had been given by way of indemnity, was extinguished and a new note given with a different surety, the court held that a verbal agreement between the mortgagor, mortgagee, and the new surety made upon the cancellation and substitution of such notes, providing that the mortgage should stand as security, created a valid mortgage *inter partes*. *Brooks v. Ruff*, *supra*.

A verbal mortgage for advances and supplies necessary to make a crop prior to the passing of section 1731 of the Alabama Code of 1886 (Acts 1884-85, p. 93), was held to be good as a mortgage on the property of that one of the mortgagors entering into such an agreement, each mortgagor having a right severally to bind his own property by enlarging the legal operation of the security, the above section of the code prohibiting mortgages by parol not bearing upon the case. *Hill v. Nelms*, 36 Ala. 442.

d. Upon sale of the land.

In *Wilkinson v. Ketter*, 69 Ala. 435, the court held a crop was considered as growing from the time the seed was sown, as it then became part of the land and passed by a sale thereof.

Growing crops pass by a sale of the land without any reserve. *Crews v. Pendleton*, 1 Leigh, 297, 19 Am. Dec. 750.

As between the vendor and vendee, the growing crop is part of the realty, and as a general rule, the sale and conveyance of the land by its owner carries the property in the crop to the purchaser. *Turner v. Cool*, 23 Ind. 56, 85 Am. Dec. 449.

8 L. R. A.

A deed absolute upon its face, without any reservation whatever in respect to a then growing crop, will pass the whole of the grantor's interest both in the crop and in the land upon which it is grown. *Gibbons v. Dillingham*, 10 Ark. 9, 50 Am. Dec. 233.

Where the title to growing crops is not reserved, they pass by a transfer of the land, and a chattel mortgage thereof by the grantor in possession passes no title as against one claiming under his grantee. *Coman v. Thompson*, 47 Mich. 22, 41 Am. Rep. 708.

Grain not reserved passes by a conveyance of the land, and the fact that the vendor exercises some new acts showing an apparent ownership without objection, is not sufficient to show a reservation of the crops. *Wilkins v. Vashbinder*, 7 Watts, 378.

A growing crop laid by before maturity was held to pass on a sale of the land. *Pitts v. Hendrix*, 6 Ga. 452.

In *Backenstoss v. Stahler*, 33 Pa. 251, 75 Am. Dec. 592, it was held as settled law in that commonwealth, that growing crops were personal property, subject, however, to be parted with and as appurtenant to the realty in case of conveyance, unless severed by reservation or expectation. *Bear v. Bitzer*, 16 Pa. 178, 55 Am. Dec. 490, and *Wilkins v. Vashbinder*, 7 Watts, 379, to the same effect.

A crop of grain was held not to pass by a conveyance of the land, in *Smith v. Johnston*, 1 Penn. & W. 471, 21 Am. Dec. 404, but this decision would seem to be overruled by the later cases of *Burnside v. Weightman*, 9 Watts, 47, and *Wilkins v. Vashbinder*, *supra*.

After the crop has matured and been severed from the soil, it is personal estate, but while growing and not severed, unless expressly reserved, it will pass by a conveyance of the land. *Creel v. Kirkham*, 47 Ill. 644.

Where upon a contract for the sale of land, a crop of wheat was, as between the parties, specially reserved by the vendor, it was held that such crop passed by the conveyance of the land, the contract being executed upon the execution of the deed which was sole evidence, the prior contract having merged therein. *Turner v. Cool*, *supra*.

And in such a case parol evidence is not admissible to prove that the reservation of the grantor's interest in the crop was intended. *Gibbons v. Dillingham*, *supra*.

Parol evidence, however, was admitted in *Flynt v. Conrad*, 61 N. C. 190, 98 Am. Dec. 588, to prove that such crops did not pass by a conveyance of the land. In that case it was said that the deed did not purport to set out the agreement between the parties.

Such evidence is admissible to prove that the possession remains in the grantor. *Bond v. Coke*, 71 N. C. 100.

It was held admissible to prove a reservation of growing crops on a sale of realty. *Backenstoss v. Stahler*, 33 Pa. 251, 75 Am. Dec. 592.

Such reservation need not be by deed or in writing, for being goods and chattels, they may be conveyed by verbal contract. *Hamblet v. Bliss*, 55 Vt. 535.

If reserved by parol, they will not pass as part of the realty under an orphan's court sale. *Backenstoss v. Stahler*, *supra*.

of February, A. D. 1885, between John Schultz, of the township of Saugatuck, Allegan county, Michigan, of the first part, and John W. Dickey and Addison Lurvey, for Douglas, county, and state aforesaid, of the second part, witnesseth as follows: The said party of the first part is the owner of the

west half of the east half of the southwest quarter of section twenty-five, township of Saugatuck, aforesaid, and desiring to set out to peach trees a piece just east of his house, and running back to his east line, and far enough south as the piece is suitable for peach trees, but not to exceed 1,500 trees, said first

Where, after a conveyance of the land, the crops not being reserved thereby, the vendor executed a chattel mortgage of the latter, it was held that such mortgage was void as against such purchaser's assignee, even though the mortgage remained in possession. *Coman v. Thompson*, 47 Mich. 22, 41 Am. Rep. 706.

As between the executor and the heir, crops on the land at the time of the testator's death go to the executor, but as between them the vendor is entitled to them. *Smith v. Barham*, 17 N. C. 420, 25 Am. Dec. 721.

Until foreclosure or possession, the mortgagor is entitled to emblements, and when severed has an absolute right to them without liability to account, but if the land be sold before severance, the purchaser is entitled to the crops not only as against the mortgagor, but against all persons claiming in any manner under him subsequent to the mortgage. *Rankin v. Kinsey*, 7 Ill. App. 215.

Where land is sold for condition broken, before severance of the crop, the purchaser is entitled to it upon the sale. *Harmon v. Fisher*, 9 Ill. App. 22; *Rankin v. Kinsey*, *supra*.

In *Jones v. Thomas*, 8 Blackf. 423, it was held that the purchaser of mortgaged property at a foreclosure sale was entitled to the crops as against the mortgagor and those claiming under him. To the same effect, *Aldrich v. Reynolds*, 1 Barb. Ch. 613, 5 L. ed. 518.

The purchaser of lands of a decedent was held entitled to the growing crops until severed. *Jewett v. Keenholts*, 16 Barb. 193.

They are the subject of mortgage and may be removed upon foreclosure sale of such a mortgage as between the parties. *Wintermute v. Light*, 46 Barb. 278.

A purchaser of such crops at a statutory foreclosure sale acquired a title thereto as against a purchaser under an execution. *Shepard v. Philbrick*, 2 Denio, 174.

In *Cassidy v. Rhodes*, 12 Ohio, 88, it was held that a sale under a foreclosure decree did not pass the tenant's crops.

And in *Welsh v. Bekey*, 1 Penr. & W. 57, grain in the ground was treated as a chattel.

Grain growing upon the debtor's land was held to pass as appurtenant thereto under a sheriff's sale, where it belonged to the debtor at the time of the execution of the conveyance. *Bear v. Bitzer*, 16 Pa. 175, 55 Am. Dec. 490.

In *Richards v. Knight*, 4 L. R. A. 453, 78 Iowa, 60, a standing crop fully matured at the time of the sale of the land under foreclosure proceedings, was held not to pass to the purchaser at such sale but to remain in the tenant.

It has been held that crops could not be reserved by a sheriff at an execution sale of lands, and passed by a foreclosure sale of the land as against a lessee holding subsequent to the mortgage. *Howell v. Schenck*, 24 N. J. L. 89.

II. General doctrine.

A mortgage has all the elements of an executed conditional sale, and like a sale requires a subject in existence and in the ownership and control of the mortgagor. *Farmers Loan & T. Co. v. Long Beach Imp. Co.* 27 Hun, 89.

At common law a mortgage could only operate on property, actually in existence at the time, and 23 L. R. A.

actually belonging to the mortgagor. *Ludlum v. Rothschild*, 41 Minn. 218; *Williman v. Neber*, 20 Barb. 37, 40; *Pierce v. Emery*, 32 N. H. 484; *Smithurst v. Edmunds*, 14 N. J. Eq. 408; *Booker v. Jones*, 53 Ala. 256.

Although not good as a mortgage, such an instrument may be valid as an executory agreement for a mortgage which will authorize the contractee to take possession of the property as soon as it is acquired by the contractor, provided he does so before third parties acquire any rights. *Ludlum v. Rothschild*, *supra*. To the same effect, *Stowell v. Bair*, 5 Ill. App. 104.

If the purpose of planting is not the permanent enhancement of the land itself, but merely to secure a single crop which is to be the sole return of the labor expended, the product would naturally fall under the head of emblements, but if the tree, bush, or vine is one which requires to be planted but once, and will then bear successive crops for years, the planting would naturally be calculated to permanently enhance the value of the land itself, and the product of any one year could not be said to essentially date its existence to labor expended during that year, and hence it would be classed among *fructus naturales*. *Sparrow v. Pond*, 18 L. R. A. 103, 49 Minn. 412.

Any property which is capable of an absolute sale may be the subject of a mortgage. *Jones v. Webster*, 48 Ala. 109.

It is universally admitted and it is a mere truism, that a sale, grant, or mortgage of property, real or personal, *in present*, to which the vendor, grantor, or mortgagor has no title or which has no existence, is inoperative and void at law and in equity. *Booker v. Jones*, 53 Ala. 256.

In *Bank of Lansingburgh v. Crary*, 1 Barb. 542, *Justice Paige* was strongly of the opinion that a chattel mortgage could only operate on property in actual existence at the time of its execution, that it could not be given on the future products of real estate, and that if given one day or one week before the product of the land came into existence, it was as inoperative as if the chattel mortgage had been given on a crop of grass or grain one, two, or three years previous to its production, and relied upon the English cases of *Waddington v. Bristol*, 2 Bos. & P. 452, and *Evans v. Roberts*, 5 Barn. & C. 829, 8 Dowl. & R. 611.

To the same effect, *Otis v. Sill*, 8 Barb. 102, and *Harder v. Plass*, 57 Hun, 540, holding that if the mortgagor has no title at the time of the execution of the mortgage but intends to acquire *in future*, the mortgage is void. In the latter case, however, the mortgagor had acquired title at the time of the execution of the mortgage and the property was therefore properly subject to the mortgage.

There can be no sale or mortgage of a crop until it is planted. *Redd v. Burrus*, 68 Ga. 574; *Crine v. Tifts*, 65 Ga. 644.

A mortgage of after-acquired property is ineffectual. *Hunt v. Bullock*, 23 Ill. 320; *Roy v. Goings*, 6 Ill. App. 163.

In *Apperson v. Moore*, 30 Ark. 68, 21 Am. Rep. 170, which was a suit in equity on a mortgage of a future crop, it was stated that at law the action could not be maintained because there was no actual or potential existence in the subject granted.

In such cases the maxim *qui non habet, ille non dat* applies. *Burns v. Campbell*, 71 Ala. 228.

party agrees to set out the trees, and care for and cultivate the same, in a good and workmanlike manner, for the period of ten years from the date hereof, and to allow said Dickey and Lurvey, parties of the second part, to have and take one half of the crop of peaches for any two years they may select

during the aforesaid term of ten years. Said Schultz agrees that, if it shall come to his knowledge that any of the said trees are affected with the yellows, that he will immediately dig up and burn the same, root and branch. Said Dickey and Lurvey, parties of the second part, hereby agree, in considera-

There must be a right *in esse* out of which the mortgagor's claim can arise. *Puroell v. Mather*, 85 Ala. 570, 76 Am. Dec. 307.

If the thing exists, as between the parties, possession being transferred, operation or effect may be given by sale or conveyance, but as against the party in whom the title resides it is without force. *Booker v. Jones*, 35 Ala. 235.

Such rule, however, will not obtain, where its effect would be to defeat the manifest intention of the parties as gathered from the language and aided by the circumstances of the case. *Norris v. Hix*, 74 Iowa, 524.

A chattel mortgage will not be deemed to cover after-acquired property, unless the intention that it should is clearly expressed. *Lorner v. Allyn*, 64 Iowa, 723; *McArthur v. Garman*, 71 Iowa, 34; *Norris v. Hix*, *supra*.

But the special lien for fertilizers, created by section 1773 of the Georgia Code, is not subject to the rule that a sale or mortgage cannot be made of an unplanted crop for the reason that it is necessary to fertilize before the crop is planted, and the statute would be robbed of its beneficial results if so construed. *Hardwick v. Burtis*, 59 Ga. 773.

The court will take judicial notice of the assignments and of the general course of agriculture, and also that at neither the date of execution, nor the recording of the mortgage, was the crop upon which it was intended to operate, planted or in being. *Tomlinson v. Greenfield*, 31 Ark. 557; *Floyd v. Ricks*, 14 Ark. 236, 53 Am. Dec. 374.

Such a mortgage must operate *in present* on property and pass the title to the mortgagee upon condition, and to be operative to pass such a title the thing must be *in esse* in the same sense as in the case of a bargain and sale which vests the title in the buyer and with respect to things not in existence or not belonging to the vendor the law divided them into two classes, one of which may be sold, while the other can only be the subject of an agreement to sell, that is, it is the subject of an executory contract. *Stowell v. Bair*, 5 Ill. App. 104.

III. Necessity and effect of ratification.

Where the future acquisition is merely expected or contemplated such crops are not at common law the subject of sale, assignment, or mortgage, and the legal title to such property does not pass, unless, after it comes into existence, the vendor or mortgagor ratifies or carries out such transaction. *Hurst v. Bell*, 72 Ala. 335; *Booker v. Jones*, 55 Ala. 235.

The mortgagor may ratify and confirm his contract and convert the equity into an alienation and transfer of the chattel. *Columbus Iron Works Co. v. Renfro*, 71 Ala. 577.

Some new act or the assent thereto on the mortgagor's part must be shown after the crops have come into existence to render such a mortgage valid. *Roy v. Goings*, 6 Ill. App. 132; *Columbus Iron Works Co. v. Renfro*, *supra*; *Head v. Goodwin*, 37 Me. 151.

At law such a mortgage is only a license until a new act intervenes. *Cressey v. Sabre*, 17 Hun, 120.

There must be a transfer of the product of the grantor's labor. *Puroell v. Mather*, 85 Ala. 570, 76 Am. Dec. 307.

The delivery clothes the mortgagee with the legal title in as full a manner as if the crops had 23 L. R. A.

been fully grown at the time of the execution of the mortgage, and the title thus acquired will prevail over subsequent mortgagees. *Stern v. Simpson*, 62 Ala. 194.

Its delivery to the agent of the railroad company for transportation to the mortgagee amounts to a ratification and confirmation of the mortgage and passes the legal title. *Columbus Iron Works Co. v. Renfro*, *supra*.

IV. Necessity and effect of possession.

It has been held that upon a sale of a growing crop where the conveyance shows a clear intention of a complete sale at the time, the title and possession pass at once to the vendee. *Vaughn v. Owens*, 21 Ill. App. 249.

In Alabama, delivery of possession is not necessary to the validity of a mortgage of personality. *Morrow v. Turney*, 35 Ala. 131.

Yet such a mortgage does not pass the legal title so as to enable the mortgagee to maintain a statutory claim, unless actual delivery of the gathered crop has taken place. *Wetzler v. Kelly*, 35 Ala. 440.

Though a conveyance of personal property to be subsequently acquired is *per se* ineffectual to transfer the legal title to the grantee, yet if the grantor delivers the property when acquired to the grantee or allows him to take possession under the conveyance, the property passes and vests both in law and in equity according to the terms of the conveyance. *Cook v. Corthell*, 11 R. I. 432, 23 Am. Rep. 513, following *Williams v. Briggs*, 11 R. I. 173, 22 Am. Rep. 553, 23 Am. Rep. 513, which held that possession must be acquired or taken by the mortgagee under the mortgage, but that such a mortgage in equity created a lien upon the crops when acquired. To the same effect *Williams v. Winsor*, 12 R. I. 9; *Moody v. Wright*, 13 Met. 32, 46 Am. Dec. 706; *Parker v. Jacobs*, 14 S. C. 12, 37 Am. Rep. 724; *Cressey v. Sabre*, 17 Hun, 120; *Moore v. Pyrum*, 10 S. C. 452, 30 Am. Rep. 58; *Stowell v. Bair*, 5 Ill. App. 104; *Bellows v. Wells*, 36 Vt. 599.

Actual possession of the property must be obtained after it comes into existence and before it is sold. *Lamson v. Moffat*, 61 Wis. 153; *Comstock v. Scales*, 7 Wis. 159; *Chynoweth v. Tenney*, 10 Wis. 397, 407; *Farmers Loan & T. Co. v. Commercial Bank*, 11 Wis. 203; *Single v. Phelps*, 20 Wis. 399; *Mowry v. White*, 21 Wis. 413; *Hunter v. Bosworth*, 43 Wis. 533; *Farmers Loan & T. Co. v. Fisher*, 17 Wis. 114; *Farmers Loan & T. Co. v. Cary*, 18 Wis. 110; *Chapman v. Weimer*, 4 Ohio St. 431, *infra*, *Equitable doctrine*.

In *Farmers' Loan & T. Co. v. Commercial Bank*, *supra*, the court approved of the above doctrine and held that such a mortgage amounted to no more than a license requiring some new act of the grantor, confirming the same after the property was acquired, in order to vest the title in the mortgagee.

And in *Hunter v. Bosworth*, *supra*, the doctrine stated in the cases cited *supra*, was adhered to, the court stating that it was not inclined to change the strict rule so long established there, merely because courts elsewhere had abandoned it.

In *Gittings v. Nelson*, 86 Ill. 501, it was held that a mortgage of a crop to be raised that year to secure the purchase of property was inoperative as such without possession being taken.

Such a mortgage, even though filed, would still

tion of the agreements hereinbefore stated, to be performed upon the part of the said Schultz, to furnish what trees may be needed to set the aforesaid piece of land, not to exceed 1,600 trees, and take as pay therefor one half of the crop of peaches for any two years they may select. It is mutually agreed that

said Dickey and Lurvey shall make their selection of the year when they will take the half of the crop on or before September 15th of that year. Each party hereto are to pick and care for their own share of the fruit and are to each take as near half of the crop as may be; but at the close of the season each

be wholly inoperative as to creditors or subsequent purchasers unless, before their rights attached, there be such delivered or subsequent act. *Merchants & M. Sav. Bank v. Lovejoy*, 84 Wis. 601.

The want of actual and continued possession of the property will render the agreement absolutely void as to creditors, whether prior or subsequent to its date, or to the time when the crop was raised, under section 2313 of the Revised Statute of Wisconsin. *Ibid.*

The mere making and recording of the instrument without any further delivery by the mortgagor or act on the mortgagee's part, showing possession or the exercise of his rights of property is not sufficient. *Moody v. Wright*, 13 Met. 17, 46 Am. Dec. 706.

Such new act is the taking of possession by the creditor under his contract. *Cressey v. Sabre*, 17 Hun, 120.

Possession obtained by him before the rights of third parties attached, would make this title good as against the world. *Roy v. Goings*, 6 Ill. App. 162; *Walker v. Vaughn*, 38 Conn. 577; *Tedford v. Wilson*, 3 Head, 312; *Polk v. Foster*, 7 Baxt. 98.

His title is superior to that of attachment creditors of the mortgagor, even though the mortgagor resided upon the premises. *Hamblet v. Bliss*, 55 Vt. 535, where possession was taken and the crops out after condition broken.

Such executory agreement is a continuing one so that when the creditor does takes possession under it, he acts lawfully under the agreement of one then having the disposing power and thus makes the lien good. *Moody v. Wright*, 13 Met. 17, 46 Am. Dec. 706.

The lien ceases as against subsequent purchasers if the harvested crops are not delivered as in other cases of personal property. *Quirique v. Dennis*, 24 Cal. 154.

But it has been held that a mortgage upon growing crops executed, acknowledged, and recorded like mortgages upon real estate, is valid against third parties without delivery of possession. *Ibid.* See also *Bellows v. Wells*, 35 Vt. 529.

There being no change of possession, the mortgagee's claim is not superior to that of an execution creditor of the mortgagor, even though it be claimed that the mortgagor was in possession as the mortgagee's agent. *Barr v. Cannon*, 69 Iowa, 20.

So if, before taking possession or the doing of acts necessary to give vitality to the mortgage as to the subsequently acquired property, an attachment or assignment for the benefit of creditors takes place, the opportunity for completing the lien is lost and the mortgage or pledge not being completed or perfected the property will pass to the assignee and be held by him for the benefit of the creditors generally. *Moody v. Wright*, 13 Met. 17, 46 Am. Dec. 706.

It is the settled law in Wisconsin that a chattel mortgage vests the legal title in the mortgagee before the debt is due, and that he may take possession thereof immediately, unless by express stipulation the mortgagor is permitted to retain possession, and that in such cases the mortgagor cannot, without proof of payment or other extinguishment of the mortgage, maintain an action of tort in the nature of trover for a conversion of the property. *Hill v. Merriman*, 73 Wis. 423.

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In the above case, however, it was conceded that the mortgage was inoperative, as the crop was not sown or not in existence at the date of the filing of the mortgage.

The mortgagee of an expectant crop has no title which will entitle him, without possession, to maintain an action for trover, trespass, or detinue, his interest being merely that of an equitable lien. *Collier v. Faulk*, 69 Ala. 58; *Wittleshofer v. Strauss*, 83 Ala. 517.

A mortgage of a crop to be grown is good and when produced the mortgagee is entitled to the possession and may maintain an action for its recovery. *Thrash v. Bennett*, 57 Ala. 156; *Doe v. McLooney*, 1 Ala. 708; *Lehman v. Marshall*, 47 Ala. 362; *Adams v. Tanner*, 5 Ala. 740.

When a mortgagee takes possession of the future acquired property under a stipulation to that effect in the mortgage, he then holds the property by way of pledge, but in the same manner as though the mortgage had been executed at the time he takes the possession of the property, and in the same manner as though he had taken the property under and by virtue of a chattel mortgage governing the property. *Cameron v. Marvin*, 28 Kan. 612.

A mortgagee taking possession and cutting the growing crops, converts them into personality, as profits to be accounted for in settlement of the debt and interest, but when the creditor remains in possession he takes the same for his own use and benefit as consumable profits absolutely. *Steele v. Farber*, 37 Mo. 71.

It has been held, however, that such a mortgage does not amount to such an executory contract as will give the mortgagee a right to enter and hold contrary to the wish of the mortgagor. *Chynoweth v. Tenney*, 10 Wis. 308.

A provision in a lease that all the produce deposited on the land was to be at the disposal of the lessor who might enter and take it for payment of rent, was held not to be a sale or mortgage thereof, and of no avail against subsequent attachment creditors in the absence of actual delivery of the same to the lessor. *Butterfield v. Baker*, 5 Pick. 522.

The above case was followed in *Munsell v. Carew*, 2 Cush. 50, where a similar clause was taken as an executory agreement for license to dispose of the crop and produce.

Where the debtor gave his creditor "a mortgage of all my cotton, corn, and wheat that I may raise during the then next year, to secure the payment of the debt, and in default of payment by the first of November next then I authorize the said creditor to take all the crops raised by me," it was held a valid lien upon such crops, even though not planted at the time of the contract, the mortgagee having taken possession before the rights of others had attached. *Moore v. Byrum*, 10 S. C. 452, 30 Am. Rep. 58.

Section 9, chapter 107, Wis. Rev. Stat. 1853, provides that a mortgage of personal property shall not be valid, unless possession be delivered and obtained by the mortgagee, or a copy thereof be filed.

In *Single v. Phelps*, 20 Wis. 399, it was held under this section of the statute that such a mortgage upon a future property executed and filed was not valid as against a purchaser from the mortgagor.

shall show up their total shipments for the season, and, if it be found one party has taken more than the other, the net proceeds of such surplus shall be equally divided between the parties hereto. Said Shultz agrees to draw that half of the fruit belonging to said Dickey and Lurvey to the boat landing in Douglas,

or railroad depot at Fennville, as they may direct. This agreement to be binding upon the legal representatives of the parties hereto. Said second party agrees to furnish a man to help set out the trees. Witness our hands and seals. John W. Dickey. [L. S.] John Schultz. [L. S.] A. Lurvey. [L. S.]

even though there was a ratification subsequent to the mortgagors acquiring the property, which made the mortgage binding *inter partes*, of which fact the purchaser had notice, no fraud being shown.

A contract for the sale of sea-weed that may be landed on the town's beach gives the purchaser no right or possession in the beach, the same being a mere chattel and not the product of the land. *Parsons v. Smith*, 5 Allen, 580.

V. Potential interests.

Land is the mother and root of all fruit, therefore he that hath it may grant all fruits that may arise upon it after, and the property shall pass as soon as the fruits are extant. A person may grant all the title wool that he shall have in such a year, yet perhaps he shall have none, but a man cannot grant all the wool that he shall grow upon his sheep that he shall buy hereafter, for then he hath it neither actually nor potentially. *Grantham v. Hawley*, 1 Hob. 182.

Leases for years, be they present or future, wardships of tenants *in capite* or by knight service, trees, oxen, horses, plate, household stuff and the like, also trees, grass, and corn growing and standing upon ground, fruit upon the trees, wool upon the sheep's back, is grantable. 1 Shep. Touch. 241.

The general doctrine, however is founded upon a technical rule, and the courts invented the doctrine of potential existence so as to extend the operation of the mortgage to property potentially belonging to the mortgagor as an incident of other property then in existence and actually belonging to him. *Ludlum v. Rothschild*, 41 Minn. 218.

A potential existence has been defined as applying to things which are the natural product or the expected increase of something already belonging to the vendor. *Hutchinson v. Ford*, 9 Bush, 818, 15 Am. Rep. 711; *Booker v. Jones*, 55 Ala. 286; *Stowell v. Bair*, 5 Ill. App. 104.

Property is said to belong to one potentially when it is the ordinary increase or growth of the very property which he has. *Page v. Larrowe*, 31 N. Y. S. R. 35.

Things not actually existing but having a potential existence may be the subject of a sale, grant, or mortgage. *Booker v. Jones*, *supra*; *Hurst v. Bell*, 72 Ala. 386; *Burns v. Campbell*, 71 Ala. 288; *Apperson v. Moore*, 80 Ark. 56, 21 Am. Rep. 170; *Grantham v. Hawley*, Hob. 183; *Arques v. Wasson*, 61 Cal. 620, 21 Am. Rep. 718; *Stowell v. Bair*, *supra*; *Walter A. Wood Mowing & Reaping Mach. Co. v. Minneapolis & N. Elevator Co.* 48 Minn. 404; *McCown v. Mayer*, 65 Miss. 537; *Everman v. Robb*, 52 Miss. 653, 24 Am. Rep. 682; *Smithurst v. Edmunds*, 14 N. J. Eq. 408; *Page v. Larrowe*, *supra*; *Brunswick Balke Collender Co. v. Stevenson*, 21 N. Y. S. R. 562; *VanHoozer v. Cory*, 34 Barb. 9; *Corderman v. Smith*, 41 Barb. 404; *Andrew v. Newcomb*, 33 N. Y. 417; *Nestell v. Hewitt*, 19 Abb. N. C. 287; *Fonville v. Casey*, 5 N. C. 389, 4 Am. Dec. 559; *Phelps v. Murray*, 2 Tenn. Ch. 746; *Merchants & M. Sav. Bank v. Lovejoy*, 84 Wis. 601.

A possibility coupled with an interest being assignable. *Cudworth v. Scott*, 41 N. H. 456.

The same principles were recognized in *Stadeker v. Loeb*, 67 Miss. 200, even though section 1359 of the Code of 1880, which gave the right to execute

deed of trust on future crops, was repealed by the Act of 1886, p. 166.

Such a property in the goods sold or mortgaged existing, the deed will be effectual as against an execution creditor. *Looker v. Peckwell*, 38 N. J. L. 263.

The subject-matter must have a potential existence as distinguished from a mere possibility or expectancy on the part of the contracting parties that it will come into existence. *Paden v. Bellenger*, 37 Ala. 577; *Hurst v. Bell*, 72 Ala. 386.

Otherwise no title passes to a purchaser. *Hutchinson v. Ford*, 9 Bush, 818, 15 Am. Rep. 711.

And nothing is conveyed. *Orcutt v. Moore*, 184 Mass. 48, 45 Am. Rep. 278; *Low v. Pew*, 108 Mass. 347, 11 Am. Rep. 367; *Thrall v. Hill*, 110 Mass. 323.

These principles were extended to the case of one having an equitable interest in the land, although the legal title was in another, as the former had the possession by consent and the rights of a legal owner to the crops to be produced. *Stadeker v. Loeb*, *supra*.

Crops being a creation or addition to land reasonably expected to be made, may be the proper subject of a mortgage. *Jones v. Webster*, 48 Ala. 109, where the mortgage was made by a lessee to secure the rent on a lease for three years.

The principle underlying the cases which hold that a potential existence is sufficient, is that the right to the property when it comes into actual existence is a present vested right. *Farmers Loan & T. Co. v. Long Beach Imp. Co.* 27 Hun, 89.

While the thing itself need not have identity or separate entity, yet it must at least be the product or growth or increase of property which has at the time a corporal existence, and in which the mortgagor has a present interest and not a mere belief, hope, or expectation of a future acquired interest. *Paden v. Bellenger*, *supra*. To the same effect, *Varnum v. State*, 79 Ala. 30; *Mayer v. Taylor*, 60 Ala. 408, 44 Am. Rep. 522; *Grant v. Steiner*, 65 Ala. 490; *Burns v. Campbell*, 71 Ala. 288; *Low v. Pew*, *supra*; *Otis v. Sill*, 8 Barb. 112; *Fennock v. Coe*, 64 U. S. 23 How. 117, 16 L. ed. 426; *Hurst v. Bell*, *supra*; *Crinkley v. Egerton*, 113 N. C. 444; *Minnesota Linseed Oil Co. v. Maginnis*, 32 Minn. 198; *Corderman v. Smith*, 41 Barb. 404; *Arques v. Wasson*, 51 Cal. 620, 21 Am. Rep. 718; *McCarty v. Blevins*, 5 Yerg. 195, 26 Am. Dec. 262; *Sanborn v. Benedict*, 73 Ill. 309; *Congreve v. Evetts*, 28 Eng. L. & Eq. 498, 10 Exch. 298, 23 L. J. Exch. 273, 18 Jur. 655; *Nestell v. Hewitt*, and *Farmers Loan & T. Co. v. Long Beach Imp. Co.* *supra*; *Brunswick Balke Collender Co. v. Stevenson*, 21 N. Y. S. R. 562; *VanHoozer v. Cory*, *supra*.

Therefore, where a mortgage was made by a party, of hay and growing crops upon a farm in which the mortgagor had not at the time any interest, he was not the potential owner and his mortgage created no lien upon such property. *Page v. Larrowe*, 31 N. Y. S. R. 35.

In *Russell v. Stevens*, 70 Miss. 685, it is stated that possession of the land and preparation for making a crop on it, makes the crop to be grown as much a subject of mortgage and sale as the next cast of the fisherman's net, or the wool to grow on the sheep of the party, and is therefore the subject of a valid mortgage having a potential existence.

No principle of law will allow a chattel mortgage operation on property not in existence either act-

In presence of May Belle Spencer, Dyer C. Putnam.

"State of Michigan, County of Allegan, ss.: On this third day of March, A. D. 1885, before me, a notary public in and for said county, personally came John W. Dickey, Addison Lurvey, and John Schultz, to me

known to be the persons whose names are subscribed to the written instrument hereon; and each acknowledged that they executed the same for the purpose therein mentioned. Dyer C. Putnam, Notary Public."

The court finds the facts in said cause, as proved on the trial thereof, to be as follows:

ual or potential. *Farmers Loan & T. Co. v. Long Beach Imp. Co. supra.*

The principles laid down and established in *Minnesota Linseed Oil Co. v. Maginnis, supra*, were followed and approved in *Miller v. McCormick Harvesting Mach. Co. 35 Minn. 399.*

It must also be specific or identified and capable of delivery, otherwise it is not strictly a contract of sale, but a special or executory agreement. *Skipper v. Stokes, 42 Ala. 255, 94 Am. Dec. 646; Purcell v. Mather, 35 Ala. 570, 78 Am. Dec. 307.*

Otherwise such a mortgage amounts to nothing more than a mere agreement to give a future mortgage and confers no specific lien on such after-acquired property. *Burns v. Campbell, supra.*

A mere possibility or expectancy not coupled with an interest in or growing out of property, cannot be made the subject of a valid sale. *Skipper v. Stokes, supra.* To the same effect, *Purcell v. Mather, supra.*

In *Adams v. Tanner, 5 Ala. 740*, it was held that a growing crop had such an existence as to be the subject of a sale, mortgage, or other contract, and passed an interest vesting any possession, either immediately or at some future time.

A tenant for life may sell the profits of his land for three or four years to come, and yet the profits are not then *in esse*. *Fonville v. Casey, 5 N. C. 389, 4 Am. Dec. 559.*

In *Arques v. Wasson, 51 Cal. 620, 21 Am. Rep. 718*, where the lessee mortgaged a crop to be raised by him during the next ensuing season, being in possession at the time, a crop being afterwards produced, it was held to be a valid mortgage as against an attachment at the suit of another creditor of the mortgagor.

Where the seed, not having been planted, had not germinated at the time of the mortgage so as to constitute a possibility coupled with an interest, which might be the subject of a sale or transfer, it was held there was no potential interest. *Merchants & M. Sav. Bank v. Lovejoy, 84 Wis. 601.*

Annual crops raised from planted seed cannot be said to have even a potential existence before the seed is put in the ground. *Rochester Distilling Co. v. Rasey, 65 Hun. 512.*

A mortgage of such a crop as might be raised or sold on some indefinite place expected to be rented by the mortgagee, would be inoperative and void as an attempt at conveyance of a mere possibility or expectancy not coupled with an interest in or growing out of property. *Burns v. Campbell, 71 Ala. 288.*

In *Martin v. Thompson, 62 Cal. 618, 45 Am. Rep. 663*, the court held that an action could not be maintained to recover the possession of grain sown and harvested upon lands to which the defendant claimed title and of which he had the actual, adverse, and exclusive possession, the grain being sown while defendant was in possession and not existing, even potentially, during the plaintiff's possession.

Where the owner of a farm leased it for a year under agreement that the lessee was to carry on the farm "at the halves," and was to leave on a given date as much hay as he found when he took the farm, and subsequently the lessor mortgaged the crops, the court held that he had not such a potential interest during the year as enabled him

to make such mortgage. *Orcutt v. Moore, 184 Mass. 48, 45 Am. Rep. 273.*

A mortgaged property, "the wheat and other crops now growing on land described, sown prior to the mortgage" was held valid, there being a potential and substantial existence. *Hansen v. Dennison, 7 Ill. App. 78.*

Crops, the seed for which is not in the ground at the time of the mortgage, cannot be regarded as having a potential existence in the soil at the time of the mortgage, and cannot pass under such a mortgage without a bill in equity to subject them to the operation of the mortgage, brought after they had existence or the possession taken by the mortgagee. *Stowell v. Bair, 5 Ill. App. 104*, where the question was whether the mortgage purporting to cover future crops *fructus industriales* gave the mortgagee's paramount title as against the execution creditor, where the seed was sown long after the execution of the mortgage.

VI. Equitable doctrine.

An equitable lien is created by a mortgage or conveyance of crops not yet planted or not *in esse* where the thing mortgaged has a potential existence. *Varnum v. State, 78 Ala. 80; Mayer v. Taylor, 69 Ala. 403, 44 Am. Rep. 522; Grant v. Steiner, 65 Ala. 499.*

In *Pennoek v. Coe, 64 U. S. 28 How. 117, 16 L. ed. 436*, the court held that whenever a party undertakes by deed or mortgage to grant property real or personal which does not belong to him or has no existence, the deed or mortgage is inoperative and void, and this either in a court of law or in equity; but this principle only applies where the mortgage is *in present*.

Courts of equity do not, like courts of law, confine themselves to the giving of effect to assignment of rights and interests which are absolutely fixed and *in esse*, but support assignments not only of choses in action, but of contingent interests and expectancies, and also, of things which have no present actual or potential existence but rest in mere possibility, the assignment of such interests only operating by way of present contract to take effect and attach to the things assigned when and as soon as they come *in esse*, and may be enforced as such a contract *in rem*, in equity. *Mitchell v. Winslow, 2 Story, C. C. 639.*

The opinion in *Mitchell v. Winslow, supra*, was followed by the court in *Ellett v. Butt, 1 Woods, C. C. 214*, a case of a mortgage of a crop of cotton not then raised, affirmed in *Butt v. Ellett, 86 U. S. 19 Wall. 544, 22 L. ed. 123*, the court holding that a mortgage clause in a lease contract could not operate as a mortgage prior to the crops to which it related coming into existence, but that the lien attached and was effectual from the time of the crops existing.

Invalidity at law imports nothing more than that a mortgage of property thereafter to be acquired is ineffectual as a grant to pass the legal title. A court of equity in giving effect to such a provision does not put itself in conflict with that principle. It does not hold that a conveyance of that which does not exist operates as a present transfer in equity any more than it does in law. But it construes the instrument as operating by way of present contract to give a lien which, as between the parties, takes effect and attaches to the subject of it as soon as it

"(1) That on the 21st day of February, A. D. 1885, John Schultz was the owner and in possession of the west half of the east half of the southwest quarter of section twenty-five, in the township of Saugatuck, in said Allegan county, and state aforesaid. (2) That on said day above named the said John

Schultz entered into a contract in writing with the said plaintiffs, which contract bore date the day and year aforesaid, and was introduced in evidence on the trial of said cause. (3) That, at the time said contract was entered into, said parcel of land described in said contract was the homestead of said

comes into the ownership of the party. *Kribbs v. Alford*, 120 N. Y. 519, 524.

A party may mortgage property to be acquired after the execution of the mortgage, provided the deed is properly executed, acknowledged, and recorded, or possession taken of the property before any lien has attached, and equity will protect such a mortgagee where the transaction is fair and honest. *Gregg v. Sanford*, 24 Ill. 17, 76 Am. Dec. 719.

No rule of law being infringed nor the rights of third parties prejudiced. *Beall v. White*, 94 U. S. 382, 24 L. ed. 173.

Whenever the parties by their contract, in clear terms express an intention to create a positive lien upon personal property not then owned, but to be subsequently acquired by the mortgagor, whether then *in esse* or not the mortgage attaches as a lien on the property as soon as the mortgagor acquires it, as against the mortgagor and all claiming under him, by voluntary transfer, or with notice, precisely as if the property had been in being and belonged to the mortgagor when the mortgage was executed. *Ludlum v. Rothschild*, 41 Minn. 218.

The theory is, that the mortgage operates as an executory agreement attaching to the property when acquired, and transferring in equity the beneficial interest to the mortgagee, the mortgagor being the trustee of the legal title; equity considering that as done which ought to be done. *Ibid.*

As respects the subject-matter, such mortgage takes effect as of the time the crop comes into existence. *Walter A. Wood Mowing & Reaping Mach. Co. v. Minneapolis & M. Elevator Co.* 48 Minn. 404.

To the same effect *Ambuehl v. Matthews*, 41 Minn. 537, a case of a chattel mortgage on crops of grain to be raised during the season of a certain year.

To the same effect, *Griffith v. Douglas*, 78 Me. 532, 40 Am. Rep. 395; *Edwards v. Peterson*, 80 Me. 367; *Williams v. Briggs*, 11 R. I. 176, 22 Am. Rep. 653, 23 Am. Rep. 518; *Williams v. Winsor*, 12 R. I. 9; *Moore v. Byrum*, 10 S. C. 452, 30 Am. Rep. 58; *Cressey v. Sabre*, 17 Hun, 120; *Quirique v. Dennis*, 24 Cal. 154; *Simmons v. Anderson*, 44 Minn. 487; *Kimball v. Sattley*, 55 Vt. 283; *Sillers v. Lester*, 49 Miss. 513; *Fitch v. Burk*, 38 Vt. 663; *Apperson v. Moore*, 60 Ark. 56, 21 Am. Rep. 170; *Smith v. Atkins*, 18 Vt. 481; *Pennock v. Coe*, 64 U. S. 23 How. 117, 16 L. ed. 436; *Hurst v. Bell*, 72 Ala. 386; *Booker v. Jones*, 65 Ala. 266; *Gregg v. Sanford*, 24 Ill. 17, 76 Am. Dec. 719; *Smithurst v. Edmunds*, 14 N. J. Eq. 408; *Seymour v. Canandaigua & N. F. Co.* 25 Barb. 284; *McCaffrey v. Woodin*, 65 N. Y. 459, 22 Am. Rep. 644; *Holroyd v. Marshall*, 10 H. L. Cas. 191; *Mitchell v. Winslow*, 2 Story, C. C. 630; *Parker v. Jacobs*, 14 S. C. 112, 37 Am. Rep. 724.

It will prevail against creditors and purchasers with notice or without consideration, although the mortgagee has not taken possession. *Ludlum v. Rothschild*, 41 Minn. 218.

Such a contract capable of being perfected by performance, is the subject of a valid mortgage or attachment in equity. *Forman v. Proctor*, 9 B. Mon. 124.

Under it the creditor with whom it is made may take the property into his possession when it comes into existence, and is the subject of transfer by his debtor, and hold it for his security, and whenever

he does so take it into his possession before any attachment has been made of the same, or any alienation, such creditor under his executory agreement may hold the same, but until such an act is done by him he has no title to the same, and such act being done and the possession thus acquired, it then becomes holden by virtue of a valid lien or pledge. *Chapman v. Welmer*, 4 Ohio St. 481; *Columbus Iron Works Co. v. Benpo*, 71 Ala. 577.

It is an executory contract attaching when the crops come into existence, with a license to enter upon the lands for the purpose of removal. *White v. Foster*, 102 Mass. 378.

The executory agreement is continuing and makes the possession of the creditor thereunder lawful and the lien good. *Chapman v. Welmer*, *supra*.

But in *Chynoweth v. Tenney*, 10 Wis. 388, it was held that such a mortgage did not amount to an executory contract which would give the mortgagee a right to enter and hold the property contrary to the wish of the mortgagor, and that such a mortgage was not effectual as an equitable lien, the court denying the position taken in *Mitchell v. Winslow*, 2 Story, C. C. 630.

An owner may mortgage a crop not *in esse* and to be planted and grown *in futuro*, but such conveyance creates only an equitable title as distinguished from a legal one. *Burns v. Campbell*, 74 Ala. 238; *Grant v. Steiner*, 65 Ala. 499; *Mayer v. Taylor*, 69 Ala. 403, 44 Am. Rep. 522.

It vests an equitable interest but no legal title. *Seay v. McCormick*, 68 Ala. 549.

The lien of such a mortgagee will be enforceable against the mortgagor and those holding under him with record notice thereof. *Apperson v. Moore*, 30 Ark. 56, 21 Am. Rep. 170; *Smith v. Atkins*, 18 Vt. 481; *Pennock v. Coe*, 64 U. S. 23 How. 117, 16 L. ed. 436; *Hurst v. Bell*, 72 Ala. 386; *Booker v. Jones*, 65 Ala. 266; *Columbus Iron Works Co. v. Renfro*, 71 Ala. 577; *Gregg v. Sanford*, 24 Ill. 17, 76 Am. Dec. 719; *Ludlum v. Rothschild*, 41 Minn. 218; *Smithurst v. Edmunds*, 14 N. J. Eq. 408; *Stevens v. Watson*, 4 Abb. App. Dec. 302; *Seymour v. Canandaigua & N. F. Co.* 25 Barb. 284; *McCaffrey v. Woodin*, 65 N. Y. 459, 22 Am. Rep. 644; *Holroyd v. Marshall*, 10 H. L. Cas. 191; *Mitchell v. Winslow*, *supra*; *Parker v. Jacobs*, 14 S. C. 112, 37 Am. Rep. 724, where the mortgagee was held entitled to recover as against the sheriff seizing property on behalf of a prior creditor.

Equity will enforce them without question whenever there is anything for the mortgage to take hold of. *Beard v. State*, 43 Ark. 284; *Apperson v. Moore*, *supra*.

In any foreclosure proceedings. *Apperson v. Moore*, *supra*.

A mortgage of future crops, or crops to be grown, is valid in Arkansas, and the lien attaches when the crops are produced, under Act of February 11, 1875. *Senter v. Mitchell*, 16 Fed. Rep. 208.

The lien follows the grain after severance and removal, and the money after sale. *Keel v. Levy*, 19 Or. 450; *Muse v. Lehman*, 30 Kan. 514; *Rider v. Edgar*, 54 Cal. 127.

Such lien is rightly enforced by a judgment. *Kribbs v. Alford*, 120 N. Y. 519, 524.

But can only attach to chattels to which the mortgagor has acquired either title or possession. *Ibid.*

It would be valid in equity as a contract to as-

John Schultz and Deborah Schultz, his wife. (4) That the plaintiffs, in the spring of 1885, furnished the peach trees required in and by the terms of said contract, and set them on the land described in said contract, and in all things performed the agreements by them to be performed, according to the terms of

said contract. (5) That on or about the 28d day of April, A. D. 1887, the said John Schultz and wife conveyed the premises described in said contract to the defendant by warranty deed, with covenants of title, and against incumbrances. (6) That, before and at the time of the execution and delivery of

sign the property when acquired, and enforceable in that court as a right under a contract, and not as a trust attaching to the property. *Otis v. Sill*, 8 Barb. 102.

And as such enforceable as a right under the contract. *Ibid*.

Such a mortgage has been held a valid license to enter and seize the property if it should be in existence at the time of default, after which entry and seizure, the title vests. *McCaffrey v. Woodin*, 65 N. Y. 450, 22 Am. Rep. 644.

And such mortgagee has no right of action for the recovery thereof after maturity, until delivered under the mortgage, his interest being only an equitable lien. *Wilkinson v. Kettler*, 69 Ala. 435.

After in the case of a planted crop. *Mayer v. Taylor*, 69 Ala. 403, 44 Am. Rep. 522.

If the attachment or assignment takes place prior to the taking of such possession, the lien is lost. *Chapman v. Welmer*, 4 Ohio St. 481.

When the mortgage was not of a growing crop, the mortgagors not having entered upon the premises having no right to do so for two months after the execution of the mortgage, the cotton not being planted for more than two months after the right of entry accrued, the mortgage operating on cotton not planted but intended to be planted in proper season after entry, and cultivated to maturity during the term, the court held that if any other relation existed between the parties than that of mortgagor and mortgagee, the mortgage was invalid at law as a conveyance of things not in existence unless ratified by some act done by the mortgagor after their acquisition, but would in equity attach to the crop as it came into existence, transferring the beneficial interest against the mortgagor and all others than bona fide purchasers without notice. *Booker v. Jones*, 55 Ala. 286.

See "*Special state doctrines and laws*," *infra*, XXI.

VII. Description.

a. General rules.

Generality and indefiniteness of description will not avoid a conveyance. *Ellis v. Martin*, 60 Ala. 304.

Personal property can seldom be so described in any instrument as to enable a stranger to select it from other property of a like kind, without the aid of other facts than those mentioned in the instrument itself. *Mills v. Kansas Lumber Co.*, 26 Kan. 574, 578.

A chattel mortgage ought not to be a drag net covering a whole act in general terms. *Muir v. Blake*, 57 Iowa, 662.

It is uncertainty that will not be removed when the conveyance is read in the light of the circumstances surrounding the parties at the time, their manifest design being considered. *Ellis v. Martin*, *supra*.

When such a debt, liability, or obligation exists, then any agreement or language by which property is sufficiently identified and designated as a security for its payment, will amount to a mortgage. *Stearns v. Gafford*, 56 Ala. 544.

Descriptions do not identify of themselves, but only furnish the means of identification, giving certain marks or characteristics which aid to single out the thing intended. *Willey v. Snyder*, 34 Mich. 40.

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The property must be definitely pointed out so as to be distinguishable or capable of identification. *Ludlum v. Rothschild*, 41 Minn. 218; *Walter A. Wood Mowing & Reaping Mach. Co. v. Minneapolis & N. Elevator Co.*, 43 Minn. 404.

The description must be sufficiently specific to enable parties examining the record to identify the property. *Winter v. Landphere*, 42 Iowa, 471.

In order to affect purchasers or others acquiring rights in the crop with notice of the mortgage lien, there must be a description in the mortgage by which it can be identified. *Dodds v. Neel*, 41 Ark. 70; *Krone v. Phelps*, 43 Ark. 350.

It must be such as will enable third persons clearly to identify the property when aided by inquiries which the instrument itself indicates and directs. *Strolberg v. Brandenburg*, 39 Minn. 348; *Griffiths v. Wheeler*, 31 Kan. 17; *Mills v. Kansas Lumber Co.*, 26 Kan. 574, 578.

Otherwise the mortgage is void for uncertainty. *Souders v. Voorhees*, 36 Kan. 138; *Tootle v. Lyster*, 26 Kan. 589; *Parsons Sav. Bank v. Sargent*, 20 Kan. 576; *Golden v. Cockrill*, 1 Kan. 259, 81 Am. Dec. 510; *Richardson v. Alpena Lumber Co.*, 40 Mich. 203; *Hires v. Hurff*, 39 N. J. L. 4; *Fowler v. Hunt*, 43 Wis. 345; *Muir v. Blake*, 57 Iowa, 662; *Williamson v. Steele*, 3 Lea, 527, 31 Am. Rep. 632.

It must be either general or special, so as to enable any one to take the deed and from its face designate the property described. *Overton v. Holinshade*, 5 Helsk. 683. To the same effect, *Williamson v. Steele*, *supra*.

The property must come within its descriptive words. *Curtis v. Wilcox*, 49 Mich. 427.

Yet it is not necessary that the full description given should apply to each article. *Fordyce v. Neal*, 40 Mich. 705.

So it is not necessary that the description of the property should be such that it may be identified by a written recital; it need not be such as would entitle a stranger to select the property, but must point out the subject-matter so that a third party by its aid together with the aid of such inquiries as the instrument suggests, may identify the property. *Kimball v. Sattley*, 55 Vt. 235, 45 Am. Rep. 614; *Jones, Chat. Mortg.*, §§ 53, 55.

A description is sufficient when in its terms, or by reasonable implication arising from the facts stated in respect to its circumstances, relations, and connections, it designates the property so that it can be certainly seen or ascertained. *State v. Logan*, 100 N. C. 464.

Recort must be had, in nearly all cases, to other evidence than that furnished by the mortgage itself, to enable third persons to identify mortgaged property, and generally where there is a description of the property mortgaged and the description is true, and by the aid of such description and the surrounding circumstances the third person would in the ordinary course of things know the property that was mortgaged, the description will be held to be sufficient. *Mills v. Kansas Lumber Co.*, 26 Kan. 574, 578.

In *Wiley v. Snyder*, 34 Mich. 60, it was held that written descriptions of property were to be interpreted in the light of the facts known to, and in the minds of the parties at the time, and that a subsequent purchaser or mortgagor was supposed to acquire a knowledge of all the facts so far as it is needful for his protection and purchase in view of that knowledge,

said deed by said John Schultz and wife to said defendant, he, the said defendant, had actual notice and knowledge of the existence and terms of said contract between said Schultz and said plaintiffs, and that, before and at the time of the execution and delivery of said deed, it was agreed between said

Schultz and said defendant that said defendant should pay said Schultz \$1,850 for said land, instead of \$3,000, the full purchase price thereof, and that, as part of the consideration for the sale of said land, said defendant should settle with said plaintiffs for their interest in the peach trees on said land; said

A plaintiff in all such cases must recover on the strength of his own title, and not on the weakness of the defendant's. *Eggert v. White*, 59 Iowa, 464.

In *Estes v. Springer*, 47 Mo. App. 99, the failure of a chattel mortgage to locate the property and state who is the owner was cured by other portions of the instrument showing the mortgagor's residence and his possession of the property.

The sufficiency of the description as submitted to the jury as a question of fact, was held error in *Austin v. French*, 36 Mich. 199, the question of the sufficiency being for the court.

Where the corn was green and growing when the mortgage was made and in the mortgagor's possession until levied upon, there being no identification of the corn at the time of the mortgage and no portion was ever designated or set apart as that which was mortgaged or intended to be, there being considerable more corn on the tract described than the quantity mentioned in the mortgage, not uniform in quantity and value, the court held the description insufficient and the mortgage void for uncertainty. *Souders v. Voorhees*, 36 Kan. 128.

b. Sufficient.

In *Floyd v. Morrow*, 26 Ala. 353, the mortgage deed conveyed *inter alia* the hire of certain slaves "or the use of them the present year, and whatever negroes, I [the mortgagor], may hire next year to make a crop with and the entire crop I may make this year and next," and was held not void.

Where there was a verbal agreement for the payment of a debt and of supplies to be furnished "out of the first cotton that may be gathered" the court held there was a sufficient description of the property to support a valid mortgage. *Stearns v. Gafford*, 56 Ala. 544.

A description as follows "my entire crop of cotton, and corn of the present year," was held not to be void for uncertainty, although very general and indefinite, still it was capable of being rendered certain by evidence showing the lands cultivated in that year, and the quantity of corn and cotton raised thereon. *Ellis v. Martin*, 60 Ala. 394. To the same effect, *Seay v. McCormick*, 68 Ala. 549.

Where the language of the descriptive clause was "all of the crops of corn and cotton and cotton seed and crops of every other name and description to be grown this year 1882 in this county," the court held it a valid pledge of the crop to be grown that year. *Hamilton v. Maas*, 77 Ala. 283.

Where the description of the property in a mortgage was "my entire crop of cotton and corn," the court held that though such description was general yet it was sufficient to put a party purchasing from the mortgagor upon inquiry, whether such cotton was the same as that conveyed by the mortgage. *Smith v. Fields*, 79 Ala. 335.

A description as "all my crop of corn, cotton, or other produce that I may raise, or in which I may in any manner have an interest for the year 1884" in a certain county and state, was held not void as to third parties for uncertainty, the mortgage being recorded and constructive notice, intrinsic evidence being admissible to specify or make clear the description. *Johnson v. Grisard*, 3 L. R. A. 795, 41 Ark. 410.

So a description as "all my entire crop of cotton and corn to be raised by me the present year or

contracted by me," reciting the mortgagee's name, was held to be sufficient and not void for uncertainty. *Henderson v. Gates*, 62 Ark. 371.

And a description as "eight bales of cotton weighing 500 pounds each of the crop" which the mortgagor should raise in a designated locality was held not to be void for uncertainty where the whole crop did not show such a number of bales. *Watson v. Pugh*, 51 Ark. 218.

Again a description covering the crops to be grown upon certain lands "during the years A. D. 1888, 1889, and for each and every succeeding year until the debt hereby secured is fully paid" was held not to be void as to the crops raised by the mortgagor on the land two years after the date of the mortgage, by reason of uncertainty as to time for the growing of the crops. *Merchants Nat. Bank of Devils Lake v. Mann*, 2 N. Dak. 455.

A description in a mortgage as follows "an undivided two-thirds interest, the same being the entire interest of [the party named] in and to sixty acres of wheat now in and growing" on a specified portion of a certain section in a given township, range, etc., was held not to be void for uncertainty, the property being capable of identification by inquiry. *Nichols v. Barnes*, 3 Dak. 148.

So a description as follows "as an advance on my crops of cotton, corn, oats, etc., growing and to be grown in the year 1879, the same being now planted, to enable me to make my said crop, and I do hereby give them a mortgage on all my said crops to take effect as soon as my said crops are planted" was not too vague, uncertain, or contradictory, and not such a description as would entitle the owner to have an execution thereon quashed and the levy dismissed. *Crine v. Tifts*, 65 Ga. 644.

Again a mortgage describing the property conveyed as "all crops growing and to be grown" was held valid as to the crops growing at the time of the mortgage, although the year was not specified, but void as to the crops to be grown. *Luce v. Moorehead*, 73 Iowa, 498.

Where a mortgage was made of crops grown during the year 1886, the court held that the mortgage included crops raised in that year after the execution of such mortgage. In that case the mortgage was executed in the early part of the year 1886, so that no crops could previously have been gathered or grown in that year. *Norris v. Hix*, 74 Iowa, 524.

So where a mortgage described the property as *inter alia* "all crops to be grown or raised" by the mortgagor in a certain year on certain lands, described according to congressional surveys, the court held the description sufficient. *Wheeler v. Becker*, 68 Iowa, 733.

Again, where the description in the mortgage was as follows, thirty-five acres of winter wheat now standing and growing on the southeast quarter of section No. 29, township No. 24, of range 1 east, in Harvey county, state of Kansas, the court held the description sufficient and the mortgage not void for uncertainty. *Muse v. Lehman*, 30 Kan. 514.

And where the description was "twenty acres of wheat now sown and growing on the ground, and still to be sown on the twenty acres this present season," the court held it was not void for uncertainty, indicating the plain intention to cover the

defendant at that time supposing that said plaintiffs would take for their interest in said trees the value of said trees at the time of setting, and interest thereon. (7) That the plaintiffs duly selected the year 1891 as one of the years when they would take one half of the crop, according to the terms of said contract; that said defendant was orally in-

formed by said plaintiffs of such selection. July 4, 1891, and that on or about August 22, 1891, the said plaintiffs gave said defendant written notice of such selection, and afterwards, and on or about the 26th day of August, 1891, offered and attempted to pick their share of the fruit, but defendant refused to permit them to do so, and denied that they

first twenty acres of wheat sown, and that subsequent purchasers or incumbrancers should make inquiry as to which portion was sown. *Wade v. Strachan*, 71 Mich. 459.

Where the description was one half of all the crop growing, the court held it meant one undivided half of such crop, and as a description was sufficiently definite. *Melin v. Reynolds*, 32 Minn. 62.

A description as follows, "The N. W. one fourth of N. W. one fourth, and S. W. one fourth of N. W. one fourth, in section 11, township number one hundred thirty-four (134) north, of range thirty-eight (38), eightie, (39) ackers in crop, (33) ackers in wheat and (6) ackers ods, all of said property," it was held that the mortgagor's then growing crop of thirty-nine acres was intended and passed by the mortgage. *Strolberg v. Brandenburg*, 39 Minn. 348.

A description in a chattel mortgage upon all the crops growing upon "the northeast quarter - 17 - 106 - 44" then in the possession of the mortgagor in a certain town and county in the state "consisting of 67 acres of wheat, 15 acres of oats, 5 acres of corn, and 8 acres of flax" sown and raised by the mortgagor thereon, the mortgagor residing on and cultivating the land that year, the mortgage being duly filed, was held sufficient and the record constructive notice of which a purchaser from the mortgagor was bound to take notice, and therefore bought subject to the mortgage. *Close v. Hodges*, 44 Minn. 204.

So a description as "the entire crops of corn and other agricultural products to be raised and gathered by the grantor, his family, or employees under him during the year 1891, on land cultivated or controlled by him" in a certain county in the state, was held sufficiently definite. *Russell v. Stevens*, 70 Miss. 635.

Where a mortgage described the property as "now growing and standing" in a certain field, it was held that such description only applied to the cereals when nourished and supported by the earth, and did not include grain and corn cut or thrashed as against an execution creditor. *Ford v. Sutherland*, 2 Mont. 440.

A description as follows, "on a certain field or farm in the possession of," and, "on lands owned or rented by me during the present year," was held sufficient. *Gwathney v. Etheridge*, 99 N. C. 571; *Atkinson v. Graves*, 91 N. C. 99.

A description giving, "alien on all crops raised on lands owned or rented by me during the year 1883," was held sufficient it being found that the mortgagor was the owner of the premises upon which the crop was raised. *Woodlief v. Harris*, 95 N. C. 211.

So a description as follows: "My tobacco crop to be grown this year on my own land, and to contain eight acres, including one third in the crop of [a specified person] to contain not less than three acres and my one-third interest in [another's] crop not less than two acres, all on my own land to be grown this year,"—was held, in an indictment for violating section 1089 of the North Carolina Code, sufficient for the purpose of conveying tobacco cultivated in the year of the mortgage upon lands, for which the mortgagor had only a bond title to what he claimed as his own, and that the purchaser of the tobacco from the mortgagor was 23 L. R. A.

properly convicted under the above section. *State v. Logan*, 100 N. C. 454.

Again a description as follows, "entire crop of cotton to be raised by me or my tenants, on all my lands during the year 1889," was held sufficient, identifying the lands and the cotton embraced by it, with such definiteness that the same could be ascertained and known. *Brown v. Miller*, 108 N. C. 385.

Such a description was held good, even where the lands were recovered from the mortgagor by one having a superior title. *Ibid*.

A description as follows, "all my entire crop now growing or to be grown the present year, on my own land" was held a sufficient designation of the property. *Well v. Flowers*, 108 N. C. 212.

Where the description was, "all the grass, oats, and corn now growing on 230 acres of said farm," the court held such description sufficient. *Kimball v. Sattley*, 55 Vt. 235, 45 Am. Rep. 614.

In *Crinkley v. Egerton*, 113 N. C. 444, it was held: that a mortgage upon the crops to be raised on the farm described and "on any other lands he may cultivate during the present year" was valid as to the crops on the lands described, though void as to those raised on "any other lands," following *Woodlief v. Harris*, *supra*; *Gwathney v. Etheridge*, 99 N. C. 571.

c. Insufficient.

A description of "all of a crop of ten acres of cotton to be grown" by the mortgagor upon a field of forty acres of cotton, was held to be void for uncertainty, the court refusing parol evidence to mark out the particular ten acres intended. *Krone v. Phelps*, 43 Ark. 350.

In *Darr v. Kempe*, 54 Ark. 91, a description as follows: "All the crop of cotton which I may raise, or any which I may in any manner have an interest in for the year 1888, on five acres of land situated on and in the south portion of the west field on my own farm," was held not to cover five acres of cotton grown in the northern part of the field, although it was the only crop grown.

Where the mortgages described the property as "an advance on my crops of cotton, corn, oats," etc., "growing and to be grown in the year 1873, the same being now planted, . . . and . . . a mortgage of all my said crops to take effect as soon as my said crops are planted," it was held the description was too vague, uncertain, and contradictory, the mortgages being executed in April and May and no crops, except a small portion, being planted at the time of the mortgage. *Crine v. Tifts*, 65 Ga. 644.

A chattel mortgage ought not to be a drag-net covering a whole act in general terms. *Muir v. Blake*, 57 Iowa. 682.

Where the description was, "all the grain, oats, wheat, flax and corn raised" the mortgage not stating the year or time, the court held the description insufficient to raise an inquiry which would lead to the identification or discovery of the property conveyed, and held the mortgage void for uncertainty. *Barr v. Cannon*, 69 Iowa. 30.

Where the description was all and the entire crop of flax and wheat, and other grain or produce raised on the east half, etc., the mortgage not describing or referring to crops growing at the time

had any share of the fruit; and that defendant took and converted to his own use the entire crop of fruit grown on said trees during that year. (8) That the value of the peaches grown during the year 1891 on the trees set by said plaintiffs on said land, under said contract, amounted to the sum of \$1,541.07 at the time of the conversion of the

same by said defendant to his own use, and that the value of one half of the peaches, at the time when they were so converted by said defendant to his own use, was the sum of \$770.53. (9) That the value of one half of the peaches converted to his own use by said defendant before August 22, 1891, was the sum of \$160, as near as the same can be now

but to crops raised, the court held the description indefinite and uncertain as not showing when the crops were raised, and refused parol evidence to identify the property mortgaged. *Eggert v. White*, 59 Iowa, 464.

So where the description was, "all the out and growing and having grown," it was held insufficient as not showing that it meant all the crops out, growing, and grown on the land. *Cray v. Currier*, 62 Iowa, 535.

Where a mortgage was executed upon crops to be sown and planted and described as "about fifty acres of wheat; twenty acres of oats; also twelve acres of barley and twenty acres of corn; also two acres of buckwheat to be sown and raised on the land leased . . . upon . . . lying and being in section 17" in a certain township and county, the court held such description indefinite and uncertain and further that in order that such a mortgage should be valid as against third persons, it should state the year and term in which the crop was to be grown. *Pennington v. Jones*, 57 Iowa, 37.

So where the crop was described as "all the crops raised by me in any part of Jones county for the term of three years" the court held it a roving description with nothing in the way of identification to suggest inquiry where the crops might be found, except the body of the county, and that third parties could not be charged with notice of such mortgage. *Muir v. Blake*, *supra*.

And a description as follows, 400 bushels of corn now growing and being on the west half of section 36, town 8, south of range 8, east of the 6 P. M., was held void for uncertainty, as giving no clew by which third parties might know what part was mortgaged and what reserved. *Clark v. Voorhees*, 36 Kan. 144, following *Souders v. Voorhees*, Id. 128, wherein the description was, 600 bushels of corn growing, located, and being upon the west half of section 36, town 8, south of range 8 east, if said corn matures before the maturity of the note secured in this mortgage, the said Burnsides to shuck the same and put in crib on the premises above described. *Tootie v. Lyster*, 26 Kan. 539; *Parsons Sav. Bank v. Sargent*, 20 Kan. 377; *Golden v. Cockril*, 1 Kan. 259, 81 Am. Dec. 510, to the same effect.

Where a husband and wife by duly recorded deed, executed a trust to secure a debt upon the "entire interest of grantees in twenty-five bales of cotton to be raised by them, or any hands they may employ during the year 1892, on lands belonging to them, or any other lands they may cultivate during the year," and subsequently the husband by deed recorded conveyed the same to secure another debt, it was held that such first mortgage was void for uncertainty in the description. *Redfield v. Montgomery (Mss.)* Oct. 30, 1893, overruling and disapproving of *Draper v. Perkins*, 57 Mss. 277.

In *Well v. Flowers*, 109 N. C. 212, it was held that a description as follows, "or any other land," was too indefinite, pointing out no particular lands. The lands of the maker at the time of execution of the deed could be seen and known, while those he might cultivate could not.

A description, "all our crop of cotton, corn, and cotton seed to be raised by either of us in the 28 L. R. A.

year 1892, on the place of," a person therein named was held insufficient as not showing that they were to be raised by the mortgagor upon lands sufficiently described in the deed, or by reference therein for identification, and as not showing that it was confined to crops grown on land next thereafter to be cultivated, and not extended to future successive use. *State v. Garria*, 98 N. C. 733.

In *Bountree v. Britt*, 94 N. C. 104, the court followed the principles laid down in the prior cases, but held a description *inter alia*, "and my entire crop of every description," was too vague and uncertain to pass any title, that such a mortgage must designate the place of products in such a manner that it can be identified.

A description as follows "one bale of good middling cotton that I may make or cause to be made or grown during this year, to weigh not less than 400 pounds" was held defective as not designating and identifying the piece sought to be conveyed, so that it could be separated from other property of a like kind, and the mortgage void for uncertainty. *Atkinson v. Graves*, 91 N. C. 92.

See also *Crinkley v. Egerton*, 113 N. C. 444, *et supra*, heading, "Sufficient."

VIII. Parol evidence to identify.

Such just interpretation must be given to the description as will effectuate the intention of the parties, if this can be done consistently with the rules of law. *State v. Logan*, 100 N. C. 454.

Parol evidence would be admissible in the case of a description as one horse, for the purpose of identifying it, providing the mortgagor had only one such animal, but in case of his having several of the same kind there is a patent ambiguity, and such evidence would not be admissible. *Spivey v. Grant*, 96 N. C. 214.

In *Nichols v. Barnes*, 3 Dak. 148, it is said to be impossible to describe personal property so well as to preclude the necessity of parol evidence to identify it.

It is well settled that parol evidence is admissible to show the identity of property the subject of a chattel mortgage. *Duke v. Strickland*, 43 Ind. 494; *Chapin v. Crane*, 40 Me. 561; *Skowhegan Bank v. Farrar*, 46 Me. 293; *Elder v. Miller*, 60 Me. 118; *Brooks v. Aldrich*, 17 N. H. 442; *Harding v. Coburn*, 12 Met. 333, 48 Am. Dec. 680; *Comins v. Newton*, 10 Allen, 518; *Putnam v. Cushing*, 10 Gray, 334; *Crosby v. Baker*, 6 Allen, 295; *Morrill v. Keyes*, 14 Allen, 222; *Lawrence v. Everts*, 7 Ohio St. 194; *Morse v. Pike*, 15 N. H. 529; *Burditt v. Hunt*, 23 Me. 419, 43 Am. Dec. 239; *Wolfe v. Dorr*, 24 Me. 104; *Winslow v. Merchants Ins. Co.* 4 Met. 306, 38 Am. Dec. 369; *Welch v. Sackett*, 12 Wis. 243; *Smith v. Jenks*, 1 Denio, 550.

In *Stephens v. Tucker*, 55 Ga. 548, it is held that parol evidence was admissible for the purpose of identification of the part of the crop so mortgaged, the question being one for the jury.

Proof of extrinsic circumstances may be given by parol to apply a description to its subject-matter, and if it appear that the description is in some respects erroneous, those parts may be rejected, and what is left, if sufficient of itself, alone be regarded. *Dodge v. Potter*, 18 Barb. 201; *Fish v. Hubbard*, 21 Wend. 651; *Dunning v. Stearns*, 9 Barb. 639; *Doe v. Roe*, 1 Wend. 541; *Loomis v. Jack-*

determined. From the foregoing facts, I find the following conclusions of law: (1) The plaintiffs are entitled to maintain this action, and the contract offered in evidence between said Schultz and said plaintiffs was admissible in evidence. (2) Said contract did not convey to the plaintiffs any interest in the land described in said contract, except the

right to said plaintiffs to take therefrom one half of the crop of peaches for any two years they might select during the period of ten years from the date of said contract. (3) The homestead right of John Schultz and wife was in no way affected by said contract, and the question of the homestead right of said Schultz and wife cannot be raised by

son, 19 Johns. 449; Jackson v. Clark, 7 Johns. 218; Atkinson v. Cummins, 50 U. S. 9 How. 479, 13 L. ed. 223; Pierce v. Parker, 4 Met. 80; Johns v. Church, 12 Pick. 557, 23 Am. Dec. 651.

Parol evidence may be admitted to apply the description to the subject-matter intended to be conveyed. Bountree v. Britt, 94 N. C. 104.

When applied the identification is complete. Caring v. Richmond, 28 Hun, 26; Robinson v. Holt, 30 N. H. 557, 75 Am. Dec. 233.

The description in the mortgage must, however, be sufficient for the purpose of identification or connection, even though evidence *alibi* may be received to apply or continue the description therein with the property claimed to be mortgaged. Walter A. Wood Mowing & Reaping Mach. Co. v. Minneapolis & N. Elevator Co. 48 Minn. 404.

In Curtis v. Martz, 14 Mich. 506, the court allowed extrinsic evidence for the purpose of identifying the property the subject of the mortgage.

Parol evidence of attending circumstances will be admissible to remove an uncertainty in the description of a mortgaged crop as "my entire crop of cotton and corn," manifesting an intention to cover the entire crop of cotton and corn raised by the mortgagor in the given year. Smith v. Fields, 79 Ala. 335, following Connally v. Spragins, 66 Ala. 258; Ellis v. Martin, 60 Ala. 394; Varnum v. State, 78 Ala. 23.

Although parol evidence is admissible to identify the property and its description, yet such conveyance will not be admitted in the case of unplanted crops. State v. Garria, 98 N. C. 733.

Where the description was, "190 acres of wheat; 136 acres of corn; 25 acres of rye; 60 acres of barley and oats, all of said crops growing upon" a specified section of a certain township and range, there being no other description of the property, the township and range being incorrectly stated, the court held that evidence of a mistake in the drawing of the mortgage was not admissible in an action by the mortgagee to recover possession against an execution creditor, the latter not being chargeable with notice of the mortgage. Adams v. Commercial Nat. Bank of Dubuque, 63 Iowa, 491.

Where the mortgage was "on all crops to be cultivated and made" during a given year according to the Act of the General Assembly of North Carolina entitled "An Act to Secure Advances for Agricultural Purposes" it was objected that the description was insufficient, and that while it purported to create an agricultural lien it lacked the statutory requirements. It was held that the objections did not lie to the introduction of the instrument as evidence, but to its legal efficacy as a conveyance. Spivey v. Grant, 96 N. C. 214.

IX. Notice.

a. General.

Purchasers of after-acquired property, having notice that the same is covered by a mortgage, stand in no better position than the mortgagor. American Cigar Co. v. Foster, 36 Mich. 366; Robson v. Michigan Cent. R. Co. 37 Mich. 70.

The equitable lien of such mortgagee will entitle him to an action against a stranger having notice who removes, destroys, or conceals the crop. Collier v. Faulk, 69 Ala. 58.

When the mortgage is on an unplanted crop, 23 L. R. A.

any person who converts it to his own use after it is gathered, with actual or constructive notice of the lien, is liable to the mortgagee in an action on the case. Smith v. Fields, 79 Ala. 335, following Rees v. Coats, 65 Ala. 256.

And as against one receiving and selling the crop with actual or constructive notice of the mortgage. Leslie v. Hinson, 83 Ala. 263.

Section 1745 of the Dakota Civil Code makes the filing of a mortgage of personal property in conformity with law operate as notice to all subsequent purchasers. Nichols v. Barnes, 3 Dak. 143.

Yet such a mortgage would be void as to purchasers for a valuable consideration, mortgagees, and judgment creditors, without notice under section 1288 of the Alabama Code. Brooks v. Ruff, 37 Ala. 371.

A purchaser with notice has been held responsible for cotton received and sold by him before foreclosure proceedings were commenced, as well as for cotton then in his possession, even though liable at law for its conversion. Comer v. Lehman, 87 Ala. 362.

So trover will lie against a factor or commission merchant, who receives and sells the crop of a mortgagor without actual notice of the mortgage, provided the instrument is recorded. Marks v. Robinson, 82 Ala. 69.

An action on the case will lie against the landlord seizing and selling the entire crop with notice of the mortgage, the proceeds of the sale exceeding the amount due the landlord. Hamilton v. Maas, 77 Ala. 283.

A second mortgagee was held not chargeable with notice of an unrecorded prior mortgage, merely from the fact that he had been informed by the mortgagor that a prior mortgage existed, but only upon other property. Simpson v. Hinson, 88 Ala. 523.

Where a mortgage, executed upon a future crop to secure advances, was assigned and transferred, and subsequently the mortgagor, without notice of the assignment, delivered a portion of the crop to the original mortgagee who shipped the same in his own name to warehouse men for sale; in an action by the transferee for the proceeds of the sale, it was held that the defendants had a right to presume that the money paid to them belonged to the prior mortgagee and that having acted bona fide and without notice, the plaintiff's action must fail. Rice v. Jones, 71 Ala. 551.

See, also, Dodds v. Neel, 41 Ark. 70; Krone v. Phelps, 43 Ark. 360, head, "Description."

b. Constructive.

Chattel mortgages properly executed and recorded in the county where the property is situated are constructive notice, both in and out of the county, of the vendee's lien; and although the property is movable in its nature and may be carried into other counties than where the mortgage is recorded, yet the vendee's lien is assertable against subsequent purchasers, upon the idea that the legal title is in him and the mortgage of record is constructive notice to those who buy. Hutchinson v. Ford, 3 Bush, 313, 15 Am. Rep. 711.

Where a copy of a chattel mortgage of after-acquired property was duly filed, the court held it constructive notice to a purchaser from the mort-

said defendant in this action. (4) Whether said contract was entitled to record or not, or whether such record would be constructive notice to defendant or not, is immaterial, inasmuch as defendant had actual notice of such contract before he purchased said land. (5) The contract relation between Schultz and Plaintiffs was not technically a sale of the

peaches thereafter to be grown on said trees by said Schultz to plaintiffs, but was more in the nature of a sale of the trees by plaintiffs to Schultz; plaintiffs reserving, in writing, one half of the products of said trees for any two years they might select during the period of ten years. (6) The defendant, having notice of said contract before his purchase

gagor, and no defense in foreclosure proceedings. *Kribbs v. Alford*, 120 N. Y. 519, 524.

In *Duke v. Strickland*, 48 Ind. 494, ten acres of growing wheat were mortgaged by deed duly recorded, and subsequently harvested and sold by the mortgagor without the mortgagee's authority, and converted by the purchaser. The court held the purchaser liable for the value of the wheat upon identification thereof having constructive notice.

Notice of the existence of a debt is not constructive notice of a secret lien secured by the unrecorded mortgage. So held in *Bell v. Tyson*, 74 Ala. 253, an action for damages for conversion of a crop of cotton, although it was shown that the defendant had knowledge of the plaintiff's claim for purchase money. *Wilkinson v. Kettler*, 69 Ala. 435, to the same effect.

In an action to recover certain growing corn mortgaged to the plaintiff, a portion of which was gathered and sold to the defendants, the plaintiff claiming a chattel mortgage upon growing grain the mortgage being duly filed and recorded, it was held not constructive notice as to the grain when placed in a crib or bin as against a bona fide purchaser of such grain from the mortgagor in open market. *Gillilan v. Kendall*, 26 Neb. 82.

A recorded mortgage is constructive notice after severance in law, that is after condition broken. *Kimball v. Sattley*, 55 Vt. 235, 45 Am. Rep. 614; *Fitch v. Burk*, 38 Vt. 638.

X. Necessity and effect of recording.

The registration of such a conveyance by way of mortgage or deed of trust is sufficient notice as against subsequent purchasers. *Butler v. Hill*, 1 Baxt. 375; *Rankin v. Kinsey*, 7 Ill. App. 215; *Kimball v. Sattley*, 55 Vt. 235, 45 Am. Rep. 614; *Fitch v. Burk*, 38 Vt. 638; *Williamson v. Steele*, 3 Lea, 527.

The recording of a deed under section 10 of the Indiana Statute of Frauds, does away with the necessity of actual delivery of the property to the mortgagee and is constructive notice of the mortgage. *Duke v. Strickland*, 48 Ind. 494.

In *Johnson v. Crofoot*, 37 How. Pr. 59, the court held that a chattel mortgage interest was defeated for want of filing.

A chattel mortgage is valid as against subsequent mortgagees when filed; *aliter* if not filed. *Betsinger v. Schuyler*, 46 Hun. 349.

In *Fry v. Martin*, 33 Ark. 203, it was held that as against subsequent purchasers from the mortgagor, the deed was invalid unless recorded.

The land upon which the crops are to be raised need not be specified, the instrument itself being recorded. *Griel v. Lehman*, 59 Ala. 419.

If the written instrument purports to secure the note given for advances, and conveys the crop, although not in words, which would constitute a statutory lien under section 1858 of the Alabama Revised Code, it is still valid as a mortgage of personal property as against subsequent purchasers, from the date of recording. *Dawson v. Higgins*, 50 Ala. 49.

The effect of recording such a mortgage is, that if such notice shows a general and leading purpose to retain a lien upon the crop for all supplies, although an inadequate sum be mentioned, and if the excess of supplies be furnished at the request

of the subsequent mortgagee of the crop, the latter's lien will be postponed. *Franklin v. Meyer*, 36 Ark. 96; *Bell v. Radcliff*, 32 Ark. 645.

Under section 2 of the Arkansas Act of March 10, 1877, every mortgage indorsed to be filed, but not recorded and filed, is void as against the creditors of a mortgagor or against subsequent purchasers or mortgagees in good faith, after the expiration of one year from the filing thereof, unless within thirty days next preceding the expiration of one year from such filing, and each year thereafter, the mortgagee, his agent or attorney makes affidavit exhibiting the interest of the mortgagee at the time last aforesaid, claimed by virtue of the mortgage, and if the mortgage secures payment of money the amount yet due and unpaid, such affidavit to be attached to and filed with the instrument or copy to which it relates. *McKennon v. May*, 30 Ark. 442.

Where the agreement was entered into, and assigned "all said crops now harvested and growing or to be raised hereafter, and the entire avails of said farm and the stock thereon, and the increase of said stock, reserving enough thereof to pay the expenses of raising and harvesting the same . . . and carrying on said farm generally," the court held it was not a chattel mortgage so as to require filing to preserve the parties' rights. *Haynes v. Ledyard*, 33 Mich. 319.

In *Thomas v. Bacon*, 34 Hun. 88, it was held that a lease of a farm reserving a lien on all crops sold as security for the performance of the lease, with an agreement to execute a chattel mortgage of the same when requested, was good as between the parties, not only as to the wheat growing at the time but also as to that subsequently sold, attaching when the latter was put in, but inasmuch as the instrument was not filed nor followed by an actual and continued possession, it was void as against the subsequent mortgagee without notice.

As between the parties, the registration of the agreement as provided for in section 1739 of the North Carolina Code, is not essential to the validity of the lien. *Reese v. Cole*, 93 N. C. 87.

An unrecorded chattel mortgage upon all and every portion "of the cotton, corn, peas, small grain, fodder, and other crops which I may produce on said farm the present year, or so much thereof as may be necessary to fully pay and satisfy the amounts advanced to me," was held invalid as against a subsequent purchaser without notice and for valuable consideration. *Sternberger v. Mo-Sween*, 14 S. C. 35.

Under section 2080 of the Tennessee Code, all agreements and bonds for the conveyance of real or personal estate must be registered, and the court held that an agreement for the conveyance of a crop to be raised and gathered, is such an agreement for the conveyance of personal estate as would be void as against creditors or subsequent purchasers for value without registration. *Jones v. Chamberlin*, 5 Heisk. 210.

Being registered it is good as against the prior verbal lien of the landowner. *Ibid*.

Such mortgage being duly recorded, a contract by which a party is to have possession of another's farm and put in crops on shares, makes them tenants in common of the crops, and each may sell or mortgage his share in the crop. *Ibid*.

of said land, and having agreed, for a valuable consideration, to recognize the rights of plaintiffs under said contract, cannot now claim that said contract was void, or that it was not binding upon him. (7) The defendant and plaintiffs were the owners in common of the crop of peaches grown on said trees during the season of 1891, and the defendant

having refused to allow plaintiffs to pick their share of said crop, and denied that plaintiffs had any right to any part of said crop, plaintiffs were entitled to their action of trover without and before any accounting as to the amount of said crop, or the share of each of the others therein. (8) Plaintiffs are entitled to recover in this action, and a judg-

The contract, however, is valid and binding *inter partes* when properly executed and signed, and as against creditors or purchasers with notice, even without registration. *Polk v. Foster*, 7 Baxt. 98; *Tedford v. Wilson*, 8 Head, 812.

A growing crop may be sold or mortgaged, yet it has been held that future crops cannot be mortgaged in such a way as to make the registration of such mortgage effectual as against creditors or subsequent purchasers without notice. *Polk v. Foster*, *supra*; *Milliman v. Neher*, 20 Barb. 37.

In *Polk v. Foster*, *supra*, a registered lien on future crops of the purchase money was retained by the vendor with the understanding that the purchaser's title should not be absolute, except upon conditions performed. The court held that the vendor's right was prior to that of beneficiaries under a deed of trust executed after registration of the lien.

In *Hicks v. Roes*, 71 Tex. 353, it was held that a chattel mortgage was valid without the acknowledgment of record, the depositing of the instrument with the county clerk being a further compliance with sections 1, 2, and 4 of the Act of April 22, 1889, Revised Statutes, appendix 15, 16.

See also, *Merchants & M. Sav. Bank v. Lovejoy*, 34 Wis. 601, *supra*, head, "Necessity and effect of possession."

As to registration and filing of chattel mortgages, see *note* to *Dempsey v. Pforzheimer* (Mich.) 13 L. R. A. 388.

XI. To what crop or part of crop it extends.

Such a lien can only affect the crop of that year, and does not affect those of any ensuing year. *Boswell v. Carlisle*, 55 Ala. 564.

When creditors of the mortgagor or others dealing with the property, have acquired adverse rights, the mortgage of a specified number of articles out of a larger number will not be allowed to prevail, unless it furnishes the data for separating the property intended to be mortgaged from the mass. *Dodds v. Neel*, 41 Ark. 70; *Krone v. Phelps*, 43 Ark. 350.

In *Rankin v. Kinsey*, 7 Ill. App. 215, it was held that crops growing on mortgaged land are covered by the mortgage, whether planted before or after its execution, *until* they are severed, and the lien of the mortgage attaches as well to the crops as to the land.

When the parties entered into an agreement for the sale and purchase of lands in installments, the contract providing that the vendor should have "and is hereby granted control . . . of and over, any fifty acres of wheat and five acres of sugarcane . . . that he may select as security for the payment of the sums" due, the court held that no lien attached to any specific portion of the crop until the vendor made his selection. *Prentice v. Nutter*, 25 Minn. 485.

A mortgage upon "one half undivided interest in and to all the oats, wheat, barley, and potatoes now growing and standing," comprises only such crops as are nourished and supported by the earth, and not, as against an execution creditor, crops out and standing in the field. *Ford v. Sutherland*, 3 Mont. 440.

In *Wooten v. Hill*, 96 N. C. 52, it is stated that the prior authorities in that state do not warrant the 23 L. R. A.

conveyance of an indefinitely prospective unplanted crop, and that it should be limited to crops planted or about to be planted, as the crop next following the conveyance. To the same effect, *State v. Garris*, 98 N. C. 733; *Perry v. White*, 111 N. C. 197; *Loffin v. Hines*, 10 L. R. A. 490, 107 N. C. 360; *Taylor v. Hodges*, 105 N. C. 344; *Smith v. Coor*, 104 N. C. 139, holding that the crop affected must be that planted or about to be planted in the year following the execution of the conveyance.

Where a purchase money mortgage covered "all crops of any kind raised on said land, to be security for the annual payment of each year, and shall not be removed from said land until the note due that year is paid in full," the same doctrine was applied, and therefore, the mortgage being dated four years prior, the mortgagor was not indictable for its unlawful removal. *Smith v. Coor*, *supra*.

A description, "all of my entire crop to be made on my lands" in a certain township, county, and state, passed the crops of the year of the date of the mortgage. *Taylor v. Hodges*, *supra*.

Atkinson v. Graves, 91 N. C. 99, also follows the doctrine established in *Robinson v. Ezell*, 72 N. C. 231; *Cotten v. Willoughby*, 88 N. C. 75, 35 Am. Rep. 564, and *Harris v. Jones*, 88 N. C. 317, but holds that it was never extended to the products of the soil to be raised without designating the place where they are to be produced.

Where a mortgage was upon crops thereafter to be raised upon certain described premises, and also "upon any other lands we may cultivate in said county," it was held that such last mentioned crops did not pass under the mortgage, the land upon which they were to be raised not being identified at the time of the mortgage. *Gwathney v. Etheridge*, 99 N. C. 571.

Where no definite or particular aliquot part of the crop was reserved, but merely so much as would make a certain number of bales of cotton each weighing not less than a given number of pounds, it was held that no title passed in such crops which would be good as against an execution creditor. *Williamson v. Steel*, 3 Lea. 527.

Where a mortgage was of "the entire crop of corn, cotton, fodder, cotton seed, and all other crops of every kind or description which may be made and grown during the present year on said lands to the extent of 100 bales of cotton which is to be the first cotton picked," which provides that the mortgagor, "may mortgage to other parties any balances after such 100 bales," the court held that the italic words conveyed the other crops as well as the 100 bales, as security for the delivery of such bales. *Comer v. Lehman*, 37 Ala. 383.

XII. Title of a mortgage.

Crops to be raised are an exception to the general rule that title to property not in existence cannot be affected so as to vest the title when it comes into being. *Andrew v. Newcomb*, 33 N. Y. 417.

In the case of crops to be sown, it vests potentially from the time of the executory bargain, and actually as soon as the subject arises. *Ibid.*

A mortgage of an unplanted crop conveys no legal title to the mortgagee, but it conveys an equity, and if after the crop is grown it is delivered to the mortgagee in pursuance of the mortgage, this clothes him with the legal title and right to the

ment should be rendered in their favor, and against said defendant, for the said sum of \$770.53, with interest on the same from October 15, 1891,—\$23.12,—making a total of \$793.65, with costs of suit to be taxed. Geo. M. Buck, Circuit Judge. April 15th, 1892."

Mr. Hannibal Hart, with Messrs. W. B. Williams & Son, for plaintiff in error:

If the contract in this case conveyed or gave the plaintiffs any interest in the land, the contract itself was void because the wife of Schultz did not sign it.

possession which will prevail over the right of any third person acquired from the mortgagor after such delivery. *Marks v. Robinson*, 82 Ala. 69.

Such a mortgage gives the mortgagee no interest in or lien upon the land, and attaches only as a lien on the interest which the mortgagor has in the crops when they are in esse. *Simmons v. Anderson*, 44 Minn. 487.

To the same effect are the cases, *Rees v. Costa*, 65 Ala. 256; *Collier v. Faulk*, 69 Ala. 53; *Hurst v. Bell*, 72 Ala. 336; *Thompson v. Powell*, 77 Ala. 361; *Mayer v. Taylor*, 69 Ala. 403, 44 Am. Rep. 522; *Stern v. Simpson*, 62 Ala. 194.

The title conveyed not being such as would support an action in trover, detinue, or trespass only being an equitable one. *Grant v. Steiner*, 65 Ala. 499. To the same effect, *Booker v. Jones*, 55 Ala. 268; *Abraham v. Carter*, 53 Ala. 8; *McCaffrey v. Woodin*, 65 N. Y. 459, 22 Am. Rep. 644; *Williams v. Briggs*, 11 R. I. 176, 23 Am. Rep. 518, 22 Am. Rep. 653; *Fonville v. Casey*, 5 N. C. 389, 4 Am. Dec. 561; *Apperson v. Moore*, 30 Ark. 58, 21 Am. Rep. 170; *Wetzler v. Kelly*, 68 Ala. 440; *Columbus Iron Works v. Renfro*, 71 Ala. 577; *Marks v. Robinson*, *supra*; *Jackson v. Bain*, 74 Ala. 323.

So he is not entitled to a statutory claim suit for recovery thereof as against a creditor of the mortgagor seizing the same under legal process. *Columbus Iron Works Co. v. Renfro*, *supra*.

But the equitable title clothes the mortgagee with the right to maintain an action on the case in his own name against any one who sells the crop thus mortgaged and receives and converts the proceeds. *Leslie v. Hinson*, 53 Ala. 266; *Thompson v. Powell*, 77 Ala. 361; *Kelly v. Longshore*, 73 Ala. 203; *Thornston v. Strauss*, 79 Ala. 164; *Barnett v. Warren*, 82 Ala. 557.

The mortgagee of a growing crop has a legal title thereto after the crop is gathered that will support an action of detinue. *Wilkinson v. Ketler*, 69 Ala. 426.

And his lien exists after severance of the crop in the mortgagor's hands against attaching creditors. *Bilder v. Edgar*, 54 Cal. 127.

In *Kellogg v. Olson*, 34 Minn. 103, it was held that the legal title to the property the subject of a chattel mortgage, passed by the mortgage, and upon default the mortgagee was entitled to the possession without foreclosure, unless otherwise stipulated, subject, however, to the mortgagor's right to redemption. To the same effect, *Fletcher v. Noudeck*, 30 Minn. 125.

Where at the time of the execution of the mortgage the mortgagor was the owner and possessor of the crop, it was held that the mortgagee's title was prior to that of one claiming the crop under a parol agreement to apply the same in payment of the purchase money. *Wetzel v. Webb* (Cal.) Aug. 14, 1893.

Upon a contract for the delivery of one third of a certain crop of wheat, it was held that the right of the assignee to the one third was assignable and passed under a chattel mortgage of "all the right, title, and interest in and to that certain crop of wheat," such crop then having been out and standing in the shock on the land, the crop becoming the property of the mortgagee the moment it was set apart. *Potts v. Newell*, 22 Minn. 551.

The property will not pass where the only proof of delivery is a conversation such as, "You have a mortgage, all that is yours, you can have it."—23 L. R. A.

had with an agent of the mortgagee. *Wetzler v. Kelly*, 68 Ala. 440.

XIII. Effect of.

a. As against creditors.

A parol sale of growing crops is valid as against creditors. *Graff v. Fitch*, 58 Ill. 373, 11 Am. Rep. 85.

Such a mortgagee could not hold such crops in the absence of such proceedings or possession, as against an execution creditor. *Stowell v. Bair*, 5 Ill. App. 104.

The equity of redemption of such a mortgage is liable to sale on execution, but the mortgagee is valid as against an execution creditor. *Headrick v. Brattain*, 68 Ind. 438.

One taking a chattel mortgage impliedly assents to an interruption of his possession by the mortgagor's creditors, for the purpose of realizing the equity of redemption. *Hackleman v. Goodman*, 75 Ind. 202.

In *Headrick v. Brattain*, *supra*, a mortgage upon future crops was held valid as against execution creditors, following the decision of the supreme court in *Butt v. Ellett*, 36 U. S. 19 Vail. 544, 22 L. ed. 183.

A mortgagee takes his mortgage subject to the provisions of the statute (Indiana), and as long as the equity of redemption exists, though he may have possession of the goods, such possession is subject to his right in favor of the mortgagor's creditors and his possession may be temporarily interrupted for the purpose of disposing of the equity. *Hackleman v. Goodman*, *supra*.

In *Mauldin v. Armistead*, 14 Ala. 702, the proceeds of a crop planted or to be planted were held to be the subject of a valid trust for payment of debts, vesting the legal title in the trustees when the crop was gathered, even as against creditors of the mortgagor into whose hands the property had fallen, for the purpose of trade.

Where a debt was secured by a deed of lands, and the debtor subsequently contracted with his creditor to cultivate the land for a specified period, giving the creditor half the crop raised, the same to be credited on promissory notes, and a lien was created upon the whole crop for such payment, the court held, the mortgagor, debtor, having died, that the creditor was entitled to an equitable lien upon such crop enforceable in equity, and that such lien was superior to that of the debtor's other creditors. *Kirksey v. Means*, 42 Ala. 426.

In such a case the court declared and enforced the lien, although specific performance of the contract was prayed for and could have been enforced. *Ibid*.

Where a deed of trust given to secure a sum of money owing by the grantor together with further advances, conveyed the mortgagor's "entire interest in any and all crops of cotton, corn, and other agricultural products raised by him and hands he may employ" during a given year, with an understanding that the deed was to secure any advance on account of the crop made after the maturity thereof and not mentioned therein, the deed being duly recorded, the court held it valid as against creditors covering all advances made prior to its maturity and also those directly made with reference to the growing and harvesting of the crops. *Gray v. Helm*, 60 Miss. 131.

b. As against purchasers.

Corn growing upon the land was held to be chat-

Standing timber is part of the realty. Jacobs & Chaney, Dig. Real Prop. § 2; *Green v. Armstrong*, 1 Denio, 550.

Growing crops, in *fructus naturales*, are a part of the soil before severance.

Benjamin, Sales, Bennett's 1st ed. p. 120;

4 Am. & Eng. Encyclop. Law, p. 894; *Green v. Armstrong*, *supra*.

A contract to convey a crop of peaches, *fructus naturales*, to be grown in the future, is a contract that affects an interest in land.

The husband cannot sell, mortgage, or other-

tel property which the mortgagor had a right to sell, and to which the purchaser acquired a good title, and the fact that the mortgage debt was due, the mortgagor being in default, did not divest him such right. *Caldwell v. Alsop*, 17 L. R. A. 732, 48 Kan. 571.

A mortgage of a crop to be raised on a farm during a certain term, but which is not yet sown, passes no title and the mortgagee has no claim against a purchaser for the crop or its value. *Hutchinson v. Ford*, 9 Bush, 318, 15 Am. Rep. 711; *Comstock v. Scales*, 7 Wis. 159; *Cudworth v. Scott*, 41 N. H. 456.

The purchaser of such a crop has a right to leave the same upon the ground until maturity, and to enter and gather and remove it after maturity. *Bloom v. Welsh*, 27 N. J. L. 177.

In *Griffith v. Douglass*, 73 Me. 532, 40 Am. Rep. 306, a mortgage upon after-acquired property was held void as against subsequent judgment purchasers attaching the same, though it might be valid as between the parties. To the same effect, *Morrill v. Noyes*, 56 Me. 453, 96 Am. Dec. 493; *Emerson v. European & N. A. R. Co.* 67 Me. 391, 24 Am. Rep. 39; *Allen v. Goodnow*, 71 Me. 420.

Where a chattel mortgage on the crops to be raised the ensuing season had been given to secure purchase money and duly filed, the purchaser selling the land before sowing the crops, the sub-purchaser assuming by parol the payment of the mortgage and that the same should be a lien as if no change in ownership had taken place, the court held that the mortgagee had no right as against such subsequent purchaser or his creditors to the crop, even though they had knowledge of the mortgage prior to the judgment, such an understanding between the original and the sub-purchaser being held to be an agreement to mortgage and not a mortgage. *Bouton v. Haggart*, 6 Dak. 32.

In *Second Nat. Bank of Grand Forks v. Swan*, 2 N. Dak. 225, it was held that a contract by the owner of the fee conveying a crop raised and harvested upon the land during the year of redemption, to the person holding the sale certificate of the land under foreclosure proceedings either as security or absolutely, had no precedence over a prior mortgage of such crop, nor could it prevail against a subsequent mortgagee having no notice of the contract, whose mortgage was created while the landowner was in possession.

Where a lease was executed subsequent to a mortgage, the crops upon the land at the time of a sale under the mortgage were held to pass to the purchaser, the mortgagee being entitled thereto. *Lane v. King*, 8 Wend. 584.

In *Sherman v. Willett*, 43 N. Y. 146, a crop sown by the mortgagor after the date of the mortgage and subsequent to default, was held to pass to a purchaser at the administrator's sale of the effects of the deceased mortgagor, the crop being reserved upon the foreclosure sale.

A mortgage of land binds the crops, and a purchaser at a foreclosure sale holds the same as against a purchaser at a subsequent sale by the assignee in bankruptcy of the mortgagor. *Gillett v. Balcom*, 6 Barb. 370.

In *Gardner v. Finley*, 19 Barb. 320, it was held that a mortgagee was entitled to a crop as against a lessee subsequent to the mortgaged property and foreclosure sale.

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Where a mortgage was, three acres of wheat four acres of potatoes, and twenty of oats, the potatoes not being in existence at the time, and subsequently sold by the mortgagor's executor with full knowledge of the mortgage, the court held in an action by the executor to recover the balance due on the sale of such products, that they did not pass by the mortgage and therefore the executor was entitled to recover their value. *Creasey v. Sabre*, 17 Hun, 120; *Corderman v. Smith*, 41 Barb. 404; *Van Hoover v. Cory*, 84 Barb. 9; *McCaffrey v. Woodin*, 65 N. Y. 450, 23 Am. Rep. 644.

Where a mortgage was given to secure the purchase money of a farm, and stipulated for the delivery, by the mortgagor, of all the wood he might cut upon a certain line upon the mortgaged premises and for the mortgagee's lien upon the same, and also for a lien upon the crops of every kind for which the mortgagor was upon demand to execute and deliver such chattel mortgage as might be necessary until the purchase money was paid, the court held, the mortgagor having sold the crops to a judgment creditor, the latter having no notice or knowledge of the lien, that the purchase was that of a bona fide purchaser who was entitled to hold free from the lien. *Wood v. Lester*, 29 Barb. 145.

In *Millman v. Neher*, 20 Barb. 37, where a lien upon the crops as security for rent was stipulated for in the lease, and the lessee sold a portion of the crop, it was held, in an action for its value against the purchaser, that the latter had a right thereto as against the plaintiff. In that case the court was of opinion that the words "lien on the crops as security" did not import a sale or mortgage, as the clause contained no words of sale nor any from which a sale could be implied.

The mortgagor, while the grain was growing, assigned his property for the benefit of creditors, and the court held that the grain passed to the assignees and not to the purchaser of the land on a judgment on a mortgage, as the assignment amounted to a severance and vested the right in the trustees. *Myers v. White*, 1 Rawle, 333.

A purchaser of mortgaged lands as against the mortgagor or any person claiming under him by a purchase of the crops, was held not entitled to such crops as were standing ungathered on the land at the time of the purchase. *Wills v. Moore*, 50 Tex. 623, 46 Am. Rep. 234.

c. As between husband and wife.

Where a husband mortgaged lands of his wife for advances on a crop prior to the statute of February the 28th, 1887, the court held that his subsequent promise made to the wife to let her have the crop did not affect the mortgagee, and further that the wife's abandonment of the crop in consideration of a release of her property from a debt incurred for household articles did not work an accord and satisfaction. *Ernst Bros. v. Hollis*, 26 Ala. 511.

d. Judgment against.

Where growing crops were mortgaged during the pendency of an action in ejectment, the court held the mortgagee bound by the judgment against the mortgagor, such crops passing with the realty. *Huerstal v. Muir*, 64 Cal. 450.

And where a mortgage conveyed, *inter alia*, "forty acres of corn to be planted; fifty acres of broom corn to be planted, attended and delivered

wise charge the homestead without the wife's consent.

Snyder v. People, 26 Mich. 10, 12 Am. Rep. 802, and cases cited.

A husband's contract, not signed by the wife, to convey premises occupied as a homestead, is void.

Phillips v. Stauch, 20 Mich. 369; *Hall v. Loomis*, 63 Mich. 709.

A lease of the homestead without the wife's consent is void.

Coughlin v. Coughlin, 26 Kan. 116.

A right of way granted to a railway com-

pany across a homestead by the husband without the wife's signature was void.

Evans v. Grand Rapids L. & D. R. Co. 68 Mich. 602.

The defendant can take advantage of the invalidity of this contract.

Dye v. Mann, 10 Mich. 291.

The contract, if affecting an interest in land, is absolutely void, and therefore not capable of enforcement.

Sherrid v. Southwick, 43 Mich. 519; *Thompson, Homesteads & Exemptions*, § 874.

The contract is purely a personal one be-

in Juniata . . . now in my possession, on section 1, township 7, range 11 W. Adams county, Nebraska," the court held such mortgage conveyed no title or lien to the corn raised by the mortgagor upon the land described and levied upon as the mortgagor's property as against the judgment creditor of the mortgagor. *Cole v. Kerr*, 19 Neb. 553.

In *Crews v. Pendleton*, 1 Leigh, 297, 19 Am. Dec. 750, it was held that a mortgagee purchasing at a foreclosure sale was entitled to the growing crops as against an execution creditor of the mortgagor in possession, and entitled to protection by way of injunction.

A judgment debtor redeeming, is entitled to the crop as against a purchaser at a sheriff's sale. *Cartwright v. Savage*, 5 Or. 397.

XIV. Severance of the property.

In a contest between the mortgagee and one having acquired a right adverse to the mortgage, a description in the instrument of a given number of articles out of a larger number is no description, where the means are not given for ascertaining what is intended. *Dodds v. Neel*, 41 Ark. 70; *Krone v. Phelps*, 43 Ark. 350; *Watson v. Pugh*, 51 Ark. 218.

Where, however, the number specified is more than the whole number of such articles, there is no other property of the same kind from which a selection is to be made and therefore no uncertainty in description. *Watson v. Pugh*, *supra*; *Washington v. Love*, 34 Ark. 98; *Crowell v. Allie*, 25 Conn. 301; *Kelly v. Reid*, 57 Miss. 89; *Draper v. Perkins*, *Id.* 277.

When only a certain quantity of articles of the same character, such as cattle, grain in bulk, or a particular crop, is undertaken to be conveyed, no title can pass until the quantity is selected and set apart. *Dodds v. Neel*, *supra*.

Until selection is made the latter property will be subject to execution by the grantor's creditor, the portion sold not being separated from that not sold, and the grantee having no title in any particular property of which he could bring action. *Ibid.*

In *Dodds v. Neel*, *supra*, the deed reserved a lien upon the land and on certain bales of cotton of a certain weight each, out of a crop to be raised each year upon the premises. The court held that such a mortgage would not be valid as against creditors or subsequent mortgagees, or others acquiring adverse rights, unless it furnished the dates for separating the specified articles from the mass.

Where land was conveyed, the consideration money being payable in installments, the purchaser conveying the land and a certain portion of each annual crop of cotton to be produced for six years to secure the purchase money, with power to take possession and of sale in default, it was held, the vendor having taken possession of the bales of cotton including some owned by a tenant of the vendee, to pay a certain yearly installment, and the tenant having mortgaged his crop for supplies, that the first mortgage was void as against the second mortgage for uncertainty, and the replevin could not be maintained against the vendor 23 L. R. A.

for the bales so taken. *Dodds v. Neel*, *supra*. See also, *Elmhart v. Olive*, 5 Watts & S. 163; *Ream v. Harnish*, 45 Pa. 376, *infra*, "Landlord and tenant."

XV. Application of proceeds.

Where two distinct debts were secured one by a mortgage upon land or real estate, the other by mortgage of a growing crop, the court held that the proceeds of the latter must be applied to the debt secured by the mortgage, and that no specific appropriation was required, the mortgage showing how the proceeds were to be disposed of and no change could be made without mutual consent. *Greer v. Turner*, 47 Ark. 17.

Where the mortgage embraced a crop of cotton to be raised during a certain year, to secure promissory notes, it was held that the mortgagee or creditor had a right to appropriate the proceeds of the crop when delivered, in payment of the secured debt, but to no other without express consent of the debtor, and such delivery operated *eo instanti* as a satisfaction *pro tanto* of the secured debt. *Ogden v. Harrison*, 56 Miss. 743.

Where the mortgage included "the rents, issues, and profits thereof," it was held under a decree of foreclosure and sale of the lands, the receiver appointed having harvested and sold the crop, that the lien of the mortgage existed against the proceeds of the sale of the crop for the deficiency, the amount realized from the land not being sufficient to cover the mortgage. *Montgomery v. Merrill*, 65 Cal. 432.

XVI. To secure crop advances.

A mortgage for advances to make a crop, properly executed and recorded, is valid and enforceable under the Georgia Code, § 3371. *Stephens v. Tucker*, 55 Ga. 543.

In *Stallings v. Harrold*, 60 Ga. 478, the crop lien was not created until shortly before the crop had matured in the fall. The court held it operative upon the year's crop and had precedence over a judgment rendered in the spring of the year.

So in *Watkins v. Wyatt*, 9 Baxt. 250, 40 Am. Rep. 90, 30 Am. Rep. 63, the court upheld a mortgage of a future crop of cotton to be planted, to secure supplies furnished and to be furnished for the purpose of making the crop.

Where an intended mortgage was to secure money loaned for the purpose of raising a crop of cotton, and bound the mortgagor "to deliver to him or his order so much of said cotton, when made, as will be sufficient to fully reimburse him for the money so advanced to him," the court held that although a mortgage of future crops might be made, yet that the present instrument was merely an executory agreement for the delivery of so much cotton as would satisfy the debt specifying no particular cotton, and not a mortgage, and that the mortgagee had no legal or equitable right to the property which he could enforce as against an attaching creditor. *Thurman v. Jenkins*, 2 Baxt. 423.

Where a tenant gave "a special lien and mortgage" upon the crop to be raised, specially binding

tween plaintiffs and Schultz. If there is any remedy for plaintiffs it is against Schultz for breach of contract, and not against defendant.

3 Am. & Eng. Encyclop. Law, 907.

In this enterprise, plaintiffs furnished the trees, Schultz furnished the land, both assisted

in setting out the trees and after the peaches were picked and shipped, there was to be an accounting between them and the proceeds should be divided equally.

This would make contract of partnership. 17 Am. & Eng. Encyclop. Law, 826.

the crop for payment of advances for making the same, it was held that such instrument was binding even though not in the ordinary form of a mortgage. *McGee v. Fitzer*, 37 Tex. 27.

See further, hereon, "*Special state laws*," *infra*.

XVII. Crops raised upon shares.

A cropper's share only falls due when the crop is harvested. *Lamberton v. Stouffer*, 55 Pa. 284.

Where the tenant of land rented for the purpose of cultivation upon shares, agreed with the landlord "that everything he had and the crop to be made should be bound for the amount" furnished him for supplies, the court held there was a valid parol mortgage against which the exemption was inoperative. *Brown v. Coats*, 56 Ala. 439.

A mere cropper has not such an interest in the crop that he can either sell or mortgage. *Ponder v. Rhea*, 32 Ark. 435.

When one let another have land to cultivate and raise a crop, furnishing part of the team, provender, and supplies for making the same which was to be his property, and after a certain portion had been reserved for the use of the land and certain indebtedness paid, the raiser of the crop was to have what remained, it was held that such raiser had no interest which he could sell or mortgage. *Ibid.*; *Sentell v. Moore*, 34 Ark. 687.

There is neither at common law nor by statute any lien in favor of a merchant who supplies for advances to make a crop, although reasonable for such purpose. No one is legally or morally bound or can have other than a speculative interest in assisting another to make a crop. *Franklin v. Meyer*, 36 Ark. 96.

But it has been held that a cropper may mortgage or alienate his interest in the crop without consent of the landlord, notwithstanding section 4452 of the Act (Mansf. Dig.) which does not place an absolute restriction upon the alienation by a cropper or tenant of his share of the crop. *Parks v. Webb*, 48 Ark. 238.

In *Beard v. State*, 43 Ark. 234, it was held that the interest of a cropper in a future crop might be the subject of such a mortgage, and that after such mortgage duly recorded he would be guilty of felony for a sale of the mortgaged property without proof of felonious intent to deprive the mortgagee of his debt.

A share cropper has such an interest in the crop as will entitle him to mortgage it, and under the Act of March 11, 1875, the legal title would vest in the mortgagee upon the cropper's right to his share being perfected, and an action for conversion of the same was maintainable. *Parks v. Webb*, *supra*.

The legal title vests in the mortgagee as soon as his share becomes perfect, so as to enable him to maintain an action for conversion under the Arkansas Act of the 11th of May, 1875. *Ibid.*

In *Emerson v. Hedrick*, 43 Ark. 263, it was stated that while prairie grass was not hay, when cut or made and raked it became hay, the drying and cutting or curing occurring between the former and latter process, and that therefore it might be said to be the production of the laborer who cuts and makes it, and that such laborer had a lien thereon for the value of his labor.

In *Burgie v. Davis*, 34 Ark. 179, the contract was to work during the year for the plaintiff "to help him make a crop of corn and cotton on the planta-

tion," the plaintiff agreeing to pay by bales of cotton to be shipped to market, the proceeds collected and paid over to defendant. The court held that the defendant was a cropper and not a tenant, and had a lien for the amount due, and that a laborer under such cropper had also a lien, enforceable as against the landowner having the crop.

In *Jewell v. Woodman*, 59 N. H. 520, it was held that a mortgagee of a tenant of a farm worked upon shares of the crops which were taken in lieu of rent, with an understanding that the whole were to be consumed upon the premises, acquired no rights which would entitle him to remove the same.

Where land was agreed to be worked on shares, a joint action of trespass is the proper remedy in cases between the landlord and the tenant, there being a joint property in the crop. *Foots v. Colvin*, 3 Johns. 316, 3 Am. Dec. 473.

Where land is let on shares, replevin is not the proper remedy in case of disseisin, where the grain has been cut and removed by the other tenant. *De Mott v. Hagerman*, 8 Cow. 220, 18 Am. Dec. 443.

Land let upon shares for the purpose of raising a crop was held not a lease to place the parties in the condition of tenants in common. *Ibid.*

Where the defendant, at the time the growing crop was levied upon, was a cropper and subsequently the crop was divided, it was held that at the day of sale the share was liable to be sold, even though it remained upon the land. *Hare v. Pearson*, 26 N. C. 76.

XVIII. Upon whom binding.

A contract to apply the profits from mortgaged chattels towards satisfaction of the debt will bind the personal representatives of the mortgagor. *Stewart v. Fry*, 3 Ala. 573.

The personal representatives of a mortgagor in possession are not bound to account with the mortgagee for sums received by the mortgagor in his lifetime, from the profits of the mortgaged chattels. *Ibid.*

Even though a specific contract to apply such profits in extinguishment of the debt existed. *Ibid.*

XIX. Landlord and tenant.

As between landlord and tenant growing crops are personal property and may be sold by parol contract. *Nuernberger v. Von Der Heidt*, 30 Ill. App. 404.

In *Wintermute v. Light*, 45 Barb. 273, wine plants were held personal estate as between the landlord and tenant.

Growing grass may be the subject of a personal mortgage as the property of a tenant. *Jencks v. Smith*, 1 N. Y. 90.

The mere fact of a landlord taking a mortgage upon a crop does not displace his lien for rent. *Franklin v. Meyer*, 36 Ark. 96.

Such a landlord has the power at his option to enforce a statutory lien during its existence. *Ibid.*

In *McCombs v. Becker*, 3 Hun. 343, the court held that it was competent for a tenant, instead of mortgaging his crop as security for rent, to agree that the crop should be the landowner's until the rent was paid.

A tenant under a lease reserving a crop as rent, has no title whereby he can sell the same. *Cooper v. McGrew*, 3 Or. 327.

Such a tenant holds as a cotenant with the landlord. *Ibid.*

Legal representatives mean ordinarily executors and administrators.

18 Am. & Eng. Encyclop. Law, 221.

It cannot be claimed that the contract is one that runs with the land. In such a case there must be a privity of estate between a covenantor and a covenantee.

Under section 3469 of the Alabama Code, Sessions Act of 1878-79, p. 72, a landlord's lien for advances is equal to the rent lien, and entitles him to an action against a purchaser with notice. Thompson v. Powell, 77 Ala. 391.

The lien of a landlord under section 3467 of the Code of 1876, was held to be independent of the remedy by way of attachment and such as would pass by an assignment of a rent note, and entitled the assignee to an action against the purchaser of the crop. Westmoreland v. Foster, 60 Ala. 448.

The property of the crop is in the tenant as between himself and the landlord, where such relationship exists, until the crop is harvested, and such crop is not liable to be levied upon as the landlord's property until divided. Hansen v. Dennison, 7 Ill. App. 73.

Otherwise if the relationship of tenants in common existed between the parties. *Ibid.*

In Nestell v. Hewitt, 19 Abb. N. C. 232, the court stated that mother earth was the natural producer of all vegetation grown in the soil and had within herself the vital agencies of production, and it would seem to be reasonable and just to hold that the owner in leasing his land might legally and properly reserve to himself a valid lien upon all crops that should be raised thereon during the term, as security for his rent.

In this case the court distinguished the cases of Otis v. Still, 8 Barb. 102; Gardner v. McEwen, 19 N. Y. 123; Milliman v. Neher, 20 Barb. 37, and reversed the decision in the principle case in the court below reported, McCaffrey v. Wooden, 62 Barb. 316.

The owner of land acquires no property in part of a crop reserved for rent, until it is set apart to him by the tenant, the ownership of the tenant continuing until that time. Townsend v. Isenberger, 45 Iowa, 670.

In Kelley v. Weston, 20 Me. 232, where the tenant had contracted to cultivate and bag a crop of hops as payment of the rent, it was held that such hops were the landlord's property, the tenant having no title thereto.

Where the rent of a lease was secured by mortgage of the crop, it was held that such mortgage covered the part of the land under-leased by the lessee and attached *pro tanto* to the crop raised thereon. Harris v. Frank, 52 Miss. 156.

In Wentworth v. Portsmouth & D. Railroad, 55 N. H. 540, it was held that the relation of landlord and tenant existed where land was let upon shares, so that no right of action of trespass would lie by the landlord, he not being in actual possession.

A parol agreement between a landlord and tenant for the working of a farm on shares void under the statute of frauds as to the meadow land, will not be treated as valid with respect to the crops of grain and vegetables, and was at the most a mere revocable license. Hobbs v. Wetherway, 38 How. Pr. 385.

In Smith v. Taber, 46 Hun, 313, the court upheld an agreement in a lease to the effect that personal property of the lessee on the said land or thereafter brought onto it, and the crop raised and to be raised on the said land, should vest as collateral security for the rent, and upheld the same against such subsequent crops even as against a subsequent purchaser with notice, the lease being properly filed.

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Spencer's Case, 5 Coke, 16, 1 Smith, Lead. Cas. 9th ed. 174; *Keppel v. Bailey*, 2 Myl. & K. 517; *Bronson v. Coffin*, 108 Mass. 175, 11 Am. Rep. 335; *Cole v. Hughes*, 54 N. Y. 444, 13 Am. Rep. 611.

This contract was a contract of sale. A mere executory contract of sale of fruit not in

Where a farm lease contained a provision for the payment of the consideration upon or sooner than a given day in each year, as the products of the farm could be marketed, the produce and products to remain the property of the lessor until the rent paid, the lessee to have no right to sell or dispose of the products without the lessor's consent, the court held that such future products having a potential existence were the subject of a grant, and that the lessor's title was absolute and perfect vesting the same in him as soon as they came into existence, and that he had a right to possession both as against the lessee and those claiming under him. Van Hoozer v. Cory, 34 Barb. 9. To the same effect is the case of *Conderman v. Smith*, 41 Barb. 404, where the mortgage was of *inter alia*, "all the grain growing on the land rented; all the corn and potatoes now planted thereon; all the hay growing on the ground."

Where the landlord was entitled to a share of the grain in the ground as rent, such grain to be delivered by the bushel, it was held no title passed till it was severed and delivered, and that the same might be secured by the tenant. *Rinehart v. Olwine*, 5 Watts & S. 164; *Ream v. Harnish*, 45 Pa. 376, to the same effect.

In *Everman v. Robb*, 52 Miss. 653, 24 Am. Rep. 682, it was held that a lien reserved in a recorded lease on the "crops grown annually on the land as security for the rent" was valid and prevailed over a subsequent mortgage. To the same effect, *Sillers v. Lester*, 43 Miss. 513.

Where in a lease part of the crop is reserved as rent, it is a reservation and constitutes such part of the property of the landlord so that he may bring trespass for severance, either in his own name or jointly with the tenant. *Moulton v. Robinson*, *Ladd v. Robinson*, 27 N. H. 550.

In *Steffin v. Steffin*, 4 N. Y. Civ. Proc. Rep. 179, it was held that such a lease with a security clause not filed as a chattel mortgage, was inoperative as against judgment creditors. *Stewart v. Beale*, 7 Hun, 406, to the same effect.

Where a landlord having a prior lien became surety on a replevin bond, the court held he was estopped from denying the validity of the attachment and could not bring action for conversion of the crop. *Brown v. Hamill*, 76 Ala. 506.

Where a mortgage was executed to secure a year's rent upon, *inter alia*, "all the crops of cotton and corn to be raised on said Asia plantation during the year 1870," it was held that the future acquired property became subject to the mortgage as soon as acquired, and that such mortgage was good as against subsequent mortgages having notice by record thereof. *Sillers v. Lester*, *supra*. To the same effect is *Cayce v. Stovall*, 50 Miss. 386.

Where the mortgage conveyed to a trustee all the crops of corn and cotton to be grown on the plantation in a certain year, or to secure the payment of advances for supplies for the purpose of making the crop, it was held that the landlord, the mortgagee having failed to make the advances, could not, after notice of the trust, supply or make the supplies himself and take the crop in payment, without first notifying the mortgagee to fulfill his contract, and in default he would perform the same himself. *Paxton v. Meyer*, 59 Miss. 445.

Where a lease provided that the amount due

existence, and therefore could not be binding upon defendant, even if he had assumed it.

Such a contract of sale was void because the subject of sale, viz., the peaches, was not in existence and therefore there could be no subject-matter of the contract.

Benjamin, Sales, §§ 76-78.

for rent should be a lien upon the crop, and subsequently the lessee executed a chattel mortgage upon such crop, the mortgagee having no notice of the condition, and the lease not being recorded the court held his lien superior to that of the lessor. *Gandy v. Dewey*, 23 Neb. 175.

Where a lease contained a covenant or proviso that the rent should be a perpetual lien upon all crops, no matter whether exempt from execution or otherwise, the court held it created a lien or equitable charge, and that the rights of a party to execute it and its validity depended upon the same principle as a mortgage. *Fejavy v. Broesch*, 52 Iowa, 88, 35 Am. Rep. 261.

Where there is an agreement between the landlord and tenant, that the former shall have part of the crop as rented with possession of the whole crop until the rent is paid, the tenant cannot pass the title by a sale of such crop. *Wentworth v. Miller*, 53 Cal. 6.

Where a crop was planted under an agreement that the landlord should have a portion thereof, and the tenant subsequently mortgaged it, it was held that the mortgagee taking possession, and refusing to deliver plaintiff's share and converting the whole crop, was liable for the landlord's share, such mortgage only extending to the mortgagor's interest. *Sunol v. Molloy*, 63 Cal. 369.

An execution issued to enforce a crop lien for supplies is invalid where the affidavit foreclosing the lien as fatally defective is known, but a landlord is entitled to such a lien without a special contract in writing, under section 1978 of the Code of Georgia, Acts 1875, p. 20. *Eve v. Crowder*, 59 Ga. 799, where the affidavit neither affirmed a special contract nor the relation of landlord, and merely stated that the supplies were furnished, but did not disclose how or under whom the defendant held the land.

Where property was leased, the rent for the same being one half of all of the crops, no crops to be sold or removed until rent, advances, and loans were paid, it was held that advances made bona fide by provisions or by pledge or mortgage, could be secured and that an estoppel *in pais* was created by a verbal assurance that such moneys should be repaid. *Brown v. Thomas*, 14 Ill. App. 428.

In *Froot v. Hardin*, 56 Ind. 185, 26 Am. Rep. 18, where the landlord was to receive a portion of the crop for rent, it was held that he was liable to an action of damages for the trespass of his animals upon the tenant's premises, prior to the severance and division of the crop.

In an action trespass *quare clausum fregit*, it was held that the lessor of land for the purpose of raising a crop on shares, receiving his share of the products standing on the land, would not be a trespasser by entering upon that part of the close upon which his share was given, and was to be regarded as the exclusive proprietor of the crop. *Woodruff v. Adams*, 5 Blackf. 817, 35 Am. Dec. 122.

A chattel mortgage upon future crops of the next season was executed by a tenant at will to whose wife the landlord subsequently leased the property with the tenant's approval, and it was held that neither the tenant nor the mortgagee had any title to the crop. *Gammon v. Buel* (Iowa) Oct. 24, 1892.

Where a farm lease stipulated that the lessor (the plaintiff) should have a lien as security for

Potentially means possibility; not in act; not positively; in efficacy, not in actuality. With this definition in view, it cannot be said that the mere ownership or possession of the soil carries with it the production of crops potentially.

Cole v. Kerr, 19 Neb. 553.

rent upon *inter alia* other personal property which might be put upon the said premises, the court held in an action for converting farm produce by the lessor's agent after default in payment of the rent, that the instrument was in effect a chattel mortgage in so far as it created a lien upon property not then in existence or acquired, and although no title would pass at law yet that such instrument gave the lessor a license to seize the property and that after seizure a title would pass; and the court further held that in equity the instrument transferred a beneficial interest without any new act intervening, upon such future property coming into existence, such a clause would cover crops subsequently raised upon the farm. *McCaffrey v. Woodin*, 65 N. Y. 450, 22 Am. Rep. 644.

Where a lease providing that the lessee should raise and handle a crop and deliver half as rent, was subsequently modified by a parol contract for the furnishing of supplies by the landlord who was to retain possession and control and sell the crop, the court held in a suit by a mortgagee of the tenant without notice of the latter contract that the modifications were valid, and that the mortgagee had no greater interest than the mortgagor or tenant under the subsequent agreement. *Meacham v. Herndon*, 86 Tenn. 386.

The mortgage of future crops as security for rent of the land is valid. *Phelps v. Murray*, 3 Tenn. Ch. 746, 753.

Where a mortgagee has notice of a contract with the owner of the land for the making of advances for the raising of a crop, it was held that the mortgagee's lien was subject to the claim of the owner for the advances and was not affected by the non-recording of such contract. *McGee v. Fitzer*, 37 Tex. 27.

Such a mortgage created by a tenant or lessee cannot affect the title of the landlord or lessor to his share of the crop, where the lease reserved a certain proportion of the crops as rent. *Ibid.*

In such a case the mortgagee's lien only extended to that portion of the crop which remained in him after paying the owner's advances. *Ibid.*

A lease reserving the crops as security for rent is valid and binds the crops as against the creditors of the lessee. *Smith v. Atkins*, 18 Vt. 465.

Where a lessee conveyed the future crops to the lessor, to be held by him till the rent was paid, it was held to have the same effect as though such crops were reserved to the lessor in the lease. *Bellows v. Wells*, 36 Vt. 589.

Where a lessee planted corn and subsequently made a sale of it upon the expiration of the term, the court held that the corn being planted was a chattel and the subject of sale, the title being reserved to the lessee, even though the term expired before severance, the lease limiting and qualifying the reversion of the lessor. *Booker v. Jones*, 55 Ala. 266; *Grantham v. Hawley*, Hob. 183.

Where a lease provided that the lessor should have a lien on after-acquired produce, it was held valid as a chattel mortgage if duly filed, and was not a mere executory agreement for an equitable lien. *Nestell v. Hewitt*, 19 Abb. N. C. 287.

To hold that the owner of land may hold a secret lien on the crop being raised by his tenant, for advances to be made to such tenant, would put it in the power of the tenant to practice innumerable frauds on innocent parties dealing with him, on

Things have a potential existence which are the natural product, or expected increase, of something already belonging to the vendor.

Hutchinson v. Ford, 9 Bush, 818, 15 Am. Rep. 711.

A chattel mortgage can have no valid operation upon a crop of grain, given at or about

the time of planting the same, and before it is up, or has any appearance of a growing crop. The property in such a case cannot be said to be in existence.

Comstock v. Scales, 7 Wis. 159; *Chynoweth v. Tenney*, 10 Wis. 397; *Wade v. Strachan*, 71 Mich. 459; *Bates v. Smith*, 88 Mich. 349.

the faith of the products of their labor. *Jones v. Chamberlin*, 9 Reisk. 210.

XX. Conversion.

The vendee of a growing crop acquires such an exclusive right to the possession of the land whereon it grows as to make that land his close until the crop is gathered and removed, and therefore he may maintain trespass *quare clausum fregit* against any who enter thereon without his leave. *Stewart v. Doughty*, 9 Johns. 108; *Austin v. Sawyer*, 9 Cow. 39.

A purchaser of such a crop has a remedy against those disturbing him in the enjoyment thereof, by way of action of trespass. *Brittain v. McKay*, 23 N. C. 255, 35 Am. Dec. 738.

In *Miller v. Baker*, 1 Met. 27, trees and shrubs, part of a nursery stock, were held personal chattels and as independent of realty for the wrongful taking and conversion of which an action of trespass *de bonis arborum* would lie.

A mortgagee of a crop not *in esse* but to be produced *in futuro*, has not such a legal title in the crop as will support an action of trover, detinue, or trespass, an equitable title being all he has. *Elmore v. Simon*, 67 Ala. 523. To the same effect, *Grant v. Steiner*, 65 Ala. 499; *Rees v. Coats*, *Id.* 256.

In *Rees v. Coats*, *supra*, the dictum of the court in *Brown v. Coats*, 55 Ala. 439, was held erroneous and it was declared that a parol mortgage on a future crop, which might be valid *inter partes*, did not operate to convey such a title in the mortgagee not in possession, as would entitle him to maintain an action of trover or detinue against third parties, but that as against third parties with notice such a mortgagee would be entitled to a special action on the case in case of conversion.

In an action for conversion of cotton upon which the plaintiffs claimed a prior mortgage, where the evidence was conflicting as to whether or not the cotton claimed was part of the mortgagor's crop, the court held an instruction was proper, making it incumbent upon the plaintiff to prove to the jury that the cotton was part of the mortgagor's crop. *Woolley v. Jones*, 84 Ala. 88.

In *Robinson v. Kruse*, 29 Ark. 575, it was held that trover might be maintained against the owner of the land by a mortgagee of a crop which had been converted by the land owner into his own possession for rent.

Where a purchaser of wheat from a mortgagor of a duly recorded mortgage mixed the wheat with his own and dealt with the same in the ordinary way of trade, he was held liable for conversion, having constructive notice of the mortgagee's title. *Nichols v. Barnes*, 3 Dak. 148.

An instrument executed as security for a loan of money to be made by advances towards the cultivation of a growing crop, there being provisions inconsistent with the mortgagee's ownership, was held to be a mere mortgage and did not entitle him to an action in trover for recovery of the crop. *Stokes v. Hollis*, 43 Ga. 282.

In an action in trover to recover a wrongful conversion of corn, the possession of which was retained by the mortgagor under the terms of the mortgage and remortgaged by him, the corn being gathered by the mortgagor and handed over to the first mortgagee who sold to defendants, which was paid for by them and sold and shipped by them to other parties, after which second mortgagee as-

signed to the plaintiff, who brought suit insisting that the first mortgage was void.—the court held that the assignment passed the mortgagee's right, except the right to sue the parties through whose hands the property passed, for injuries prior to assignment, and that it was necessary for the assignee, in order to maintain such an action, to be the owner or entitled to the possession of the property at the time of the wrong committed. *Bowers v. Bodley*, 4 Ill. App. 279.

Where a mortgage was given by a tenant who worked the farm on shares and described the property as "two thirds of all the wheat that should be sown the then coming fall on the farm," the mortgage being filed, and subsequently the land was sold, and yielded a crop of three hundred and five bushels, and during the growth of the wheat the mortgagor inserted a clause in the mortgage making it a lien upon all the property the same for the subsequent as for the present year, and later surrendered possession and removed from the premises,—the court held that the mortgage and subsequent stipulation inserted therein, created as between the first and second mortgagee, the second mortgage being executed after the possession taken by the first mortgage, but one mortgage, and a sale by such first mortgagee created no liability in trover, the second mortgagee taking with notice of the prior mortgage. *Grimes v. Rose*, 24 Mich. 416.

After condition broken, the mortgagee's title becomes vested with an immediate right of possession, and the purchaser of the crop from the mortgagor will become liable as for conversion upon refusal to deliver up the property. *Cloes v. Hodges*, 44 Minn. 204.

In *Stamps v. Gilman*, 43 Miss. 456, it is held that a mortgagee of chattels could maintain trover for a conversion by a stranger while in the possession of the mortgagor, after condition broken. He is purchaser *sub modo*, holding the double relation of creditor and purchaser.

Where the deed described the property as "all the hay and grain of every kind that grows on the farm on which I now live the present year," and part of the crop was sown in the fall of the year previous to the execution of the deed, and other productions were sown in the spring of the same year in which the mortgage was executed, it was held in an action of trover for carrying away the products of the year in which the mortgage was executed, that no part of the crop sown in the spring of the year passed under the mortgage, but that the action could be maintained to recover the value of hay and the winter rye, the same being *in esse* at the time of the mortgage. *Cudworth v. Scott*, 41 N. H. 456.

In the above case the reliance was placed upon section 1, chapter 138, of the Compiled Laws, making personal property and crops of every description, whether the same have or have not come to maturity, subject to mortgage agreeably to the provisions of such chapter.

After foreclosure and sale of the premises in possession of the mortgagor's lessee under a lease subsequent to the mortgage, the lessee is a wrongdoer and liable to action for taking and carrying away the crops. *Simers v. Sattys*, 3 Denio, 219. To the same effect, *Lane v. King*, 8 Wend. 584, 24 Am. Dec. 105.

The mortgagee of one of two tenants in common

Where the subject-matter has neither an actual nor potential existence such an agreement is usually denominated an executory contract, and for its violation the remedy of the party injured is by an action to recover damages.

Hutchinson v. Ford, supra; Pierce v. Emery, 32 N. H. 484.

of an interest in a fallow for the purpose of raising wheat is a co-tenant with the landowner provided such tenancy existed with respect to the crop, and therefore the sale of the wheat by the latter without the assent of the plaintiff and assignor of the mortgage and with the assent of the defendant, who claimed title to the half covered by the mortgage and the receipt by him of the produce of that half was held, as to the plaintiff, a conversion. *Shuart v. Taylor, 7 How. Pr. 251.*

In *Wood v. Dudley, 8 Vt. 420*, it was held that an action for trover could not be maintained by a mortgagor against the mortgagee prior to redemption of the chattels.

In *Malone v. Hill, 68 Ala. 225*, a mortgagor of crops having died, the same was sold by a commission merchant and the proceeds paid to a distributee of the estate, who had not qualified as administrator for the purpose of furnishing a future crop. The court held that such merchant paid over the same at his peril in allowing any one but the regularly appointed administrator to draw the fund.

XXI. Special state doctrines and laws. Alabama.

Under section 1800 of the Alabama Revised Code, any person having a lien upon the crop for advances to assist in making a crop, has the same rights and remedies to enforce such lien as landlords have for collection of rents. *McKinney v. Benagh, 48 Ala. 358.*

Such a lien is not dissolved by the death of the defendant and the insolvency of his estate, and is enforceable by sale. *Ibid.*

In *Dawson v. Higgins, 50 Ala. 40*, it was held that the language of section 1858 of the Alabama Revised Code must be strictly pursued in order to create a statutory lien for crop advances. See also *Comer v. Daniel, 69 Ala. 424.*

Its form and spirit must be complied with in every essential particular. *Griel v. Lehman, 59 Ala. 419.*

It is necessary that the articles should be such as are enumerated in the above section. *Watson v. Auerbach, 57 Ala. 353.*

A case must be shown conforming in every respect with the sections. *Ibid.*

Thus a mere statement that the "advances were made to me to enable me to make a crop the present year" is insufficient, not showing in writing the person to whom the advance is made, and that the same was obtained bona fide for such purpose. *Dawson v. Higgins, supra.*

Where, however, such mortgage is in the form and for the consideration prescribed by the statute the lien attaches to a mortgage or assignment of crops not planted. *Stewart v. Fry, 3 Ala. 573; Robinson v. Mauldin, 11 Ala. 977; Abraham v. Carter, 53 Ala. 8; Boswell v. Carlisle, 55 Ala. 554*, wherein it was held that a third party might show the same to be false and for an antecedent debt.

If the sections of the code are strictly followed, the mortgagee has a preferential lien upon the crop raised, as against all except the landlord. *Flexner v. Dickerson, 65 Ala. 129.*

Unless it is sufficient to operate as a mortgage the mortgagee will not have such an interest as will entitle him to maintain an action for a trial of the right of property. *Boswell v. Carlisle, supra.*
28 L. R. A.

The contract in this case could be but an agreement to sell.

Boulton v. Haggart (S. Dak.) Feb. Term, 1888.

A mortgage on crops to be grown, which fails to state the year or time when the crops are to be raised, is void.

If the advance is bona fide for the statutory purposes, the lender's lien will not be affected by any misapplication on the borrower's part. *Watson v. Auerbach, 57 Ala. 353.*

It is not the subject of extension as between the parties. *Ibid.*

Such lien is not destroyed or impaired by the fact that the same instrument contains a mortgage of the same property to secure the same debt, but the resort to one security would render it improper to resort to the other at the same time. *Grady v. Hall, 59 Ala. 341.*

The requirements of section 3236 of the Code of 1876 being complied with, the mortgagee has a lien on the crop and upon the stock furnished with the money so advanced and a right to sue out attachment to enforce this lien co-extensive with the rights of landlords to sue to such process for the collection of rent under sections 3238, 3472, of the same Code. *Ibid.*

Where a note was given for advances for the purpose of making a crop and recited that the advance was made in provisions and a horse, the court held it was fatally defective for uncertainty as a lien upon the crop under the above sections. *Schuessler v. Gains, 68 Ala. 554.*

A mortgage under the above section of the Revised Code which states the consideration as a present debt "to enable them to make a crop the present year, and without which advance it would not be in their power to procure the necessary teams, provisions, farming implements and other materials essential to make such crop,"—was held not to create a statutory lien, but might be valid as a mortgage and allowed to stand as a security for the advances. *Tison v. People's Sav. & Loan Assn. 57 Ala. 323.*

An instrument which shows as a consideration "necessary advances and horses, mules, oxen and necessary provisions, farming tools and implements, and money to procure the same obtained by me bona fide for the purpose of making a crop the present year," and also stating, "without such advances it would not be in my power to procure the necessary teams, provisions, money, implements, etc., to make a crop the present year,"—the court held there was a substantial compliance with section 3236 of the Code, and to create a statutory lien upon the crop. *Connor v. Jackson, 74 Ala. 464.*

Where a mortgage was given to secure a promissory note, the consideration being described as "an advance for the purpose of making a crop," the note conforming to the requirements of section 3236 of the Code and showing a contemplated future advance for the purpose of making a crop during the then current year, the court held that only such articles as came within the express provisions of the statute could be secured by such a mortgage not exceeding the amount of the note. *Marcus v. Robinson, 76 Ala. 550.*

Where a mortgage declared that "this mortgage is made a lien on the crop of cotton made on the place" to the extent of the annual payment due for each succeeding year, it was held that this was not a mortgage, but a mere lien created by contract or a right to charge the cotton with the payment of the debt; a mere equitable lien in the nature of a mortgage conferring no legal estate or interest in the cotton such as is necessary to support an action of trover. *Bush v. Garner, 73 Ala. 162.*

Barr v. Cannon, 69 Iowa, 20; *Pennington v. Jones*, 57 Iowa, 37; *Eggert v. White*, 59 Iowa, 464.

Messrs. Padgham & Butler, for appellees:

This case lacks the essential elements of a partnership. There is no agreement to share

the profits or stand the losses, proportionately or in any other manner.

Robbins v. McKnight, 5 N. J. Eq. 645, 45 Am. Dec. 406, and cases cited.

Language creating rights should be construed according to its ordinary and commonly accepted meaning, if used by persons who are

Under section 3467 of the Alabama Code, a landlord has a prior lien for rent and advances on his tenant's crops to that of a merchant advancing, under sections 3236, 3237, of the Code. *Brown v. Hamill*, 76 Ala. 506.

Arkansas.

Prior to the Act of February 11, 1875, making valid mortgages on crops to be planted, a mortgage on such a crop was invalid. *Tomlinson v. Greenfield*, 31 Ark. 537.

The Act of February 11, 1875, put an end to the conflict between law and equity in respect to mortgages of unplanted or immature crops, by making such mortgages good at law as well as in equity. *Jarrett v. McDaniel*, 34 Ark. 598; *Beard v. State*, 43 Ark. 234.

Section 4749 of the Arkansas Digest of Statutes (ed. 1884) provides, all mortgages executed on crops already planted, or to be planted, shall have the same force and effect to bind such crops and their products as other mortgages now have to bind property already in being (Act Feb. 11, 1875).

Under this Act the court held in *Jarrett v. McDaniel*, *supra*, that a mortgage executed subsequent to the date of the act, upon an unplanted crop, was valid so as to enable the mortgagee to replevin the mortgaged property.

California.

Section 2972 of the California Code provides that the lien of a mortgage on the growing crop continues on the crop after severance, whether remaining in its original state or converted into another product, so long as the same remains on the land of the mortgagor, and it has been held that there is nothing in the language of the section under which the lien could be lost through the tortious removal of the crop by a third person. *Wilson v. Prouty*, 70 Cal. 196, following *Martin v. Thompson*, 68 Cal. 4. In such a case the mortgagee has the right to maintain an action for conversion in his own name.

A mortgage upon growing crops executed, acknowledged, and recorded like mortgages upon real estate, is valid against third parties without delivery of possession, but the lien of such mortgage ceases as against subsequent purchasers, unless the crops when harvested be delivered to the mortgagee as required in other cases of mortgages of personal property. *Wood's Cal. Dig. 107*; *Quirique v. Dennis*, 24 Cal. 154; Stat. 1850, p. 87, section 17, of the Act of May 19, 1850, as amended by the Act of April 9, 1856.

In *Goodyear v. Williston*, 43 Cal. 11, it was held that the above section was to protect the mortgagee's lien without delivery of possession until the property is harvested, but afterwards the continuance of the lien depended upon the actual delivery and retention of the crop by the mortgagee.

Where such crops after being out were sold and delivered by the mortgagor to a bona fide purchaser for value, it was held that the mortgagee's lien only extended to the severance from the land, and did not extend to the purchaser. *Goodyear v. Williston*, *supra*.

Section 2972 of the California Civil Code keeps the lien alive so long as the same remains on the land of the mortgagor. *Waterman v. Green*, 60 Cal. 142.

In *Granger's Business Assn. v. Clark*, 84 Cal. 201, it was held that section 2922 of the Civil Code, which

provides that a mortgage can be created, renewed, or extended only by writing, executed with the formalities required in the case of a grant of real property, did not affect a verbal agreement to divert the grain from the satisfaction of the debt for which it was secured by chattel mortgage, and converting into a pledge to secure subsequent indebtedness and that such verbal agreement does not create a mortgage.

Florida.

In *Weed v. Standley*, 12 Fla. 166, it was held a written instrument providing that the crop should not be removed until the rent was paid, operated as a mortgage under the provisions of the Laws of 1865-66, p. 61, an act for the relief of landlords, and was a security for the payment of the money, such instrument being duly recorded.

Georgia.

The Georgia Code, § 1954, embraces all property in possession or "to which the mortgagor has the right of possession at the time," and § 1955 of the same Code declares that the mortgage "must specify the deed to secure which it is given and the property upon which it is to take effect."

The crops coming into existence under a law rendering them to be bound at any time for the payment of the debts, but the lien thus created must be enforced in the manner prescribed by section 1991 of the Georgia Code. *Stallings v. Harold*, 60 Ga. 478.

But a lien for fertilizers on such crop is good. *Crine v. Tifts*, 65 Ga. 644.

Idaho.

Where lands, leased for a term of years, at a rent of one third of a crop to be raised during the term, were sown and a chattel mortgage executed and recorded upon "the crop of wheat which may be sown and grown for the year 1890 upon said lands" the lessee subsequently sub-letting for a short term, the court held in an action by the sub-lessee against the sheriff under foreclosure of the chattel mortgage, that under the statute of Idaho such chattel mortgage was a valid lien upon the said crop, and any rights acquired thereto from the lessee subsequent to the recording thereof were subject to such mortgage. *Pierce v. Langdon*, 2 Idaho, 578.

Illinois.

The doctrine in this state is against such crops passing under a mortgage upon future crops not *in esse*, *aliter* if growing. *Stowell v. Bair*, 5 Ill. App. 104; *Hansen v. Dennison*, 7 Ill. App. 73.

A mortgage of after-acquired property is ineffectual. *Hunt v. Bullock*, 23 Ill. 320; *Roy v. Goings*, 6 Ill. App. 162.

Possession must be taken. *Gittings v. Nelson*, 66 Ill. 561.

Indiana.

Growing crops raised annually by labor are the subject of sale as personal property being as readily delivered as any other article of commerce. 2 Rev. Stat. § 123, p. 54; *Matlock v. Fry*, 15 Ind. 483.

In *Matlock v. Fry*, *supra*, it was held that the statute relating to the recovery of personal property applied to ripe standing corn not severed from the land.

Iowa.

In *Wheeler v. Becker*, 68 Iowa, 723, a chattel mortgage providing that after-acquired property

unacquainted with any different technical significance which it may have in law.

Rivenett v. Bourguin, 58 Mich. 10.

Undoubtedly the parties to this instrument understood the words "legal representatives" to mean and to include assignees and heirs as well as executors and administrators.

Hammond v. Mason & Hamlin Organ Co., 92 U. S. 724, 23 L. ed. 767; *Duncan v. Wal-*

ker, 2 Dall. 205; *Com. v. Bryan*, 6 Serg. & R. 88.

This contract between Schultz and the plaintiffs was not a sale of peaches at all, and therefore was no sale of things in expectation or sale of things which had no potential existence.

The property sold had a "potential existence."

should be transferred thereby, was held valid, such property upon its acquisition becoming subject thereto, following *Scharfenburg v. Bishop*, 35 Iowa, 40; *Brown v. Allen*, 35 Iowa, 306; *Stephens v. Pence*, 35 Iowa, 258.

In *Norris v. Hix*, 74 Iowa, 534, the court held that a valid mortgage of crops not yet grown may be made.

A chattel mortgage of property not in the possession of the mortgagor at the time of making the mortgage is valid and entitles the mortgagee to hold such property as against an attaching creditor. *Brown v. Allen*, 35 Iowa, 306, 310, following *Scharfenburg v. Bishop*, 35 Iowa, 61. To the same effect, *Stephens v. Pence*, 35 Iowa, 257.

There must, however, be a clear intention to pass them. *McArthur v. Garman*, 71 Iowa, 34; *Lormer v. Allyn*, 64 Iowa, 725.

But in *Muir v. Blake*, 57 Iowa, 662, the court questioned, whether a chattel mortgage upon future crops could be valid so far as the creditors of the mortgagor were concerned.

Kansas.

In *Cameron v. Marvin*, 26 Kan. 612, it was held that property afterwards to be created, purchased, or procured was not the subject of mortgage, and that only property which at the time was in existence, and to which the mortgagor had a title, would pass.

Contracts may be made with reference to future acquired property, which will be legal and upheld, but such contracts will not constitute chattel mortgages, they are simply executory contracts to be performed *in futuro*, and though binding upon the parties they are void as to third parties without notice, and cannot be treated as chattel mortgages affecting such parties. *Cameron v. Marvin*, *supra*.

Such contracts, however, will be held valid as though they were chattel mortgages as against third persons who had not in the meantime obtained any specific interest in the property, when the mortgagee has obtained possession of the property under the contract. *Ibid*.

A mortgage of goods or other personal property, which the mortgagor does not, at the time of making or recording, own, though he may afterwards acquire them, is void in respect to such goods or property as against a subsequent purchaser or attaching creditors. *Long v. Hines*, 40 Kan. 220, where the above rule was applied to a case of an unplanted crop of corn.

Kentucky.

In the case of *Hutchinson v. Ford*, 9 Bush, 318, 15 Am. Rep. 711, the court held it would be carrying the doctrine to too great an extent to permit liens to be created by mortgage upon property not *in esse*.

A mortgage on all the crop that might be raised on the farm during the term was held to pass no title or claim to the crop or its value, the crop not being sown at the time of the execution of the mortgage, as against the purchaser of the crop. *Hutchinson v. Ford*, *supra*.

The crop must be sown when the mortgage was executed. So held in *Hutchinson v. Ford*, *supra*. 22 L. R. A.

Louisiana.

The Louisiana Act of 1874 authorizes the pledge or pawn of a growing crop, which cannot, until it is gathered, be delivered to the creditor, and requires the agreement to be recorded in the office of the recorder of mortgages in the parish in which the crop is produced, in order to supply the want of actual delivery. The act does not specify however, any time for recording and such a mortgage might be good as against creditors acquiring rights and privileges after recording.

In *Benton v. Mahan*, 30 La. Ann. 1401, it was held that money and goods advanced and used in paying laborers who make the crop are privileged under the Act of 1874 as much so as provisions consumed by them, and constitute a privileged debt upon the crop.

Under the first section of the Louisiana Act, any planter may pledge or pawn his growing crop for advances in money, goods, and necessary supplies that he may require for the production of the same, by written agreement to pledge, recorded, and such recorded contract confers a right of pledge upon the crop the same as if the crop had been in the pledgee's possession. *Gay v. Diagre*, 30 La. Ann. 1007.

Article 3274 of the Revised Civil Code of this state declares that no privilege can confer a preference over creditors having acquired a mortgage, unless it be recorded as prescribed by that article, and it would therefore require a positive legislative act to withdraw the contract authorized by the Act of 1874 from the control of such article. *Ibid*.

In *Laloue v. Wiltz*, 31 La. Ann. 428, the pledge of a crop under the Act of 1874 duly recorded was held to give the pledgee a preference to that of a judgment creditor under a *fi. fa.* and such a pledge covers all moneys advanced and necessary supplies furnished for the purposes of a crop.

Such privileged debt or pledge of the party furnishing supplies on a growing crop extended only to the merchantable part of the crop, and not to such portion as would be of necessity reserved for seed for a subsequent crop. *Citizens Bank v. Wiltz*, 31 La. Ann. 244.

And the privilege could only be enforced against the crop upon which the advances were made. *Re Roger's Succession*, 41 La. Ann. 400.

Maine.

In Maine all courts have ruled that at law property not existing, but to be acquired at a future time, is not assignable, while in equity it is so assignable. *Hamlin v. Jerrard*, 72 Me. 77; *Morrill v. Noyes*, 56 Me. 453, 36 Am. Dec. 436; *Griffith v. Douglass*, 73 Me. 532, 40 Am. Rep. 386; *Edwards v. Peterson*, 80 Me. 387.

In *Head v. Goodwin*, 37 Me. 181, it was held that a grant of goods which did not belong to the grantor at the time of the grant was void, but after the grantee had acquired a title thereto the grant might be made effectual to pass the property by a new act.

In *Bryant v. Pennell*, 61 Me. 103, 14 Am. Rep. 580, where a mortgage covered nursery stock consisting of plants, shrubs, and trees, the court held that such mortgage covered plants grown from the cuttings of the plants mortgaged.

McCarthy v. Blevins, 5 Yerg. 195, 26 Am. Dec. 262; *Foote v. Casey*, 5 N. C. 389, 4 Am. Dec. 559; *McCaffrey v. Woodin*, 65 N. Y. 459, 22 Am. Rep. 644; *Wyatt v. Watkins*, 30 Am. Rep. 63, 40 Am. Rep. 90, 16 Alb. L. J. 205, 9 Baxt. 250; *Andrew v. Newcomb*, 32 N. Y. 417; *Roberts v. Church*, 17 Conn. 144;

Massachusetts.

In *Claffin v. Carpenter*, 4 Met. 580, 38 Am. Dec. 381, a contract for the sale of wood or timber to be cut and severed from the freehold by the vendee, conveys no interest in land within the meaning of the statute of frauds.

And a mortgage thereof is a mortgage of personal chattels to take effect as soon as the property is severed from the freehold. *Ibid.*

In *Barnard v. Eaton*, 2 Cush. 294, it was stated that a mortgage being an executed contract, a present transfer of title although conditional and feasible, could only bind and affect property existing and capable of being identified at the time it is made, and that whatever the agreement of the parties might be it could not bind property afterwards acquired by the mortgagor. To the same effect, *Jones v. Richardson*, 10 Met. 481; *Winslow v. Merchants Ins. Co.* 4 Met. 303, 38 Am. Dec. 368.

Michigan.

A mortgage may be made to cover after-acquired property. *Curtis v. Wilcox*, 49 Mich. 427.

And is good *inter partes*. *American Cigar Co. v. Foster*, 36 Mich. 368.

See *Chynoweth v. Tenney*, 10 Wis. 397, *supra*, head IV.

Minnesota.

Mortgages of potential interests are valid in this state. *Minnesota Lined Oil Co. v. Maginnis*, 32 Minn. 183; *Ludlum v. Rothschild*, 41 Minn. 218; *Walter A. Wood Mowing & Reaping Mach. Co. v. Minneapolis & N. Elevator Co.* 43 Minn. 404; *Ambuehl v. Matthews*, 41 Minn. 537.

The Minnesota Statutes (ed. 1888, vol. 2, p. 488), section 14a, provide, the mortgaging of crops before the seed thereof shall have been sown or planted, for more than one year in advance, is hereby forbidden, and all securities or mortgages hereafter executed on such crops are declared void and of no effect; provided, this act shall not apply to mortgages given upon crops to secure part or all of the purchase price of lands upon which said crops may be sown or planted. (1887, chap. 176.)

Section 2 of chapter 99 of the Minnesota General Statutes 1878, as amended by section 1, chapter 38, of the Laws of 1883 (ed. of 1888, vol. 2, p. 485), is applicable to a mortgage of future crops, the seed of which had not been sown when the mortgage was executed, so far as they relate to the filing of chattel mortgages. *Miller v. McCormick Harvesting Mach. Co.* 35 Minn. 399.

When filed as so provided it is full and sufficient notice to all parties interested, of the existence and conditions thereof. *Ibid.*

Mississippi.

Such a mortgage may be authorized by act of legislature. *Betts v. Ratliff*, 50 Miss. 551.

Section 7 of the Mississippi Act of 1867, for the encouragement of agricultural produce, provides "that it shall be lawful to convey by way of mortgage or deed of trust, any crop of cotton, corn, or agricultural products being produced or to be produced within fifteen months from the date of such mortgage." *McCown v. Mayer*, 65 Miss. 537; *Iverson v. Robb*, 32 Miss. 563, 24 Am. Rep. 682.

It was held in *Betts v. Ratliff*, *supra*, that under this act the mortgage had preference from its date, whether the crop be then planted or not, the pro-

Gardner v. Hoeg, 18 Pick. 168; *Macomber v. Parker*, 14 Pick. 497; *Tripp v. Brownell*, 13 Cush. 376; *Jones v. Richardson*, 10 Met. 431; *Pierce v. Emery*, *supra*; *Smith v. Atkins*, 18 Vt. 465; *Pierce v. Milwaukee & St. P. R. Co.* 24 Wis. 551, 1 Am. Rep. 203; *Galena & O. U. R. Co. v. Menzies*, 28 Ill. 121; *Jones v. Web-*

spective crop, before the seed was sown, being such potential interest or expectancy in property that may be conveyed, and when the crop grows the subject comes *in case* and the mortgage takes effect.

And in *White v. Thomas*, 52 Miss. 49, it was held that the above-mentioned statute was designed to render invalid any lien or mortgage which was valid before, and that therefore a mortgage by a tenant to his landlord to secure rent on personal property not in existence at the time was good *inter partes*.

Section 1369 of the Code of this State of 1880, giving the right to execute a deed of trust on future crops, was repealed by the Act of 1886, page 158.

But the doctrine of potential interests was upheld in *Stadeker v. Loeb*, 67 Miss. 200. See this case *supra*, head, V.

Missouri.

In *Boyer v. Williams*, 5 Mo. 335, 32 Am. Dec. 324, it was held that the purchaser of lands from the United States acquired by the purchase the same title to the land and to everything growing upon the land, which the United States had before the sale, and that the doctrine of emblements did not apply.

Where a debtor made a conveyance of his property as security, with a condition that it should be void if the debts were paid, giving power of sale in case of default, the deed was held a mortgage valid as against an execution creditor. *Steele v. Farber*, 37 Mo. 71.

Nebraska.

Under section 14, chapter 32, Compiled Statutes of Nebraska, ed. 1891, page 459, such mortgages are void unless recorded as therein provided.

By section 11 of the same there must be a delivery of the goods and chattels, otherwise they are presumed to be fraudulent and void as against creditors.

There must be a seizure of the crop when it comes into existence, in order to constitute a valid lien at law. *Cole v. Kerr*, 19 Neb. 553.

New Hampshire.

Section 1, chapter 140, Public Statutes of New Hampshire, ed. 1891, provides that crops of every description whether matured or not may be mortgaged. And by section 2, possession must be either taken by the mortgagee or the mortgage must be recorded.

In *Norris v. Watson*, 23 N. H. 364, 55 Am. Dec. 160, the court stated that it did not think the provisions of the revised statutes authorizing the mortgage of growing crops as personal property and the attachment of personal property subject to mortgage, were intended to make any change in the law relating to the attachment of growing crops.

The statute names "grain unthrashed, hay or potatoes" etc., but makes no mention of growing crops which would fall peculiarly within the reason of the enactment, and would hardly have been omitted if it had been understood that they were liable to attachment. *Norris v. Watson*, *supra*.

The fifteenth section of chapter 184, which provides for the attachment of personal property subject to mortgage, is limited in its operation by the terms of the statute to "property not exempt from attachment." *Ibid.*

A possibility coupled with an interest is assignable. *Cudworth v. Scott*, 41 N. H. 456.

ster, 43 Ala. 109; *Butt v. Ellett*, 86 U. S. 19 Wall. 544, 22 L. ed. 183; *Grantham v. Hawley*, Hob. 182.

Such contracts deserve that the law should be extended to the utmost in their favor.

Wyatt v. Watkins, *supra*.

Trover is proper.

New Jersey.

A mortgage of a potential interest is effectual. *Looker v. Peckwell*, 88 N. J. L. 258.

New York.

The mortgage of subsequently acquired property can only be regarded as a contract to give a further mortgage on such property binding upon the mortgagors personally, and the mortgagee's only remedy, upon such a contract, is as a general creditor. *Winslow v. Merchants Ins. Co.* 4 Met. 318, 38 Am. Dec. 368; *Otis v. Sill*, 8 Barb. 102, 118.

Where a party having an interest in a fallow for the raising of wheat executed a chattel mortgage, the court held it bound his interest in the fallow and the wheat subsequently put in, pursuant to the contract. *Shuart v. Taylor*, 7 How. Pr. 261.

In *Ludwig v. Kipp*, 20 Hun. 265, it was held that as between the parties, a chattel mortgage of after-acquired property is valid.

As against subsequent purchasers and attaching creditors, a chattel mortgage cannot be given for property not in existence, so as to vest the title when it comes into being in the mortgagee. *Rochester Distilling Co. v. Rasey*, 65 Hun. 512.

They may be mortgaged by one out of possession of the premises. *Harris v. Frink*, 49 N. Y. 24, 10 Am. Rep. 818.

It can have no validity where neither the property nor the agent of its production is in possession. *Farmers Loan & T. Co. v. Long Beach Imp. Co.* 27 Hun. 82.

North Carolina.

Annual crops are *fructus industriales*, personal estate. *Walton v. Jordan*, 65 N. C. 172.

A mortgage of a crop to be grown, either not planted or immature, is a chattel mortgage. *Robinson v. Ezzell*, 72 N. C. 231.

The term "growing" imports that it has not come to maturity, that is, green and not made; but the North Carolina Act of 1844, chapter 85, denies cropstanding when ripe. *Shannon v. Jones*, 34 N. C. 206.

In *Kawlings v. Hunt*, 90 N. C. 270, it is stated to be settled that a contemplated unplanted crop to be made by a mortgagor on his own land, or land let to him, as well as one planted and in process of cultivation, might be the subject of a valid mortgage. *Cotten v. Willoughby*, 88 N. C. 75, 36 Am. Rep. 564; *Harris v. Jones*, 88 N. C. 317.

It was also held that an instrument intended by the parties to operate as an agricultural lien, and which purported to be one, must take effect as such or not at all, and would not be permitted to prevail as a mortgage. *Rawlings v. Hunt*, *supra*; following *Clark v. Farrar*, 74 N. C. 686; *Patapasco Guano Co. v. Magee*, 86 N. C. 350.

Section 1739 of the North Carolina Code provides that any person advancing money or supplies to another engaged or about to engage in the cultivation of the soil, should be entitled to a preferential lien in the crops made during the year upon such land, upon which crops the money has been expended, provided an agreement as prescribed thereby shall be executed.

Under the above section an agreement in writing shall be entered into before any advance is made, specifying the amount advanced, all the limits of such advances to be made from time to time, and the agreement must be recorded as therein provided.

23 L. R. A.

Weldon v. Lytle, 53 Mich. 1; *Wood v. Elliott*, 51 Mich. 320; *Bray v. Bray*, 30 Mich. 479; *Ripley v. Davis*, 15 Mich. 75, 90 Am. Dec. 262; *McCoy v. Herbert*, 9 Leigh, 548, 82 Am. Dec. 256; 7 Lawson, Rights, Rem. & Pr. § 3866, and notes citing *Lyman v. Hale*, 11 Conn. 177, 27 Am. Dec. 728.

The term "legal representatives" is to be

Public policy is opposed to such limitations, and the Agricultural Lien Law, section 1739 of the Code, limits the advances for the current year's crop. *Loftin v. Hines*, 10 L. R. A. 490, 107 N. C. 360.

The advance must be in money or supplies to the person engaged or about to engage in the cultivation of the soil, after the agreement is made, to be expended in the crop made that year, and the lien must be on the crop of that year. *Clark v. Farrar*, *supra*.

The furnishing of supplies and the making of the securing instrument are contemporaneous, constituting one transaction of which the acts are part, and it is not material which precede in actual time, both being done at the same time in contemplation of law. *Reese v. Cole*, 98 N. C. 57; *Patapasco Guano Co. v. Magee*, 86 N. C. 350; *Womble v. Leach*, 88 N. C. 84.

In such a mortgage there must be a provision for taking possession of crops in case of default, since the lien may be enforced through the courts, and possession is only required to enable the mortgagee to enforce it himself, and without judicial assistance. *Woodlief v. Harris*, 96 N. C. 211.

The possession of the mortgagor is not adverse as against an assignee of the mortgage. *Murray v. Blackledge*, 71 N. C. 492.

An instrument intended as an agricultural statutory lien, which is wanting in essential matter in order to make it valid as such, may yet take effect as a mortgage at common law, provided its form be sufficient for that purpose. *Spivey v. Grant*, 96 N. C. 214.

Ohio.

Here the courts would seem to follow the same doctrine as those of Kansas. *Chapman v. Welmer*, 4 Ohio St. 481.

Pennsylvania.

In this state it is necessary that there should be a delivery of the chattel be it a crop or otherwise. *Lynch v. Welsh*, 3 Pa. 294; *Clow v. Woods*, 5 Serg. & R. 275, 9 Am. Dec. 348.

Rhode Island.

Possession must be acquired or taken, but in equity it creates a lien upon the crop when acquired. *Williams v. Briggs*, 11 R. I. 178, 28 Am. Rep. 518, 23 Am. Rep. 658; *Cook v. Corbelle*, 11 R. I. 482, 28 Am. Rep. 518; *Williams v. Winsor*, 12 R. I. 9.

South Carolina.

Under section 92 of the Code of South Carolina, the distinction between actions at law and suits in equity, and the forms of all such actions in suit, are abolished, and one form of action established. *Parker v. Jacobs*, 14 S. C. 112, 37 Am. Rep. 724.

In *Warren v. Lawton*, 14 S. C. 474, it was held that the advances must be made for the purposes of the crop, otherwise the creditor was not entitled to the remedy prescribed by the Act of March 4, 1878, 16 Stat. at L. 410.

The South Carolina statute only applies to the lien of an owner of a crop, as landlord or tenant cultivating the soil on his own account. *Carpenter v. Strickland*, 20 S. C. L. To the same effect, *Richey v. Dupre*, 1d. 4.

The agreement or lien must be in writing and signed, in order that the crop may be seized under a warrant. *Carpenter v. Strickland*, *supra*.

construed to mean the heirs, the executors, or administrators, the assigns, the alienees, or vendees of a party, according to the subject-matter.

Duncan v. Walker and *Um. v. Bryan*, *supra*.

Defendant's refusal to allow plaintiffs to pick their share, and his denial of their right to any part of the crop, amounted to a conversion for which trover will lie.

Sutherland v. Carter, 52 Mich. 471; *Wattles v. Dubois*, 67 Mich. 818.

Tennessee.

Section 3542a, of the Tennessee Code (Act 1870, chap. 121, Thompson & Steger), provides that any debt by note, account, or otherwise, contracted for supplies, implements of industry, or work stock furnished by the owners of lands to lessees, or by lessees to sub-tenants, and used in the cultivation of the crop, shall be and constitute a lien upon the crops growing or made during the year upon the premises, in as full and perfect a manner as now provided in sections 3539-3542 of the Tennessee Code with regard to rents, provided the lien is expressly contracted for on the face of the note, etc., between the owner of the land and lessees, or between the lessees and sub-tenants, and provided that such contract shall not have priority over the landowner's lien for rent.

The lien created by the above section of the code is not intended or authorized in favor of other parties. *Whitmore v. Poindexter*, 7 Baxt. 242.

Texas.

Where the instrument did not fully comply with the provisions of the statute, but substantially followed it in most of its material requisitions, it was held that it was good as a mortgage at common law subject to a prior lien existing at the time of the execution of the mortgage under an agreement of making advances. *McGee v. Fitzer*, 37 Tex. 37, the agreement being specially binding on the corn and cotton.

Where cotton was planted before the date of the contract, its growth towards maturity at the time of the contract was held not to be a material question as affecting the right to dispose of it by the mortgage. *Cook v. Steel*, 42 Tex. 52.

Growing crops are subject to mortgage as personal property. *Cook v. Steel*, and *McGee v. Fitzer*, *supra*; *Willis v. Moore*, 50 Tex. 622, 46 Am. Rep. 224; *Silberberg v. Trilling*, 52 Tex. 522.

In Texas the courts hold that a mortgage is part security for a debt, that the title to property mortgaged remains in the mortgagor and with it the right to possession, which is one of the ordinary incidents of title, and therefore the foundation upon which the rights of mortgage is based in England and in some of the states, does not hold in that state. *Willis v. Moore*, *supra*.

Vermont.

In *Wood v. Dudley*, 8 Vt. 425, a distinction is made between a mortgage and a pledge, the former passing the general property to the mortgagee subject to redemption, according to the terms of the contract, and to become absolute if not redeemed within the time stated, giving the mortgagee power to sell or dispose of the chattel immediately, the latter passing no property, the former retaining the same and the pawnee having only a special property or lien, the pledge retaining its character although not redeemed at the time specified.

In *Smith v. Atkins*, 18 Vt. 455, it is said that it is without doubt true that the sale of a thing not in existence is upon general principles inoperative, being merely executory and conferring no title, but that when the thing thereafter to be produced

Grant, J., delivered the opinion of the court:

The contract and the finding of facts in this case are found in the margin. This contract and the judgment should be sustained, unless there are some inexorable rules of law which stand in the way. Two rules are invoked to defeat the plaintiffs' action: (1) That the land upon which the peach trees were planted is a homestead; that Schultz's wife did not sign the contract; that it in-

is the product of land or other thing, the owner of the principle thing may retain the general property of the thing produced in the absence of fraud.

Growing grass, although realty, may be mortgaged as a chattel, such mortgage being valid *inter partes*, and when the mortgage becomes absolute by a non-performance of the conditions before actual severance of the grass, a severance in law takes place changing the grass into personal property, and a recorded mortgage is constructive notice to third parties after such severance, and a valid lien is then constituted as against an attachment. *Kimball v. Sattley*, 55 Vt. 285, 45 Am. Rep. 614; *Fitch v. Burk*, 33 Vt. 683.

If an absolute sale operates as a severance in contemplation of law, then a chattel mortgage executed, must after a condition broken have the same effect, the rule in that state being that after condition broken, the interest of the mortgagor becomes absolutely vested at law in the mortgagee who is entitled to an immediate possession, the mortgagor being only tenant at severance with right of redemption in equity. *Kimball v. Sattley*, *supra*; *Hager v. Brainerd*, 44 Vt. 294, to the same effect.

Washington.

Mortgages may be made upon all kinds of personal property and upon growing crops. Gen. Stat. title xix, chap. 1, § 1646, ed. 1891, p. 577.

Wisconsin.

In *Comstock v. Scales*, 7 Wis. 159, a chattel mortgage upon a crop of grain executed about the time of the planting thereof was held invalid, the property not being *in esse* and there being nothing for such mortgage to operate upon.

The same principles were applied in *First Nat. Bank of Stevens Point v. Knowles*, 67 Wis. 373, in the case of a deed of trust of future acquired property given to secure a bond.

Wyoming.

The prior laws of this state would seem to have been repealed by those of 1891, chapter 7, p. 26.

As to the efficacy of a mortgage on chattels to be manufactured or acquired as independent articles, and not as increase or fruits of existing property, see *note* to *Deeley v. Dwight* (N. Y.) 18 L. R. A. 226.

As to the efficacy of a chattel mortgage on fixtures, see *note* to *Tibbotts v. Horne* (N. H.) 15 L. R. A. 56.

As to retaining possession of chattels by a mortgagor, see *note* to *Hangen v. Hachemeister* (N. Y.) 5 L. R. A. 137.

As to the necessity of filing, see brief in *Marks v. Miller* (Or.) 14 L. R. A. 180.

As to registration and filing, see *note* to *Dempsey v. Pforzheimer* (Mich.) 12 L. R. A. 383.

As to the liability of growing crops to seizure and sale under execution, see *note* to *Polley v. Johnson* (Kan.) 22 L. R. A. 253.

As to what constitutes growing crops, see *note* to *Carlisle v. Killebrew* (Ala.) 6 L. R. A. 617.

For a classification of growing fruit as personal property, see *note* to *Sparrow v. Pond* (Minn.) 16 L. R. A. 108.

R. W.

interferes with the homestead right, and the contract is therefore void. (2) That the crop which the plaintiffs agreed to take in payment for the trees was not *in esse* at the time, and therefore not the subject of sale.

1. We think there is no force in the first proposition. Schultz's land consisted of forty acres. The trees were planted upon only a portion of it. The occupation and possession of the buildings and land were not interfered with. During the growth of the trees, the land could be cultivated, and crops raised. If the trees proved valueless, neither Schultz nor his wife had suffered. If they proved valuable, which was the fact, then the homestead itself was increased in value. Under these circumstances, we see no reason in holding that either Schultz or his wife had parted with any homestead right, or that their possession was in any manner interrupted.

2. Such contracts are reasonable, and beneficial to both the vendor and the vendee. They are especially beneficial to the vendee. He avoids all expense except his labor, runs no risk and, if in indigent circumstances, he may obtain gains which would otherwise be beyond his reach. Such contracts are of common occurrence, and, if the rigid rules of law are against their validity, there is a necessity of legislative action to render them valid. The rule of law is well established that things having no potential existence cannot be the subject of mortgage and sale. There are, however, exceptions to this rule, as where a merchant mortgages his stock of goods, and all future additions thereto. It is unnecessary to cite authorities to this proposition. The difficulty seems to arise in determining what comes within the definition of the term "potential existence." The definition of the word "potential" is: "Having latent power; endowed with energy adequate to a result; efficacious; existing in possibility, not in act." Sir W. Hamilton said: "Potential existence means merely that the thing may be at some time; actual existence, that it now is." In the legal sense, things are said to have a potential existence when they are the natural product or expected increase of something already belonging to the vendor. When one possesses a thing from which a certain product, in the very nature of things, may be expected, such product, we think, has a potential existence. The following rule appears to be well established both by reason and authority, viz.: That, while one owns property from which such product naturally arises, such product may be the subject of sale and mortgage. The authorities which thus hold also recognize the other rule above stated. The authorities are by no means uniform, but we think the conflict in them has arisen from a failure to make a proper distinction. In *Grantham v. Hawley*, Hob. 132, it was held that a grant of that which the grantor has potentially, though not actually, is good, as a grant by the lessee of all the corn that shall be growing on the land at the end of the term. It was there said: "Though the lessor had it [the corn] not actually in him, nor certain, yet he had it potentially, for the land is the mother and root of all fruits. Therefore, he

that hath it may grant all fruits that may arise upon it after, and the property shall pass as soon as the fruits are extant. A person may grant all the tithe wool that he shall have in such a year, yet perhaps he shall have none; but a man cannot grant all the wool that shall grow upon his sheep that he shall buy hereafter, for there he hath it neither actually nor potentially." Powell, in his Treatise on Contracts, says: "Although it be uncertain whether the thing granted will ever exist, and it consequently cannot be actually in the grantor, or certain, yet it is in him potentially, as being a thing accessory to something which he actually has in him, for such potential property may be the subject of a contract executed, as a grant, or the like. . . . So a tenant for life may sell the profits of his lands for three or four years to come, and yet the profits are not then *in esse*." It is held that a lease of land, reserving rent, and which provides that all the crops raised on the land during the term are to be the property of the lessor until the rent is paid, is valid, and will entitle the lessor to hold such crops against the creditors of the lessee. *Smith v. Atkins*, 18 Vt. 461. Justice Redfield, in delivering the opinion, said: "It is, without doubt, true that the sale of a thing not in existence is upon general principles, inoperative, being merely executory; that is, it confers no title in the thing bargained. But when the thing thereafter to be produced is the produce of land, or other thing, the owner of the principal thing may retain the general property of the thing produced, unless there be fraud in the contract, and it be entered into merely to defeat creditors." In *Jones v. Webster*, 48 Ala. 112, it is said: "If the mortgagors had undertaken to convey the future crops they might make, without possessing any land upon which to make them, and especially without the contemplation of the immediate acquisition of some, then, certainly, their conveyance would be without operation. In this case they had the land, and the crops conveyed were to be grown upon it during their possessory interest. The crops were an accretion or addition to the land which might very reasonably be expected to be made. They were therefore proper subjects of mortgage." In *McCaffrey v. Woodin*, 65 N. Y. 464, 22 Am. Rep. 644, it is said: "It is well settled that a grant of the future produce of land actually in possession of the grantor at the time of the grant passes an interest in such future crop as soon as it comes into existence." It was held in *Andrew v. Newcomb*, 32 N. Y. 417, — Chief Justice Denio rendering the opinion, — that crops to be raised by the owner of the land are an exception to the general rule that the "title to property not in existence cannot be affected so as to vest the title when it comes into existence," and that "the owner of land may lawfully contract for its cultivation, and may provide in whom the ownership of the product shall vest." In *Watkins v. Wyatt*, 9 Baxt. 250, 40 Am. Rep. 90, Wyatt agreed to furnish one McCain with supplies on condition that McCain, who was a farmer, should execute to him a mortgage of his cotton crop

for the then current year as security for the supplies so furnished "to enable him (McCain) to make said crop." The crop was not then sown. This case cites many of the above authorities, and others. It recognizes that there is a seeming conflict in the adjudged cases upon the subject, but sustains the validity of the mortgage. It is there said: "The right in the proprietor of the soil to plant, cultivate, and gather his crops, to the exclusion of all others, is an absolute legal right, and an incorporeal property, and incorporeal property is as well the subject of valid sale and mortgage as any other kind of property. The mortgagor, in this case, was the proprietor of the land on which he proposed to raise the crop in controversy. The crop had a potential existence, because it was to be the natural product and expected increase of the land then owned and occupied by him." The like contract was sustained in *Butt v. Ellett*, 86 U. S. 19 Wall. 544, 22 L. ed. 183. This doctrine is also sustained by the following authorities: *Arques v. Wasson*, 51 Cal. 620, 21 Am. Rep. 718; *Conderman v. Smith*, 41 Barb. 404; *Van Hoozer v. Cory*, 84 Barb. 10; *Senter v. Mitchell*, 16 Fed. Rep. 206. In *Robbins v. McKnight*, 5 N. J. Eq. 642, 45 Am. Dec. 406, the contract was in all essential features identical with the one here involved, and it was sustained by the court.

In the present case the trees were in existence at the time of the contract, were transferred to and became the property of Schultz, the vendee, subject to a share of the crops for the years specified; the contract was ex-

ecuted by the plaintiffs, and operated to the great benefit of Schultz and his grantee, the defendant. This contract is one that the law ought to delight in sustaining. If it cannot be sustained, then no executed contract can be, where a party furnishes seed, and puts in the crop upon shares. The same reason that would defeat the right to recovery for the crop of peaches in this case would defeat the right to recovery for a crop of corn, wheat, or other grain, or strawberries and other fruits of like character. The defendant purchased with notice, and the purchase price was reduced on account of the plaintiffs' rights in the crop. We think that under the authorities above cited, as well as in reason and justice, plaintiffs and Schultz became tenants in common of the peaches for the years which they should select, and that defendant, having purchased with notice, stood in the same relation to plaintiffs that did his grantor. Defendant's counsel cite *Bates v. Smith*, 83 Mich. 347, and insist that it controls this case in their favor. The language of that case is broad, and, if strictly followed, would seem to include the present one; but we think the authorities above cited make a clear distinction between the natural products of the soil, wool from sheep, milk from cows, and the like, from the case that was then under consideration, and we are disposed to follow them. The language of that case must be construed in connection with its facts.

Judgment affirmed.

The other Justices concurred.

PENNSYLVANIA SUPREME COURT.

K. T. MEADE

v.

William CLARK *et al.*, Appts.

(159 Pa. 159.)

The insufficiency of a deed of her real estate by a married woman to convey title because not duly acknowledged by her, cannot be asserted by a creditor who obtains judgment against her and sells the property thereunder four months after the delivery of the deed and of possession of the property, where she subsequently joins her husband in a proper acknowledgment of the deed.

(December 30, 1893.)

APPEAL by defendants from a judgment of the Court of Common Pleas Number 2, for Allegheny County to review a judgment in favor of plaintiff in an action brought to recover possession of certain real estate. *Reversed.*

On June 10, 1891, Harriet E. Oates, a married

woman, executed and delivered a deed of certain land to Albert Davies. Her husband joined in the deed. The purchase money was paid to her. The deed was not acknowledged at the time, but on January 4, 1892, it was acknowledged by both husband and wife and subsequently recorded. In the meantime a judgment had been obtained against Mrs. Oates and her husband and the land in question sold at sheriff's sale to plaintiff. Davies rented to defendants, who were in possession. At the trial defendants asked leave to set up by way of amendment that the judgment under which the sale was had was fraudulent and void, because the purchaser of the land had been acting as Mrs. Oates' attorney and permitted the judgment to be fraudulently taken against her, and a defense on the merits was willfully neglected. The amendment was refused.

Further facts appear in the opinion.

Messrs. James S. Young and S. U. Trent for appellants.

Messrs. K. T. Mead and James C. Doty for appellee.

NOTE.—The principle which denies the right of other persons to assert a disability like that of coverture is usually presented in respect to defenses, but is here applied to a direct attack by a plaintiff in ejectment. In this respect it is unusual but not

reason is apparent for restricting the application of the rules to defenses. On the other hand, if proper as to defenses, it would seem to apply *a fortiori* to affirmative claims.

Williams, J., delivered the opinion of the court:

Rules of court are devised and enforced by the courts to facilitate the administration of justice. This is accomplished by requiring the parties litigant to disclose to each other the nature of their demand or defense, and narrowing the range of inquiry to questions that are subjects of actual controversy. Their enforcement should not be insisted on, when such a course will defeat the purposes they are intended to serve. For this reason it is usual to allow an omission made in the preparation of an abstract or a notice of special matter to be supplied by amendment, upon such terms, as to continuance or costs, as shall be fair to the other party. As this case appears to us, on the printed pages of the paper books, it would seem that the motion for leave to amend the defendants' abstract should have been allowed. The omitted line of defense was held by the learned judge to be relevant and material. Without it, justice could not be reached; and, for want of it, a verdict was directed in favor of the plaintiff.

But we prefer to rest our judgment in this case on a more important question. It was raised on the following facts: Mrs. Oates was the owner of the property in controversy prior to June, 1891. On the 10th day of June, 1891, she sold it to Alfred Davies, and delivered possession to him. The price was a fair one. The sale was made in good faith. A deed was prepared and executed by both husband and wife on the same day the sale was made, and it was delivered to Davies, at his request, to show to his mother. It was acknowledged in due form some six months later, and put upon record. Meantime, in October, 1891, a judgment was obtained in the common pleas of Allegheny county against Mr. Oates and his wife, upon which a sheriff's sale took place in July, 1892. The plaintiff K. T. Meade, was the purchaser, and, upon his title acquired under the sheriff's deed, he brings this action of ejectment against Davies and his tenants or vendees. On the trial the defendants asked the court to charge the jury that if the sale by Mrs. Oates to Davies was made in good faith, and for an adequate price, on the 10th day of June, the judgment entered in October was not a lien upon the land, and that the sale by the sheriff conferred no title. The learned judge refused this prayer for instructions. If Mrs. Oates had been seeking to avoid her unacknowledged deed, the rule laid down in *Kirk v. Clark*, 59 Pa. 479, on which the learned judge relied, would have been applicable. It was applied in *Glidden v. Struppler*, 52 Pa. 400, where the married woman repudiated her own agreement; in *Kirk v. Clark*, where her heirs-at-law asserted her title against her vendee. But I have been able to find no case in which her creditors have been allowed to assert it for her, and against her will. Let it be conceded that the judgment against her was a lien upon real estate owned by her at the date of its rendition. Let it be conceded further that her unacknowledged deed did not bind her, and that she might have recovered the land conveyed by it from her vendee without returning to him the purchase money she had received. The question still remains, Can a creditor compel her to be

unjust to her vendee, against her own will? As matter of fact, she had sold her property in June, received the purchase money, and delivered possession to the purchaser. As matter of law, she was not bound by her bargain until her deed was duly acknowledged. She had the right to repudiate the sale, or to perfect it by joining her husband in a proper acknowledgment of her deed. Which she would do, she had the power to determine. She decided to be honest, and accordingly acknowledged the deed. She is bound by her decision. Her deed vests her title irrevocably in her vendee, and all claiming under her are bound, as she is, by it. A creditor, who obtains a judgment four months after she parted with her property and delivered possession to the purchaser, claims the right to set up her disability to defeat a conveyance made in good faith, and perfected in a manner which the law declares to be binding upon her. This cannot be done. Disability, whether arising from infancy or coverture or lunacy, is declared for the protection of the person on whom the disability rests. An infant can ratify after reaching a proper age. A lunatic can ratify after the return of sanity. A married woman may ratify after the coverture terminates, but, as her disability results from the unity of husband and wife, she may bind herself at any time during coverture by complying with the requisite legal formalities. In *Grinn's App.*, 105 Pa. 375, it was held that a married woman was bound to the same measure of good faith as other persons in like cases, except where her disability rendered her act void. In such a case she is not bound by the rules relating to estoppel, but is at liberty to use her disability as a shield against the remedies applicable to other persons. Whether she will keep faith in that class of cases, she alone must determine, or those on whom the law casts her right at her death.

The nearest case to this, in the question raised, is *Freiler v. Kear*, 126 Pa. 470, 3 L. R. A. 889. The wife in that case owned a brewery. She leased it to a firm, of which her husband was a member. They were in arrears for rent. She brought suit in the name of her husband and herself for her use against F. G. Kear and Freiler, her husband, trading as F. G. Kear & Co. The court below held that the action could not be maintained, and that Kear could avail himself of the objection that the plaintiff was the wife of his partner and codefendant. This court reversed the judgment, holding that the husband alone could raise the question, and "that the objection of coverture could not be insisted on by a stranger to invalidate such proceedings and judgment, when waived by the husband." He might have been heard to deny his wife's right of action against him, but he did not choose to deny it. His partner could not compel him to do so. Mrs. Oates might have repudiated her deed at any time before its acknowledgment, but she did not choose to do so. No one else could do it for her, or compel her to do it. She had sold her property, and had its price. She had delivered possession and her deed to the purchaser, but the statutory proof of its execution was not made when the judgment was obtained against her. This proof she soon after supplied, and the deed was then binding, according to its terms. The

title of the purchaser related to its date, and, as against a creditor who had no lien at that time, it went without incumbrance. Under this view of the case, it is unnecessary to consider the effect of the Act of 1897 on the form

of the acknowledgment by a married woman.

The fourth assignment of error is sustained, and the judgment is reversed. As this is conclusive of the case, a venire will not be awarded.

NEW YORK COURT OF APPEALS.

PEOPLE of the State of New York, *as rel.*
John COPCUTT, *Appl.*,

v.

Board of Health of the City of YONKERS,
Resp't.

(140 N. Y. L.)

1. A hearing of a property owner before the condemnation of his land as a nuisance by a board of health is not necessary to constitute due process of law, where the question of nuisance remains open to trial in the courts, notwithstanding the decision of the board of health.

2. Whoever abates an alleged nuisance and thus destroys and injures private property, or interferes with private rights, whether he be a public officer or private person, unless he acts under the judgment or order of a court having jurisdiction, does it at his peril, and when his act is challenged in the regular judicial tribunals, to protect him it must appear that the thing abated was in fact a nuisance.

3. Boards of health in summary proceedings, without hearing the owner of the property, cannot make that a nuisance which is not in fact a nuisance, and have no jurisdiction to make any order or ordinance to abate an alleged nuisance, unless it is in fact a nuisance.

4. The decision of a board of health condemning an alleged nuisance is not reviewable by certiorari, where the board is not obliged to hear any party, but may act upon its own inspection and knowledge.

6. On a division of the city of Yonkers into five wards, with a supervisor from each, by the amendment of 1892 to the city charter, the office of "the supervisor," who was a member of the board of health, disappeared, and the ward supervisors did not become members of the board of health.

(November 23, 1893.)

A PPEAL by plaintiff from a judgment of the General Term of the Supreme Court, Second Department, affirming, upon certiorari to review the same, the proceedings of defendant in enacting a certain ordinance declaring mill ponds owned by relator to be a public nuisance, and directing their destruction.
Affirmed.

Statement by Earl, J.:

The Nepperhan river is a small stream of

water flowing through the city of Yonkers, and across the stream there were several dams, to furnish power to drive machinery. Much complaint having been made to the board of health that these dams created nuisances, the members of the board resolved to hold a meeting on the 27th day of March last to consider the condition of the dams, and they ordered notice to be given to the owners of the dams to show cause at that time why the dams should not be removed. In pursuance of this resolution, notice was served upon the relator, who owned or was interested in two of the dams and the ponds and water powers thereby created, called the "5th" and "6th" water powers, and he appeared before the board at the time and place in person and by counsel, and he gave evidence tending to show that the two dams were not nuisances, and did not create nuisances; and there was also evidence in conflict with the case made by him. After hearing the evidence, the board made its determination that the dams were nuisances, and ordered them removed. The relator then instituted this proceeding by certiorari to review this determination. The board made return to the writ, setting forth all its proceedings and the evidence taken by it, and stated in its return that its determination and action were based "not only upon testimony given by the witnesses, but that the determination of the said board of health, and the members thereof, has been based mainly upon the individual knowledge and experience of the members of said board of health concerning the ponds in the Nepperhan stream, and the condition thereof, inasmuch as each member of the board of health, in performance of the duties imposed by law, has personally inspected and has examined and inquired into the condition of said ponds and of said stream, and that the conclusions reached by this board have been reached and depend largely upon personal knowledge and experience of the individual members of this board, and for this reason it is apparent that this board cannot certify to and reproduce before this court all of the proofs, nor all of the grounds of the determination of said board, nor any considerable part thereof." Upon the return and the papers filed therewith the general term affirmed the action of the board, and then the relator appealed to this court.

NOTE.—The right to compensation for property destroyed in abating a public nuisance is fully reviewed in the note to *Oriando v. Pragg* (Fla.) 19 L. R. A. 194.

The present case clearly presents the question of the validity of summary proceedings for abatement 23 L. R. A.

of nuisances which as shown in the Florida case as well as in the present case must be taken at the peril of those who act.

As to the powers of a board of health in such cases and the lawfulness of a pond in a city, see the case next following, *post*, 485.

Messrs. R. E. Prime and Calvin Frost, for appellant:

None of the matters other than what took place at the hearing of which the relator was notified, and at which he was present, should have been returned, and should be disregarded.

Babcock v. Buffalo, 58 N. Y. 268; *Re Jacobs*, 98 N. Y. 98, 60 Am. Rep. 626.

The relator has no redress. He cannot appeal and if he brings an action for damages, as was done in the case of *Van Wormer v. Albany*, 15 Wend. 164, the present adjudication will be pleaded as it was in that case, and the court will say, as in that case, "You might have raised those questions on certiorari, but not as a defense to this action."

The remedy, when matters have been returned which should not have been, is to disregard it.

Bacon, Abr. title, *Certiorari*, H; *People v. Covert*, 1 Hill, 874; *People v. New York*, 2 Hill, 9, 11; *People v. Webb*, 50 N. Y. S. R. 46; *Stone v. New York*, 25 Wend. 168.

The right to certiorari is given by Code Civ. Proc., § 3120, and it was undoubtedly issuable at common law, which brings it within the second subdivision of this section.

Lawton v. Cambridge Highway Comrs. 2 Cal. 179; *Bradhurst v. First Great Southwestern Turnp. R. Co.* 16 Johns. 8.

The duties of a board of health are quasi judicial, and certiorari was the proper remedy.

People v. Seneca Falls Board of Health, 58 Hun, 595.

An indictment could not be sustained against a person for refusing to obey an ordinance of a board of health, without notice to him before making the order.

People v. Wood, 62 Hun, 181; *People v. Rochester*, 44 Hun, 166; *Rochester v. Simpson*, 57 Hun, 86; *Schuster v. Metropolitan Board of Health*, 49 Barb. 450.

All of these cases proceeded upon the ground that the proceedings of boards of health were reviewable by courts, which they could not have done if the acts had been legislative.

See also *Van Wormer v. Albany*, 15 Wend. 262.

Mr. James M. Hunt, for respondent:

There can be no question about the offensiveness of a pond of stagnant water around and underneath residences. That stagnant water so situated is unhealthful and a direct promotant of disease the court will also take judicial notice of.

Adams v. Popham, 76 N. Y. 410.

The only possible way under any existing law by which these nuisances can be abated, and the health of the men, women, and children of Yonkers preserved from this terrible danger, is by the exercise by the board of health of the powers intrusted to them by statute.

In view of the statements contained in the return of the writ now before the court the writ should have been quashed. The statements contained in the return to the writ are conclusive, and must be taken as true.

People v. New York Fire Comrs. 73 N. Y. 487.

Unless all of the facts which were before the board of health, and which had a controlling influence upon the members of the board of 28 L. R. A.

health, can be reproduced before the court, the court cannot properly review the action taken by the board of health.

People v. McCarthy, 102 N. Y. 630.

The record shows that these ponds were just such nuisances as the statutes authorized the board of health to abate, and the only way to abate a nuisance caused by stagnant water lying immediately under and around residences is to remove the dams which create the stagnation.

Adams v. Popham, *supra*.

The fact that the relator claims that the water power is of great value should not have weight enough with the court to permit these nuisances to continue and public health to be jeopardized.

Earl, J., delivered the opinion of the court:

The disposition of this case turns largely upon the effect and the construction of the statutes constituting the board of health, and defining its powers and duties, and we will therefore first give attention to the statutes. By chapter 184 of the Laws of 1881 (an act to revise the charter of the city of Yonkers), it is provided in title 9 that the mayor, the supervisor, the president of the common council, the president of the board of water commissioners, the president of the board of police, and the health officer shall constitute the board of health of the city; and the board is given power, among other things, "to suppress, abate, and remove any public nuisance detrimental to the public health," and, in addition to other remedies which it may possess by law, it is empowered to issue its warrant, whenever necessary, to the sheriff of the county of Westchester, or to any policeman of the city, authorizing and commanding him to forthwith suppress, abate, and remove such public nuisance, at the expense of the lot whereon the nuisance exists, and of the owner thereof, to be enforced and collected as in the act provided. It is further provided that, in addition to the powers expressly granted in the act, the board shall "have and exercise all the powers now or at any time hereafter conferred upon boards of health in cities by any general law;" and it is authorized to make ordinances, rules, and regulations to carry into effect its powers, and to enforce observance of them by penalties, and by action instituted in its name to recover penalties and to restrain and abate the nuisance. By chapter 270 of the Laws of 1885 (the general act for the preservation of the public health) it is provided that the board of health in any city of the state, except the cities of New York, Brooklyn, and Buffalo, shall have the power, and it shall be its duty, "to receive and examine into the nature of complaints made by any of the inhabitants concerning nuisances or causes of danger or injury to life and health within the limits of its jurisdiction; to enter upon or within any place or premises where nuisances or conditions dangerous to life and health are known or believed to exist, and by appointed members or persons to inspect and examine the same, and all owners, agents and occupants shall permit such sanitary examina-

tions, and said board of health shall furnish said owners, agents and occupants a written statement of results or conclusions of such examinations; and every such board of health shall have power, and it shall be its duty, to order the suppression and removal of nuisances and conditions detrimental to life and health found to exist within the limits of its jurisdiction," and "to make, without the publication thereof, such orders and regulations in special and individual cases, not of general application, as it may see fit, concerning the suppression and removal of nuisances." It is further authorized to abate nuisances, and to impose penalties for the violation of its orders and regulations, and the violation of them is also made a misdemeanor, and it may commence actions to restrain and abate nuisances, and to enforce its orders and regulations.

A careful examination of the two acts shows that there is no provision for a hearing before the board on the part of any person who is charged with maintaining a nuisance upon his premises. The right to such a hearing is not expressly given, and cannot be implied from any language found in either act, or from the nature of the subjects dealt with in the acts. Boards of health and other like boards act summarily, and it has not been usual anywhere to require them to give a hearing to any person before they can exercise their jurisdiction for the public welfare. The public health might suffer or be imperiled if their action could be delayed until a protracted hearing could be brought to a termination. There is no provision in the acts for calling or swearing witnesses, and there is no general law giving them power to do so. Section 848 of the Code of Civil Procedure is not applicable to such a case, for the reason that the board is not authorized by law to hear testimony or take the oral examination of witnesses.

The question may be asked, How can these provisions conferring powers upon boards of health to interfere with and destroy property, and to impose penalties and create crimes, stand with the constitution, securing to every person due process of law before his property or personal rights or liberty can be interfered with? The answer must be that they could not stand if we were obliged to hold that the acts referred to made the determinations of the board of health as to the existence of nuisances final and conclusive upon the owners of the premises where they are alleged to exist. Before such a final and conclusive determination could be made, resulting in the destruction of property, the imposition of penalties and criminal punishments, the party proceeded against must have a hearing, not as matter of favor, but as matter of right; and the right to a hearing must be found in the acts. *Stuart v. Palmer*, 74 N. Y. 188, 30 Am. Rep. 289. As we have said, there is no provision of law giving any party a right to a judicial hearing before these boards, and there is no provision making their determination final. If the decisions of these boards were final and conclusive, even after a hearing, the citizen would in many cases hold his property subject to the judgments of men

holding ephemeral positions in municipal bodies and boards of health, frequently uneducated, and generally unfitted to discharge grave judicial functions. Boards of health, under the acts referred to, cannot, as to any existing state of facts, by their determination make that a nuisance which is not in fact a nuisance. They have no jurisdiction to make any order or ordinance abating an alleged nuisance unless there be in fact a nuisance. It is the actual existence of a nuisance which gives them jurisdiction to act. Their acts declaring nuisances may be presumptively valid until questioned or assailed, for the same reasons which give presumptive legality to the acts of official persons under the maxim, "*omnia presumuntur legitime facta donec probetur in contrarium.*" What operation, then, does the order or ordinance of the board of health have under these acts? The nuisance actually existing, and the jurisdiction having been regularly exercised, the order or ordinance has all the operation and effect provided in the act, and the persons who abate the nuisance have the protection which they would not have as private persons abating, not a private nuisance, especially injurious to them, but a public nuisance injurious to the general public. It may be said that if the determination of a board of health as to a nuisance be not final and conclusive, then the members of the board, and all persons acting under their authority in abating the alleged nuisance, act at their peril; and so they do, and no other view of the law would give adequate protection to private rights. They should not destroy property as a nuisance unless they know it to be such, and, if there be doubt whether it be a nuisance or not, the board should proceed by action to restrain or abate the nuisance, and thus have the protection of a judgment for what it may do.

It may further be asked, what, under this view of the law, is the remedy of the owner of property threatened with destruction or actually destroyed as a nuisance? He may have his action in equity to restrain the destruction of his property if the case be one where a court of equity under equitable rules has jurisdiction, or he may bring a common-law action against all the persons engaged in the abatement of the nuisance to recover his damages, and thus he will have due process of law; and, if he can show that the alleged nuisance does not in fact exist, he will recover judgment, notwithstanding the ordinance of the board of health. Thus the views we take of these acts and similar acts conferring powers upon local officers to proceed summarily upon their own view and examination furnish adequate protection to boards of health, to the public, and to property owners, and, while these views are not supported by all the decided cases upon the subject, they have the support of the best reasons and of ample authority. In Cooley's Constitutional Limitations, 5th ed., at page 722, in a note, the learned author, speaking of boards of health, says: "Though they cannot be vested with authority to decide finally upon one's right to property, where they proceed to interfere with it as constitut-

ing a danger to health, yet they are vested with quasi judicial power to decide upon what constitutes a nuisance, and all presumptions favor their actions." And again, at page 742, in a note, citing authorities, he says: "Whether any particular thing or act is or is not permitted by the law of the state must always be a judicial question, and therefore the question what is and what is not a public nuisance must be judicial, and it is not competent to delegate it to local legislative or administrative boards. The local declaration that a nuisance exists is, therefore, not conclusive, and the party concerned may contest the fact in the courts." Dillon, in his work on Municipal Corporations, 4th ed. § 874, says the authority to prevent and abate nuisances and its summary exercise "may be constitutionally conferred on the incorporated place, and it authorizes its council to act against that which comes within the legal nature of a nuisance; but such power conferred in general terms cannot be taken to authorize the extrajudicial condemnation and destruction of that as a nuisance which in its nature, situation, or use is not such." In Wood's Law of Nuisances (sec. 740), it is said that, where the public authorities abate a nuisance under authority of a city ordinance, "they are subject to the same perils and liabilities as an individual if the thing abated is not in fact a nuisance.

... It would, indeed, be a dangerous power to repose in municipal corporations to permit them to declare by ordinance or otherwise anything a nuisance which the caprice or interests of those having control of its government might see fit to outlaw, without being responsible for all the consequences; and, even if such power is expressly given by the legislature, it is utterly inoperative and void, unless the thing is in fact a nuisance, or was created or erected after the passage of the ordinance, and in defiance of it."

In *Yates v. Milwaukee*, 77 U. S. 10 Wall. 497, 19 L. ed. 984, Mr. Justice Miller said: "It is a doctrine not to be tolerated in this country that a municipal corporation without any general laws, either of the city or the state, within which a given structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all the property of the city at the uncontrolled will of the temporary local authorities." In *Hutton v. Camden*, 39 N. J. L. 122, 23 Am. Rep. 208, it was held that the action of the board of health could not determine conclusively that a nuisance exists, and that such a conclusive determination could be made only in a regular course of law before an established court of law or equity. In *Underwood v. Green*, 42 N. Y. 140, the action was to recover the value of dead hogs removed under the direction of the city sanitary inspector, an officer clothed with judicial discretion, and acting under a city ordinance declaring that all dead animals "be forthwith removed and disposed of by removal beyond the limits of the city or otherwise, so as most effectually to secure

the public health;" and it was held that it must be shown, in order to justify the act, that the dead hogs were or would become in some way dangerous or deleterious to public health. The following are also instructive authorities upon the same subject: *Hoffman v. Schultz*, 81 How. Pr. 385; *Clark v. Syracuse*, 18 Barb. 82; *Rogers v. Barker*, 81 Barb. 447; *Coe v. Schultz*, 47 Barb. 64; *Lawton v. Steele*, 119 N. Y. 226, 7 L. R. A. 134. The result of these authorities is that whoever abates an alleged nuisance, and thus destroys or injures private property, or interferes with private rights, whether he be a public officer or private person, unless he acts under the judgment or order of a court having jurisdiction, does it at his peril; and when his act is challenged in the regular judicial tribunals it must appear that the thing abated was in fact a nuisance. This rule has the sanction of public policy, and is founded upon fundamental constitutional principles.

The way is now clear to the disposition of this case. The board of health did act, and had a right to act, upon its own inspection and knowledge of the alleged nuisance. It was not obliged to hear any party. It could obtain its information from any source and in any way, and hence its determination upon the question of nuisance is not reviewable by certiorari. *People v. McCarthy*, 103 N. Y. 630. It is claimed, however, on the part of the relator that the board of health was not properly organized when it made its determination, and that, therefore, the determination was void. Under the Act of 1881, above cited, there was but one supervisor for the city of Yonkers, and "the supervisor" was made a member of the board of health. By an amendment of the charter in 1893 (chapter 54 of the Laws of that year) the city was divided into five wards, and one supervisor was required to be elected in each of the wards. The claim of the relator is that all these supervisors became members of the board of health, and that, therefore, after the Act of 1892, the board of health was composed of ten members instead of six; and that, as only four members, to wit, the mayor, the president of the board of police, the health officer, and the president of the common council, took part in the proceedings under review, the board was not properly constituted; that, in fact, therefore, the board as such did not act; that there was no determination, and that the action taken was a nullity. If this claim be well founded, then there was no judicial determination for review by certiorari. *People v. Parker*, 117 N. Y. 86. But, assuming that the question as to the constitution of the board of health is before us, we think it was properly constituted. By the Act of 1892 the office of "the supervisor" disappeared, and therefore there was no longer any such officer as "the supervisor." The five supervisors elected in the wards were not made members of the board, and the board was thereafter composed of but five members, and the four who made the determination in the absence of the fifth were competent to act as the board.

Our conclusion, therefore, is that the judg-

ment of the General Term should be affirmed, with costs.

All concur.

Board of Health of the City of YONKERS,
Rept.,

v.

John COPCUTT, *Appt.*

(140 N. Y. 12.)

1. A finding that the sanitary code of a board of health was subscribed by the secretary will not be disturbed on appeal, where there is no proof that the original, which has been destroyed, was not signed, and a copy of the code as published purports to be signed by the secretary, and is attested by his signature, as published.
2. Yonkers, although excepted by New York Laws 1888, chap. 270, § 1, from the provisions of the Act, so far as it relates to the composition of boards of health and appointment of members thereof, is not excepted from section 8, conferring general powers upon such boards.
3. A pond in a city is a public nuisance, where foul and malarious exhalations arise from the stagnant water and from the sides and bed as the water is drawn off, and are intensified by the accumulation of filth which no police vigilance can keep out of the stream and which the dam retains and holds.
4. The erection and creation of a nuisance, dangerous to health, may be restrained by injunction by a board of health, under the general health act of New York, as well as under the city charter of Yonkers.
5. The fact that a dam was made when the water of a stream was clean and pure will not prevent its abatement as a nuisance, when, by the growth of a city and the consequent pollution of the water, it has become an inevitable menace to the public health.

(November 23, 1898.)

APPEAL by defendant from a judgment of the General Term of the Supreme Court, Second Department, modifying a judgment of a Special Term for Westchester County in favor of plaintiffs in a proceeding brought to enjoin the maintenance of a dam and to recover penalties for violation of a health ordinance. *Affirmed.*

The facts are stated in the opinion.

Messrs. R. E. Prime and Calvin Frost, for appellant:

Even if the complaint and ordinance had been sufficient for the purpose and the board was clothed with ample powers in the premises, it is insisted that the part of the judgment which restrains the defendant from rebuilding his dam, which had been torn down, and ordering him to clear out all other obstructions from the stream, cannot be sustained.

The exercise of the board is reviewable by the court as to its reasonableness. *See Jacobs, 98*

NOTE.—As to rights of owner in respect to summary destruction of an alleged nuisance, see the preceding case, *ante*, p. 481, and *note* to *Orlando v. Pragg (Fla.)* 19 L. R. A. 136, 23 L. R. A.

N. Y. 110, 50 Am. Rep. 686; *People v. Gillsen*, 109 N. Y. 389; *Rochester v. Simpson*, 57 Hun, 36; *Babcock v. Buffalo*, 56 N. Y. 268; *Lawton v. Steele*, 7 L. R. A. 184, 119 N. Y. 239.

To restrain the defendant from rebuilding his dam is a practical confiscation of his property, without compensation. In other words, would be a justification of the board in tearing down defendant's dam.

Resort can only be had to the extreme measures of destroying property without compensation when human life and health are in imminent peril—when an imperious necessity, which knows no law, is above the constitution, and cannot wait, demands the sacrifice when “the pestilence that walketh in darkness and the sickness that destroyeth in the noon-day” is present.

Re Jacobs, 98 N. Y. 108, 50 Am. Rep. 686.

The plain duty of the board was to clean the ponds by taking out the deposits and not by destroying the defendant's property and depriving him of a water power, which supplied eighteen or twenty manufactories, which he rented to his tenants.

Com. v. Patch, 97 Mass. 21; *Rochester v. Simpson and Babcock v. Buffalo, supra.*

Mr. James M. Hunt, for respondent:

Physicians testified that it would be impossible to maintain ponds, in which water must necessarily be more or less stagnant, in the heart of a city of thirty-five thousand inhabitants, such as Yonkers is, in such a manner that the same would not be detrimental to the health of the people who live in the vicinity of any such pond.

It seems that the court must take judicial notice of the fact that a large body of stagnant water in the heart of a city, lying in part under buildings in which people live, as shown to be the case in regard to the pond owned by the defendant at the first water-power, must be detrimental to public health.

Adams v. Popham, 78 N. Y. 410.

Plaintiff had full power to ordain the section of the sanitary code now under consideration and also to enforce the same in such an action as the present, even without previous notice to the defendant.

Gould v. Rochester, 105 N. Y. 46; *Metro-politan Board of Health v. Heister*, 87 N. Y. 661.

Finch, J., delivered the opinion of the court:

The first cause of action against the defendant, stated in the complaint of the board of health, was for violation of the sanitary code of the city of Yonkers, adopted in 1881, and the recovery of a penalty imposed for such violation. The defendant, seeking a reversal of the judgment rendered against him for such penalty, contends that the sanitary code was not proved, because not shown to have been subscribed by the secretary of the board of health. The original draft of the code, which was before the board for adoption, and upon which that body acted, was not produced, and could not be produced, because it was destroyed by the printers in the process of publication; but the plaintiff did produce the proofs of such publication filed in the office of the board, and those proofs contain a complete

copy of the code as adopted and published. That copy purports to be signed by the secretary of the board, and was attested by such signature as published. There was no proof that the original was not signed, but it was shown that the sanitary code, as published, was correctly printed in a volume produced, at the end of which appeared the words: "Adopted by the board of health, September 5th, 1881. W. H. Doty, Secretary." On this state of facts, the court found that "the plaintiff, on the 5th day of September, 1881, established its sanitary code: the same being duly subscribed by the secretary of said board, adopted, approved, and published." That finding, having sufficient evidence in the record to support it, is a finding of fact, which we may not, on this appeal, convert into a question of law.

The appellant further suggests the inquiry whether the board of health can maintain an action for the penalty upon a general enactment against all public nuisances, such as is section 82 of the Sanitary Code. That section provides that "whatever is dangerous to human life or to health . . . and whatever renders the air or food and water or drink unwholesome shall be deemed to be nuisances and to be illegal, and every person having aided in creating or contributing to the same, or who may support, continue, or retain any of them shall be deemed guilty of a violation of this section." The manner of enforcing the provision is dictated by section 97, which imposes a penalty for its violation, which may be recovered, with costs, "in an action brought by said board of health in its name in any court of competent jurisdiction." The charter of the city (chapter 184, Laws 1881, title 9, § 2) authorized the board to enact a sanitary code, and imposed penalties for its violation, and to maintain actions for the recovery of such penalties. In addition, the charter gave to the board of health of the city "all the powers now or hereafter conferred upon boards of health in cities by any general law." Such a general law was enacted afterwards (Laws 1885, chap. 270), which authorized the imposition of penalties for the violation of or noncompliance with, not only the orders of such a board, but also its regulations, and to maintain actions to collect such penalties. The learned counsel for the appellant maintains that the city of Yonkers was excepted from the operation of the general law. That is true, so far as it relates to the composition of the board, and appointment of its members (section 1), but is not true as to the general powers conferred upon the boards of health, when organized (section 3). At that point the excepted cities are named, but Yonkers is not one of them. There was ample authority, therefore, for the maintenance of the action.

There is nothing in the defendant's plea of the statute of limitations. He maintained the nuisance, and neglected and refused to abate it, down to the time of the destruction of his dam, and this action was commenced a few days later. It is said, however, that the complaint does not allege, and the proof does not show, that the dam and pond, in and of themselves, had become a nuisance, and so their maintenance down to the time of the commencement of the action does not answer the

plea of the statute. The complaint alleges that the defendant maintained the dam and pond in such a condition as to be dangerous to human health, and to render the air and water unwholesome, and continues to support and retain the same in that condition. The trial judge found that the waters of the pond are stagnant, and filled with decomposed and decomposing animal and vegetable matters; that when the waters are drawn down, and the sides and bed of the pond are left exposed and bare, there arise noxious and poisonous exhalations, which taint the air, and are dangerous to life and health; and that "the said pond, with its contents so retained by the said dam, is and constitutes a public nuisance detrimental to the public health." There is evidence to support this finding, even irrespective of the filth contributed by others than the defendant; proof that the stagnant water, and, when drawn off, the exposure of the sides and bed of the stream tend to produce vile and malarious exhalations, and these are intensified by the accumulation of filth, which no police vigilance could keep out of the stream, and which the dams retained and held. I deem it impossible, upon the proof and the findings, to exempt the maintenance of the pond and the dam from the charge of being a public nuisance.

We come now to the third cause of action; the second having been defeated by the general term, and the plaintiff having submitted to the decision by omitting to appeal from it. That third cause of action was to recover a penalty for a violation of the ordinance of the board of health passed December 7, 1892. That ordinance recited that the dam had been partially torn down pursuant to a warrant issued by the board, and that the defendant threatened and was about to rebuild the dam and re-create the pond, which, if restored, would be a public nuisance, and then ordered him to refrain from building the dam and re-creating the pond, and directed him to remove all obstructions to the flow of the water. We have already said that the findings of the court declared the dam and the pond, as existing facts, to be a public nuisance, and that obstructions at that point could not exist without endangering the public health. As such, the dam had been partially torn down, and the defendant had not only threatened to rebuild, but had actually commenced the work, by putting obstructions in the stream, interfering with the free flow of the water. He was therefore engaged in the very act of creating a nuisance, and was ordered to desist. That order he disobeyed, and now seeks to justify his disobedience, and avert the two remedies of a fine and an injunction, upon several grounds.

The first is quite narrow and technical. It is, in substance, that the board had no power to declare in advance that a future construction would be a nuisance. It is apparent that the facts do not raise that question by itself, so far as the action for the penalty is concerned, because the board had many times declared a dam and pond in the river at that point to be a nuisance, and the court has so found as a fact. So far as defendant had put obstructions in the stream, he had created a nuisance, less in degree than the old dam, but of the same character and effect. He was ordered to re-

move such obstructions, and refused, and that fact alone will sustain the judgment for the penalty. But, beyond that, I think the board had power to prevent a reconstruction and a reinstatement of what it had declared to be, and what the court has found in fact was, a public nuisance. The question, however, may conveniently be reserved until we reach the argument made against the injunction which was granted.

The appellant also objects that the ordinance, which was directed against him specially, and affected his property rights, was invalid, because passed without notice to him, and an opportunity to be heard. In another phase of this case, coming to us on certiorari for a review of the action of the board, we have decided that a hearing was not necessary, because the question of nuisance, or not, lies at the foundation of the jurisdiction, and the party proceeded against may always try that vital and decisive question in the courts, and is not foreclosed by the order made. This case well illustrates the doctrine in actual operation. The plaintiff did not rely on its orders or ordinances alone, or the presumptions which they raised, but proceeded to allege and prove that the dam and pond were a public nuisance. The defendant took issue upon that, and the battle was fought out over that question. The defendant has had his day in court, ample and abundant chance to be heard,—better and more complete than any hearing which the board could give. But we have already decided the question adversely to the defendant's contention, and nothing needs to be added to the discussion which it has received.

We come now to the final point of the appellant's argument, which is a contention that no injunction should have been granted, and that the one allowed should be set aside. In a large class of cases, the writ of injunction is a preventive remedy. It issues often, and promptly, where the defendant threatens or is about to do some act of such a character that no legal action can furnish adequate redress. It implies the danger of a future injury, and very frequently has been used to check and prevent an apprehended nuisance. Even where a statute provided specially for the removal of a nuisance, the people were not compelled to await its completion, but were awarded an injunction to restrain the further erection, and compel the removal so far as erected. *People v. Vanderbilt*, 24 How. Pr. 301, 26 N. Y. 287. Beyond the general jurisdiction, we have in this case the fact that both by the charter of the city of Yonkers, and the provisions of the general health act, the boards may avail themselves of the remedy by injunction. In that fact is necessarily involved the power of such boards to prevent the erection and creation of a nuisance, and so their right to determine what will be a nuisance, and interfere to stop it. Certainly, in a matter so serious as that of the public health, they ought not to wait until some citizen is sick or dead before they prevent or abate the nuisance causing the injurious result.

The appellant, however, further argues that this is not a case in which it is reasonable or just to grant the remedy, and his contention is, in substance, that when he built the dam the

stream was clean, and the water pure; that he never did anything to pollute it, or make it dangerous to health; that it came into that condition from the acts of others, made possible by the negligence of the city authorities; and that his property is destroyed, and he is forbidden to restore it, without any fault of his own. But the court below has found as a fact that he did participate in creating the actual condition of things which menaced the public health, and there is evidence tending to show that he erected and maintained closets which emptied into the stream. That finding furnishes one answer to his plea of absolute innocence. But this dam and pond were his. He had a right, and it was his duty, to keep them clean and safe, or dispense with them entirely if he could not. His dam was a pocket to catch and hold all filth thrown in above. He well knew it, and could not sit still, and suffer his own property to become an intolerable nuisance, and say it was not his fault. When pestilence is forcing a way into our harbors, and danger and death approach through all rot and filth, it is the condition with which boards of health must grapple, and the condition which must be abated or removed, without regard to the question who caused the trouble. Thus in *Wenick v. McCotter*, 87 N. Y. 127, 41 Am. Rep. 358, it was said by Danforth, J., as to the position of an owner of land upon which a third party should wrongfully enter and erect a nuisance, that "in such a case the owner would not be liable either for the erection of the nuisance, or its continuance, until he was requested to abate it. . . . As if the defendant simply suffer a dam erected upon his land by a former owner to remain, without being used by him, it is no continuance of the nuisance, unless he first be requested to remove it." That is to say, however innocent he may be in creating the condition or maintaining it, he is bound to abate it upon the proper official request, and, if he refuses, becomes at once responsible for the existing condition, as continuing a nuisance which it was his right and his duty to remove and suppress. Again and again the defendant was notified by the board of health that his dam and pond had become a public nuisance, and endangered the health of the city. The trial judge finds that formal notice of the fact was given to the owner in September, 1891, accompanied by an order to abate the evil. In December of that year, he was again warned that if the pond was not cleaned before February of 1892 the board would cause the nuisance to be abated. It was not till October of that year that the board ordered the destruction of the dam, and not until December that the order was executed. For more than a year he refused to make his own property clean and safe, and for the sake of his private interest neglected his public duty, and left the city's health in peril; and now he complains that the board should have cleaned his pond, and not destroyed the dam. He had the opportunity to clean it himself, but chose to refuse, and stand defiantly in the maintenance of his basin of filth. I think there was full jurisdiction to grant the injunction, ample occasion for it, and no error in awarding the writ. In *Rochester v. Simpson*, 57 Hun, 86, to which we are referred, there

was no proof that the pond contained water which was stagnant or impure, or that the existence of the pond was in any manner detrimental to the public health. In *Babcock v. Buffalo*, 56 N. Y. 268, a slip in the canal was ordered to be filled up because it had become foul; and this court held that, as it could have been dredged and cleaned at a moderate expense, the filling should stop. Here the dam has been torn down,—whether rightfully or not is a question not before us. If that was a wrongful act, the defendant has his remedy.

The *Babcock Case* may have some bearing upon the inquiry whether the mode of abating the nuisance here involved was reasonable or proper, but has very little bearing upon the question whether the defendant should be permitted to rebuild his dam, and restore a nuisance already abated. The proof here is that all these dams and ponds in the heart of the city are an inevitable menace to the public health, and cannot safely be allowed to exist. *The judgment should be affirmed with costs.*
All concur.

VERMONT SUPREME COURT.

George W. BUCHANAN

v.

Town of BARRE.

(.....Vt.....)

A town which leases to an opera company a hall, situated in a village where in the town has no responsibility for the streets, is not, because of such private use of the hall, charged with liability for the defective condition of a sidewalk in front of the hall, since the sidewalk is a part of the public street for which the village alone is responsible.

(March 10, 1894.)

EXCEPTIONS by plaintiff to an order of the Washington County Court directing a verdict in favor of defendant in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. G. W. Wing and John G. Wing, for plaintiff:

A town in this matter stands as an individual. When persons are invited to enter the house of said person, either on business or for amusement, the party so inviting must provide a safe approach to and from said houses, and so with a town.

The town were the owners in fee to the center of the highway, with only an easement in the sidewalk to the public to use the same for travel. The town rented said opera house for \$25, and took said money for use of the same.

We seek to recover under the common law, creating a liability on a party who invites the attendance of another person, who receives an injury attending upon said invitation, by reason of the lack of care in permitting the approaches to said place to remain in an unsafe and careless condition.

Devire v. Bailey, 181 Mass. 169, 41 Am. Rep. 219; *Moak's Underhill*, Torts, 252; *Wornden v. New Bedford*, 181 Mass. 28, 41 Am. Rep. 185; *Whart. Neg.* 252, referring to An-

thony v. Adams, 1 Met. 284; *Oliver v. Worcester*, 102 Mass. 490, 8 Am. Rep. 485; *Looney v. McLean*, 129 Mass. 38, 37 Am. Rep. 295; *Henly v. Lyme*, 5 Bing. 91; *Lyme Regis v. Henley*, 3 Barn. & Ad. 77, 1 Scott, 29, 1 Bing. N. C. 222, 2 Clark & F. 381, 8 Bligh, N. S. 690; *Weet v. Brockport Village Trustees*, 16 N. Y. 161, note; *Weightman v. Washington*, 66 U. S. 1 Black. 89, 17 L. ed. 52; *Nebraska City v. Campbell*, 67 U. S. 2 Black. 590, 17 L. ed. 271; *Eastman v. Meredith*, 36 N. H. 289, 72 Am. Dec. 302; *Bigelow v. Randolph*, 14 Gray, 543; *Child v. Boston*, 4 Allen, 41; *Thayer v. Boston*, 19 Pick. 511, 81 Am. Dec. 157; *Bailey v. New York*, 8 Hill, 531, 38 Am. Dec. 669; *Pittsburgh v. Grier*, 22 Pa. 54, 60 Am. Dec. 65; *Mersey Dock & Harbour Board of Trustees v. Gibbs*, 11 H. L. Cas. 687, L. R. 1 H. L. 93; *Carleton v. Franconia Iron & Steel Co.* 99 Mass. 216; *Dillon, Mun. Corp.* § 683, and notes; *Ray, Negligence of Imposed Duties*, pp. 344, 345.

Messrs. John W. Gordon and Barney & Hoar, for defendant:

A town is not liable except in case of a bridge, culvert or sluice, for an accident upon its sidewalks included in its streets.

1 Dill. Mun. Corp. §§ 29, 962; *Eastman v. Meredith*, 36 N. H. 284, 72 Am. Dec. 302; *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 382; *Chidsey v. Canton*, 17 Conn. 475; *Welsh v. Rutland*, 56 Vt. 228, 48 Am. Rep. 762; *Daniels v. Hathaway*, 65 Vt. 247; *Baxter v. Winooski Turnp. Co.* 23 Vt. 114, 53 Am. Dec. 84; *Hyde v. Jamaica*, 27 Vt. 443; *State v. Burlington*, 36 Vt. 521; *Bates v. Rutland*, 9 L. R. A. 863, 62 Vt. 178; *Parker v. Rutland*, 56 Vt. 224; *Bates v. Horner*, 22 L. R. A. 824, 65 Vt. 471.

The plaintiff was guilty of contributory negligence. There were two entrances to the town hall, known to him, and open for his use. He learned of the condition of the east entrance when he entered the hall and left the hall by the same way.

A person knowingly choosing a dangerous way cannot recover.

Quincy v. Barker, 81 Ill. 800, 25 Am. Rep. 278; 2 Dill. Mun. Corp. § 1006; *Farrelly v. Cincinnati*, 2 Disney (Ohio) 530; *Farnum v.*

NOTE.—The above case is a very peculiar one with respect to the ownership by a town of a building within a village. But even regarding the ownership as that of a private individual the question of the owner's liability for the defective

condition of a sidewalk in a public highway is said by counsel to be new in that state. This question is discussed at considerable length in the case of *Rochester v. Campbell* (N. Y.) 10 L. R. A. 323.

Concord, 2 N. H. 394; *Roberts' Dig.* §§ 192-195, p. 573.

The place where the plaintiff slipped on the ice, fell, and hurt himself, had been used and occupied as a sidewalk for twenty-six years, and for about twenty years before the town hall was built.

Sidewalks are a part of the street.

Dickinson v. Worcester, 188 Mass. 565; *McKinsey v. McKee*, 109 Ind. 209; *Bishop, Noncont. L. § 977*; *Anderson, Law Dict.*

There was no evidence tending to show that the slipperiness in front of the building within the limits of the street where the accident happened was due to the negligence of the town; so far as the evidence goes, it only tends to show that the walk was slippery. Mere slipperiness is not ground for liability even where statutes exist making towns liable for accidents upon its highways.

Chamberlain v. Oshkosh, 19 L. R. A. 518, 84 Wis. 289; 2 Dill. Mun. Corp. § 1006; *Bishop, Noncont. L. § 978*; *Stanton v. Springfield*, 12 Allen, 566; *Taylor v. Yonkers*, 105 N. Y. 203, 59 Am. Rep. 492; *Keith v. Brockton*, 136 Mass. 119; *Broburg v. Des Moines*, 63 Iowa, 523, 50 Am. Rep. 756; *Kinney v. Troy*, 109 N. Y. 567.

The town as an owner of land abutting on a public highway is not liable for the dangerous condition of the sidewalk in front of its building, caused by "snow and ice accumulated by natural causes thereon."

1 Thomp. Neg. p. 380, § 26; *Kirby v. Boylston Market Assn.*, 14 Gray, 249, 74 Am. Dec. 682; *Flynn v. Canton Co. of Baltimore*, 40 Md. 812, 17 Am. Rep. 603.

Tyler, J., delivered the opinion of the court:

Action on the case to recover for injuries alleged to have been received by the plaintiff near the entrance to the town hall in the defendant town. The plaintiff's evidence tended to show that he slipped and fell, and was injured, upon the sidewalk within the limits of the village of Barre, at a point two to four feet from the steps of the town hall or opera house, in consequence of the slippery condition of the sidewalk. To entitle the plaintiff to recover under the law of negligence, it must appear that the defendant owed him a duty in respect to the safe condition of the street at that point, and failed to perform that duty. By sections 5, 6, Act No. 190, Laws 1886, the village of Barre assumed all duties and responsibilities in respect to the streets of the village, and the town was relieved therefrom. If there was negligence in respect to the care of the sidewalk, it was on the part of the village. But there was no statutory liability upon either corporation, they being liable by the statute only for damages arising from the insufficiency of bridges, culverts, and sluices. The plaintiff contends that as the defendant owned the opera house, and rented it on this occasion for other than public purposes, namely, to an opera company, and received rent for its use, it owed a common-law duty to the plaintiff and others who were invited to the opera house to have the approaches to it reasonably safe. It is a general rule that towns and other quasi corporations are not liable for any neglect of corpo-

rate duty unless an action is given therefor by statute. This is for the reason that they are governmental in their character,—political subdivisions formed for the purpose of aiding in carrying on the government of the country. *Dill. Mun. Corp. § 963*; *Mower v. Leicester*, 9 Mass. 247, 6 Am. Dec. 63; *State v. Burlington*, 36 Vt. 521.

A city or town is not liable to a private citizen for an injury caused by any defect or want of repair of a city or town hall, or other public building erected and used solely for municipal purposes; but where a city or town does not devote such building exclusively to those purposes, but lets it for its own advantage and emoluments by receiving rents or otherwise, the city or town is liable, while it is so let, in the same manner that a private person would be liable. *Oliver v. Worcester*, 102 Mass. 489, 8 Am. Rep. 485; *Hill v. Boston*, 122 Mass. 844, 28 Am. Rep. 332; *Worden v. New Bedford*, 131 Mass. 28, 41 Am. Rep. 185. The rule applies only to the neglect or omission of a town to perform those duties which are imposed on all towns without their corporate consent, and exclusively for public purposes. *Bigelow v. Randolph*, 14 Gray, 541. The cases make a clear distinction between the responsibilities of towns for acts done in their public capacity, in the discharge of duties imposed upon them by the legislature for the public benefit, and those done for their immediate profit or advantage as a corporation, though inuring ultimately to the public benefit. *Oliver v. Worcester, note to Perry v. Worcester*, 66 Am. Dec. 434; *Moffitt v. Asheville*, 103 N. C. 237; *Howard v. Worcester*, 153 Mass. 426, 12 L. R. A. 160. Applying the rule for which the plaintiff contends,—that the defendant town stood in the case like a private individual; that, having rented the opera house on this occasion for the purpose shown by the evidence, it was legally bound to provide a reasonably safe approach to the building for persons going to and from it,—what was the measure of its liability? If a private person had been the owner of the opera house, he would have been under a legal obligation, to all persons visiting it on this occasion, to have had the building and its entrances and approaches, which were under his control, reasonably safe for their proper use. If there had been a space between the sidewalk and the building, owned and controlled by him, over which visitors had to pass in going to and from the building, he would have owed them the duty of having it in a reasonably safe condition for their passage over it; but over the sidewalk, which was a part of the public street, such private individual would have had no control, and in respect to its condition would have owed visitors no duty, and consequently would have been under no liability for its defects. Wherever there is a clear space between the street and any private building to which the public are invited, owned by the owners of the building, and used as an approach to it, such owners are responsible for its reasonably safe condition. If, on the other hand, the space is a part of the public street which it is the duty of the village, town, or city to maintain, the owners of the building are not liable for defects in the approach unless there is an

ordinance which imposes upon them a duty to keep the approach in repair. In the absence of a duty there is no liability. The defendant has made no point as to the length of time the

slippery condition of the sidewalk had existed, and we have not considered it.

Judgment affirmed.

All concur.

SOUTH DAKOTA SUPREME COURT.

N. C. FOSTER, *Respt.*,
v.
CHARLES BETCHER LUMBER CO.,
Appt.

(.....S. Dak.....)

*1. Under the provision of section 4898, Comp. Laws, service of summons upon the

*Headnotes by CORSON, Ch. J.

managing agent of a foreign corporation, in this state, constitutes a valid service, when such corporation has property within the state, or the cause of action arose therein.

2. The failure of a foreign corporation to file a copy of its articles of incorporation and the certificate of the appointment of an agent authorized to accept service of process, as required by sections 3190 and 3192, Comp. Laws, cannot be taken advantage of by such corporation, and service of summons upon

NOTE.—Who may be served with process in suit against a foreign corporation?

Early doctrine.

Some early cases laid down the doctrine that a foreign corporation could not be sued because it could not be served with process outside of the state by which it was created. This was declared in the case of *McQueen v. Middletown Mfg. Co.*, 16 Johns. 5, but that case in reality only decided that an attachment under the New York act relative to absconding and absent debtors did not apply to a foreign corporation.

Other cases expressly decided that a foreign corporation, not having its chief office or place of business in the state, cannot be served with process, except by attachment. *Robb v. Chicago & A. R. Co.*, 47 Mo. 540; *Middough v. St. Joseph & D. C. R. Co.*, 51 Mo. 520.

So in *Kain v. Morris Canal & Bkg. Co.*, as reported in a note to 14 Conn. 808, it was decided by the superior court in New York that service of summons on the teller of a bank at a New York banking office of a New Jersey banking corporation was not valid, on the ground that suit could not be brought against a foreign corporation, except by attachment of property.

And in *Middlebrooks v. Springfield F. Ins. Co.*, 14 Conn. 301, service of summons on the secretary of a Massachusetts insurance company who was in Connecticut when served at an agency of the corporation in that state, was held not valid, since a foreign corporation could be sued only by attachment.

In *Hulbert v. Hope Mut. Ins. Co.*, 4 How. Pr. 275, service of summons upon the president of a foreign insurance corporation temporarily within the state, in an action on a contract made with an agent of the company in the state, was contested, but it was upheld with a statement that it was not a judicial process, but for all practical purposes simply a statutory notice that proceedings were about to be instituted against the property of the corporation.

Service on the rector, as the head of a church corporation, organized in another state, was held insufficient in *Nash v. Evangelical Lutheran Church*, 1 Miles (Pa.) 78, with the declaration that "service must be within the jurisdiction of the sovereignty where the artificial body resides." There is no distinction suggested in this case between a corporation engaged in business within the state and others, but from the nature of the corporation which was there sued, it would appear that it had no property or business in the state.

Likewise in *Andrews v. Michigan Cent. R. Co.*, 99 Mass. 534, 97 Am. Dec. 51, where service on a nonresident railroad corporation was made on its 28 L. R. A.

treasurer at its office in Boston, which was alleged to be its usual place of business within the commonwealth, it was held that the foreign corporation could be sued only by attachment of its property, except as in case of foreign insurance companies by virtue of an express provision of statute.

Service on the treasurer of a foreign corporation when not authorized by statute, was also held insufficient in *Desper v. Continental Water Meter Co.*, 137 Mass. 252; and *Lewis v. Northern Railroad*, 139 Mass. 234.

The early doctrine declared in *McQueen v. Middletown Mfg. Co.*, 16 Johns. 5, that a foreign corporation could not be sued because its representative officers, on whom process must be served, could not carry their official character with them out of the state in which the corporation was created, is said in *St. Clair v. Cox*, 108 U. S. 350, 27 L. ed. 223, to be perhaps unnecessary to the decision in that case, but nevertheless, to have been accepted as correctly stating the law; but, as stated by *Justice Field* in *St. Clair v. Cox*, this doctrine "was the cause of much inconvenience and often of manifest injustice. The great increase in the number of corporations of late years, and the immense extent of their business, only made this inconvenience and injustice more frequent and marked. . . To meet and obviate this inconvenience and injustice, the legislatures of several states interposed and provided for service of process on officers and agents of foreign corporations doing business therein."

Later doctrine.

But even in the absence of any statutory provision for service on agents or officers of such corporations, the courts in other cases have established what may be regarded as the present prevailing doctrine that a foreign corporation which enters a state for the transaction of business may be sued by serving process on its representative in that state.

Thus in *Diana v. Virginia F. & M. Ins. Co.*, 13 Rep. 457, decided by *Judge Hughes* of the circuit court of the United States for the eastern district of Virginia, it is said that a corporation doing business in a state other than that by which it is created through an agent may be sued and brought into court by service on such agent independently of any statute, law, or warrant of attorney especially authorizing such service. The case also holds a decision as to the effect of such agency, which is contested by the defendant, is conclusive on the courts of another state, when an attempt is made to enforce the judgment.

Also in *Van Dresser v. Oregon R. & N. Co.*, 43 Fed. Rep. 203, it is held that whoever, with the

a managing agent of such corporation within this state will be valid, notwithstanding the failure of such corporation to comply with the laws of the state.

3. A person who has full charge of the business of a foreign corporation dealing in lumber and merchandise at a particular place within this state, and subject to no authority from any other person or agent within the state, but who corresponds with, accounts to, and receives instructions from, the main office of such foreign corporation in the foreign state, receives and disburses moneys, pays freight, makes contracts with customers as to terms of payment of accounts, issues receipt for money, employs all necessary temporary assistance for and in behalf of the corporation, and, with the knowledge and under the instructions of the corporation, holds himself out and advertises in the newspaper as manager, is within the meaning of section 4893, the "managing agent" of such foreign corporation.

knowledge and consent of a foreign railroad company has the actual control and superintendence of its railway within a state, must be regarded as its authorized agent and representative, on whom process may be served.

And in *Havden v. Androscoggin Mills*, 1 Fed. Rep. 53, the circuit court of the United States sitting in Massachusetts held contrary to the doctrine of the Massachusetts cases above cited that a foreign corporation doing business in the state might be sued by serving an officer in the state irrespective of the fact of attachment of property.

In *North Missouri R. Co. v. Akers*, 4 Kan. 453, 16 Am. Dec. 183, service of process on a foreign railroad company in the state was upheld; but in this case the corporation had answered to the merits.

The person to whom a foreign corporation commits the management and control of its business in the state is its agent for the purpose of receiving service of process in actions arising out of the conduct of its business in the state. *Norton v. Berlin Iron Bridge Co.* 51 N. J. L. 442.

Service on the president of a foreign corporation at his residence within the state gives jurisdiction in suit on a contract made within the state, as by making the contract the corporation submits itself to the jurisdiction. *National Condensed Milk Co. v. Brandenburg*, 40 N. J. L. 111.

On the same theory if the chief office or place of business of a foreign corporation is in the state and its officers there, it cannot be attached as a nonresident, because it may be sued as an individual. *Farnsworth v. Terre Haute, A. & St. L. R. Co.* 29 Mo. 75.

A suit *in personam* will not lie on a contract or deed of a foreign corporation, which has no connection with its agency in the state. *Bawknicht v. Liverpool, L. & G. Ins. Co.* 55 Ga. 194.

Statutes authorizing service.

It is said in *St. Clair v. Cox*, 108 U. S. 360, 27 L. ed. 222, that "if a state permits a foreign corporation to do business within her limits, and at the same time provides that in suits against it for business there done process shall be served upon its agents, the provision is to be deemed a condition of the permission; and corporations that subsequently do business in the state are to be deemed to assent to such condition as fully as though they had specially authorized their agents to receive service of the process."

So in *Merchants' Mfg. Co. v. Grand Trunk R. Co.*, 23 Fed. Rep. 358, it is held that a foreign corporation consents to be amenable to suit by such modes of service as the laws of the state provide when it invokes the comity of the state for the transaction of its affairs.

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(March 3, 1894.)

APPEAL by defendant from an order of the Circuit Court for Grant County denying a motion to set aside a default judgment in favor of plaintiff in an action brought against a foreign corporation, in which the summons was served on persons alleged to be its managing agents. *Affirmed.*

The facts are stated in the opinion.

Messrs. E. M. Bennett and F. M. Wilson for appellant.

Mr. Bion A. Dodge for respondent.

Corson, P. J., delivered the opinion of the court:

This is an appeal from an order denying the motion of the appellant to vacate and set aside a judgment rendered in favor of the respondent by default, the appellant not having appeared in the action. The summons

Foreign corporations are within the provisions of Ala. Code, § 2538, authorizing service on president or other head of the corporation, or its secretary, cashier, or managing agent. *Western U. Tele. Co. v. Pleasants*, 46 Ala. 641.

So the Illinois statute authorizing service on "any incorporated company" by service on its president, etc., or an agent, is applicable to a foreign corporation doing business in the state. *Mineral Point R. Co. v. Keep*, 22 Ill. 2, 74 Am. Dec. 124.

And a foreign corporation doing business in the state is subject to Ga. Rev. Code, § 3293, authorizing service in a suit against any corporation on "any officer or agent." *City F. Ins. Co. of Hartford v. Carrugi*, 41 Ga. 680.

Likewise in New Hampshire it was held that a corporation allowed to hold property and bring suits in the state could be sued there by service on an officer by whom it transacted business in the state, under general provisions of a statute allowing service on agents of corporations. *Libbey v. Hodgdon*, 9 N. H. 384.

Service on a foreign corporation, under Missouri Rev. Stat., § 3489, has the same effect to allow personal judgment as service on an individual. *McNichol v. United States Mercantile Reporting Agency*, 74 Mo. 457.

A judgment in a state court against a foreign corporation obtained on service made upon a designated agent of the company within the state according to statute must be given full effect in a federal court. *Warren Mfg. Co. v. Etna Ins. Co.* 3 Paine, C. C. 501; *Lafayette Ins. Co. v. French*, 59 U. S. 18 How. 404, 15 L. ed. 451.

The legislature may determine how service shall be made on a foreign corporation. *Hillier v. Burlington & M. River R. Co.* 70 N. Y. 223.

It is competent for the legislature of a state to authorize commencement of a suit against a foreign corporation, having a place of business or making contracts in the state, by service of process upon its president, secretary, or treasurer. *Weymouth v. Washington, G. & A. R. Co.* 1 MoArth. 19.

The rule limiting jurisdiction on such service to cases on contracts made or transactions occurring within the state does not apply where the foreign corporation has its principal place of business in the state. *Peters v. Neely*, 16 Lea, 275.

Where corporation is not engaged in business within the state.

A statute directing service of process on the agent of a foreign corporation conducting its business in the district clearly contemplates cases in which the corporation has an established place of business in the district with agents or persons em-

and complaint were served upon A. J. Fairchild, at Millbank, in Grant county, in this state, and upon Albert Wihlborg, at Big Stone City, in said county. The sheriff, in his amended return, states that he duly served the summons and complaint upon the persons above named, who were the managing agents of said defendant. The appellant assigns as error that the court erred in denying appellant's motion to vacate and set aside the said judgment, as the court acquired no jurisdiction of the person of the appellant. It appeared that the appellant was a foreign corporation, organized and existing under the laws of the state of Minnesota, but it also appeared that it had property and places of business in this state. It also appeared from

the proof offered by appellant that it had never filed a copy of its articles of incorporation in the office of the secretary of state, nor its appointment of an agent authorized to accept service of process, as required by the laws of this state.

Two questions are presented for our decision: (1) Can service of a summons be legally made upon the managing agent of a foreign corporation, in this state, who has not been appointed by the corporation in the manner prescribed by the statute of this state? And (2) were the persons upon whom the service in this case was made "managing agents" of the appellant, within the meaning of the statute of this state relating to the service of summons upon foreign corpora-

tions, employed to conduct it. *Dallas v. Atlantic, M. & O. R. Co.* 2 McArthur, 146.

In *State v. Ramsey County Dist. Ct.*, 28 Minn. 233, it is intimated, though not decided, that jurisdiction of a foreign corporation, having no office or business in the state, cannot be obtained by service on an officer who comes into the state on private business.

This states a doctrine that is generally supported by the decisions outside of New York state.

Only those foreign corporations which have an agency or place of business within the state are contemplated by the Pennsylvania statute authorizing service against foreign corporations upon "any officer, agent, etc.," either personally or by copy, or by leaving a copy at its office, depot, or usual place of business. *Branson v. Trump Bros. Mach. Co.* 16 Phila. 112; *Phillips v. Library Co.* 141 Pa. 462.

If a foreign corporation is doing no business within a state, jurisdiction cannot be obtained in an action against it by service of process on its president who is temporarily within the state for his own business or pleasure. *Phillips v. Library Co.* *supra*.

This decision in Pennsylvania fully approves the doctrine of *Camden Roll Mill Co. v. Swede Iron Co.*, *infra*, in which it is said that "upon general principles and in the absence of statutory innovations, it is to be regarded as settled that if a foreign corporation at the time of commencement of suit does not do business or has not any office or place of business in this state, such corporation, except by its own consent, cannot be brought within the jurisdiction of this or any other court of this state. Under such circumstances the officers or agents of such foreign corporation when they come into this jurisdiction do not bring with them their official character or functions."

The Pennsylvania case also says that the Statute of 1849, in respect to process on officers of a foreign corporation, contemplates a foreign corporation doing business within the commonwealth. This case, therefore, does not necessarily conflict with the New York decisions, *infra*, which uphold service of process on officers of a foreign corporation which does not do any business within the state, as the New York statute clearly contemplates service in such cases; but it is more difficult to harmonize the New York decisions with those of the federal courts.

So in New Jersey service upon one of the officers or agents of a foreign corporation who are named by the statute authorizing service will not give jurisdiction of the suit, if on general principles the courts of the state have no jurisdiction of the cause of action, as in a case in which the corporation did no business in the state, and the suit was on a contract not made in the state. *Camden Roll Mill Co. v. Swede Iron Co.* 22 N. J. L. 15.

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A statute which authorizes service of process upon one of the officers or members of a foreign corporation, who is accidentally within the jurisdiction, in a case where the corporation confines its business operations to the state which chartered it, is so contrary to natural justice and to the principles of national law that the courts of other states ought not to sanction it. *Moulin v. Trenton Mut. L. & F. Ins. Co.* 24 N. J. L. 222.

The provision for service on certain officers or agents of "any incorporated company" in the Illinois practice act does not apply to a foreign corporation having no business in the state but whose officer is served while passing through the state. *Midland Pac. R. Co. v. McDermid*, 91 Ill. 170.

So service of process on the president of a foreign corporation, who was temporarily in the state on his own business, is not valid, where the corporation has no agent or place of business in the state, merely because he sends a telegram in relation to a proposition in the business of the company. *Galveston City R. Co. v. Hook*, 40 Ill. App. 547.

A statutory provision allowing service on the presiding officer, or if there is none, in such manner as the court may direct in any suit against a corporation, if it applies at all to a foreign corporation does not justify service on an officer of a Canadian corporation which has no office or business, or resident officer in the state, while he is casually in the state. *Newell v. Great Western R. Co.* 19 Mich. 338.

Under Hill's Annotated Laws (Or.) § 516, a corporation is not subject to the jurisdiction of a court, unless it was created by the laws of the state, or has an agency for business, or property within the state, and then only to the extent of such property at the time the jurisdiction attached, therefore service upon an officer of a foreign corporation who is temporarily within the state to negotiate a transfer of its stock and plant is invalid where the corporation has no property or business in the state. *Aldrich v. Anchor Coal & D. Co. (Or.)* April 10, 1903.

The president of a foreign corporation, who is within the state, although not on official business or in any official character, or in any way representing the corporation, may be served with process against the company, if the cause of action accrued within the state, under *How. Stat. (Mich.)* § 8145, allowing service in such a case upon any officer or agent of a foreign corporation. *Shickie, H. & H. Iron Co. v. The S. L. Wiley Constr. Co.* 61 Mich. 226.

This was an action on a draft drawn by the foreign corporation upon a drawee within the state.

In this case it is said that this statute was passed to remedy defects in prior laws, as indicated in the case of *Newell v. Great Western R. Co.* *supra*.

Under S. C. Code, § 155, as amended in 1887, service on a foreign corporation can be made on its

tions? The section of the statute relating to such service is section 4998, Comp. Laws, and reads as follows: "The summons shall be served by delivering a copy thereof, as follows: (1) If the action be against a private corporation, to the president or other head of the corporation, secretary, cashier, treasurer, a director, or managing agent thereof; but such service can be made in respect to a foreign corporation only when it has property in this territory, or the cause of action arose therein, or when such service shall be made within this territory personally upon the president, treasurer, secretary, or duly authorized agent thereof." The learned counsel for appellant contend that, under this section, service can only be made upon a foreign

corporation by serving the summons upon the president, treasurer, secretary, or duly authorized agent, as provided in the last clause of the section, and that service can only be made upon a managing agent in case of domestic corporations. But we cannot agree with the counsel in this construction of the statute. In our opinion, the language of the section will not bear that construction. The first clause of the section clearly applies to all private corporations, whether domestic or foreign. No distinction is made in that clause between the two classes. But by the second clause a condition of such service is made, not as to the persons upon whom service may be made, but under what circumstances such service can be made; and it pro-

vide that service can only be made upon a president or agent only when it has property within the state, or the cause of action arose therein, or where service is made within the state personally upon the president or resident agent. *Hester v. Basin Fertilizer Co.* 38 S. C. 609.

The language of this section would seem to authorize service upon the president even if the cause of action did not arise in the state or the corporation have any property therein, but such a case was not presented for decision.

If the cause of action arose in the state, service on the president of a foreign corporation is sufficient under N. Y. Code Proc., § 134. *Barnett v. Chicago & L. H. R. Co.* 4 Hun, 114.

After the president of a foreign corporation has made a resignation, which has been accepted, and a new election had at which he is not elected, service upon him in an action against the corporation is not valid. *Sturges v. Orescent Jute Mfg. Co.* 10 N. Y. Supp. 470.

Under the New York Code of Procedure, § 134, as it stood in 1866, service on an officer of a foreign corporation was authorized only when it had property within the state, or the cause of action arose therein. *Hillier v. Burlington & M. River R. Co.* 70 N. Y. 223; *Bates v. New Orleans, J. & G. N. R. Co.* 13 How. Pr. 516.

The cause of action in favor of an agent of a foreign corporation on a contract for maintaining an office and performing services in New York arises in that state. *Hillier v. Burlington & M. River R. Co.* *supra*.

Service on the vice-president and manager of a foreign corporation while temporarily visiting in the state, but not in his official capacity, is valid under N. Y. Code, § 432, subd. 8, where the president, treasurer, or secretary is not within the state, if the cause of action arose within the state. *Porter v. Sewall Safety Car-Heating Co.* 7 N. Y. Supp. 166. So in *Atlantic & P. Teleg. Co. v. Baltimore & O. R. Co.* 11 N. Y. Week. Dig. 123, service on the president of a foreign corporation was held good in a suit for injunction against interference with telegraph lines in New York, although he was not in the state on his own business, and not acting as representative of the company.

And even if the cause of action did not arise within the state and the company has no corporate office, property, or business within the state, service on the president of a foreign railroad company, who is temporarily within the state for purposes of his own on his way to a sea-side resort, is authorized by N. Y. Code Civ. Proc., § 432, subd. 1. *Pope v. Terre Haute Car Mfg. Co.* 87 N. Y. 137.

So under that section and sub-division service of summons on the secretary of a foreign corporation in the state is sufficient, although it had no property within the state, and the cause of action did not arise therein. *Miller v. Jones*, 67 Hun, 281.

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The New York decisions last cited go farther than those of any other state and are contrary to some of the federal cases following.

Thus in *Bentliff v. London & C. Finance Co.*, 44 Fed. Rep. 667, it was held that service upon a director of a foreign corporation found in the state of New York but not in any official capacity or business of the corporation, where the cause of action arose in the state, but the corporation has no place of business within the state and does no business there, although such a service is held valid by the courts of the state, will be set aside in a federal court after the cause has been removed thereto.

And the presence of an officer of a foreign corporation in the state of New York merely to negotiate a loan upon a mortgage of its property does not make service upon him in an action against the company a valid one. *Clews v. Woodstock Iron Co.* 44 Fed. Rep. 81.

Service on the president of a foreign newspaper corporation in a libel suit made while he was temporarily in the state was held invalid, there being no office, agent, property, or business of the corporation in the state. *Golden v. The Morning News of New Haven*, 42 Fed. Rep. 112.

Service upon an officer or agent of a foreign corporation, who is temporarily within the state on private business, is insufficient, where the corporation has no office and transacts no business within the state. *Reisenfer v. American Imp. Pub. Co.* 45 Fed. Rep. 433. (This case followed a decision of a court of the state in which suit was brought.)

In *St. Clair v. Cox*, 106 U. S. 350, 37 L. ed. 222, the Supreme Court of the United States held that a corporation must be engaged in business in the state in order to authorize a personal judgment against it based on service of process made upon an agent or officer within the state.

This decision was rendered in relation to service of an attachment which by statute was equivalent to a summons under a Michigan statute authorizing service on "any officer, member, clerk, or agent of" a foreign corporation; and while the court construes the statute in the light of a Michigan decision as applying only to corporations doing business in the state, it quotes from *Moulin v. Trenton Mut. L. & F. Ins. Co.*, 24 N. J. L. 222, to the effect that a law sanctioning service on an officer accidentally within the jurisdiction is contrary to natural justice and to the principles of international law.

The same court held in *Fitzgerald & M. Constr. Co. v. Fitzgerald*, 137 U. S. 98, 34 L. ed. 608, that if a foreign corporation is not doing business in a state the mere fact that its president, or other officer, is within the state, but not transacting business for it or representing it, will not authorize service upon him so as to bring the corporation into the jurisdiction.

vides: "But such service can be made in respect to a foreign corporation only when it has property in this territory, or the cause of action arose therein." The expression "such service" evidently refers to the service specified in the preceding clause, as there is no other service to which it can properly refer. The third and last clause of the section provides for a different service, which may be made when the foreign corporation has no property in this state, and the cause of action did not arise therein. The learned counsel for the respondent contends "that the section authorizes service on the managing agent of a foreign corporation when it has property in this state, or the cause of action arose therein; and that when neither of these con-

ditions exists, service can be made only upon the president, secretary, or duly authorized agent." We are of the opinion that this is the true construction of the section. This seems to be the construction placed upon a somewhat similar provision of the practice act of New York, whence the section we are considering apparently came. *Brewster v. Michigan Cent. R. Co.* 5 How. Pr. 183; *Sterrett v. Denver & R. G. R. Co.* 17 Hun, 816; *Reddington v. Mariposa Land & Min. Co.* 19 Hun, 405; *Tuchband v. Chicago & A. R. Co.* 115 N. Y. 437. We are not able to discover any valid reason why any distinction should be made as to the service of process between the managing agent of a domestic and a foreign corporation when such corporation has

The statute here applicable provided for suit against a nonresident or foreign corporation "in any county in which there may be property or debts owing to, or where said defendant may be found." Neb. Code Civ. Proc. § 59.

These cases suggest the question whether or not the New York decisions, upholding service on such officers as president, secretary, and treasurer of a foreign corporation, can be sustained under the Federal Constitution if the corporation has no property or business in the state and the cause of action did not arise there, or even if the cause of action did arise in the state.

As the New York statute clearly provides for such service the only question is as to its constitutionality, and this would seem most liable to attack on the ground of denying due process of law or the equal protection of the laws. The rule that a foreign corporation submits to such conditions as the laws of a state prescribe when it enters the state to do business manifestly has no place in case of a corporation which has not thus entered the state, and it is difficult to see how a foreign corporation which does no business in a state, asks no recognition or favor from the state, and does not enter it in any corporate capacity, can be held subject to the jurisdiction of that state merely because one of the corporate officers in the exercise of his personal liberty chooses to go into the state on his own affairs of business or pleasure. Therefore, recognizing the fact that the decisions of the Supreme Court of the United States above cited are to be construed with reference to the facts involved in each case, and that neither of those cases is conclusive in respect to the New York statute, the constitutionality of that statute is at least subject to question. It may be said in this connection that the kindred provision of N. Y. Code Civ. Proc., § 438, authorizing service by publication in any suit against a foreign corporation, seems to be even more questionable as to constituting due process of law.

Service on director.

Service on a director of a foreign corporation, who is temporarily within the state, where the corporation has no property, although the cause of action is alleged to have arisen in the state, does not give jurisdiction which will sustain a personal judgment by default, and such judgment will not be upheld in another state. *Latimer v. Union Pac. Railway*, 43 Mo. 105, 97 Am. Dec. 373.

This decision follows *Hulbert v. Hope Mut. Ins. Co.*, 4 How. Pr. 275, and *Brewster v. Michigan Cent. R. Co.*, 5 How. Pr. 183, which have been in effect overruled in New York.

Service on a director of a foreign corporation who is temporarily in the state in pursuance of his own business is sufficient, if the corporation has property in the state, or the cause of action arises therein. *Hiller v. Burlington & M. River R. Co.* 70 N. Y. 223, 33 L. R. A.

To sustain service of process on a director of a foreign corporation it is enough, under N. Y. Code Civ. Proc., § 432, subd. 3, if the cause of action arose in the state. *Childs v. Harris Mfg. Co.* 104 N. Y. 477.

A director of a foreign corporation may be served in New York, in an action based on a contract to indemnify the plaintiff against actions for infringement in the state, although the contract was made in another state. *Ibid.*

Service of summons on a director of a foreign corporation, not being authorized in the case by N. Y. Code, § 432, although by section 431, a domestic corporation may be served in this way, service on the director of a foreign corporation, under N. Y. Laws 1846, chap. 195, authorizing service upon it "in the same manner as corporations created by the laws of this state," can be upheld only when the summons served is of the character described in that act, and not where it was in an action under section 1898 by a person aggrieved to recover a penalty of forfeiture. *Quade v. New York, N. H. & H. R. Co.* 37 Jones & S. 479.

Service on stockholder.

Service on a stockholder of a foreign corporation is authorized by Colo. Code Civ. Proc., § 40, if there is no officer or agent on whom process can be served within the state, and this cannot be defeated by a collusive transfer of stock. *Colorado Iron Works v. Sierra Grande Min. Co. (Colo.)* 9 Ry. & Corp. L. J. 113.

Effect of designating agent.

Where a foreign insurance company has, in accordance with law, designated a general agent and attorney within the state on whom process may be served, service upon another person who is merely a soliciting agent for the company is invalid. *Prudential Ins. Co. of Newark v. Connors*, 6 Kulp, 401.

Under a statute requiring the appointment of a designated person to receive service of process for a foreign insurance company, where such an agent has been appointed, service on a mere solicitor of the company is insufficient. *Lablong v. Kansas F. Ins. Co.* 82 Pa. 413.

An agent of a foreign insurance company, who is not the attorney whom it has appointed as required by statute for the service of process, cannot be served with process for the company. *Thayer v. Tyler*, 10 Gray, 164.

Service upon the designated agent of a foreign corporation gives jurisdiction over it, if the corporation has property in the state, or the cause of action arose there. *Gibbs v. Queen Ins. Co.* 63 N. Y. 114, 20 Am. Rep. 513.

Service upon an agent of a foreign corporation which, in compliance with law, it had appointed for that purpose, is good in admiralty as well as in law. *Re Louisville Underwriters*, 134 U. S. 433, 33 L. ed. 991.

such a managing agent within this state, and we think the lawmaking power has made none.

The counsel for appellant further contend that inasmuch as the appellant had never filed its articles of incorporation with the secretary of state, nor its certificate of the appointment of an agent, as required by the law of this state, it was not legally doing business within the state, and could not legally have a managing agent therein, on whom service could be made. But we cannot assent to this proposition. The failure of appellant to comply with the laws of this state cannot be taken advantage of by itself, nor in fact by any private person in a collateral proceeding. The state only, in its

sovereign capacity, can take advantage of such failure of a foreign corporation to comply with the law. *Wright v. Lee* (S. Dak.) 51 N. W. Rep. 706, 55 N. W. Rep. 981. If a foreign corporation is engaged in business in this state, though failing to comply with the laws by filing a copy of its articles of incorporation and a certificate of the appointment of an agent, it is still subject to the laws of the state, and amenable to its process, until its right to so continue to do business within this state is declared forfeited by the courts of the state, upon due proceedings taken in the name of the state. The person transacting the business of the corporation in this state, as managing agent, must be presumed to be the agent of the corporation,

A certificate of a foreign corporation appointing its general manager residing in a designated city in the state as its agent for receiving service of process is not insufficient because it does not give his name. *Goodwin v. Colorado Mortg. & Investment Co. of London*, 110 U. S. 1, 28 L. ed. 47. See also *Michigan State Ins. Co. v. Abens*, and *Gibson v. Manufacturers Fire & Marine Ins. Co. infra*.

An agent designated for service of process in accordance with the Alabama constitution need not be a person authorized to exercise any of its contractual powers. *Nelms v. Edinburgh-American Land Mort. Co.* 32 Ala. 187; *McCall v. American Freehold Land Mort. Co. (Ala.)* April 5, 1893.

Failure to make designation.

Where a statute provides that a foreign insurance company may not do business in the state until it has filed a stipulation authorizing service of process in suits against it to be made upon the auditor of state, the validity of service on such auditor cannot be contested by the company on the ground that it has not filed such stipulation, as it was required to do by law. *Ehrman v. Teutonia Ins. Co.* 1 McCrary, 123.

Failure of a foreign corporation to appoint an agent to receive service will not prevent service of process on an agent doing business for the company in the state from being valid, where the statute of the state authorizes service on such an agent. *Mooch v. Virginia F. & M. Ins. Co.* 10 Fed. Rep. 696.

A foreign insurance company which fails to comply with a statute requiring the appointment of an agent to receive service of process may be sued by serving an agent in the state by whom it transacts business out of which the suit arises. *Funk v. Anglo-American Ins. Co.* 27 Fed. Rep. 336.

Service on any agent, or, at least, on the only one who is found in the state, is sufficient as against a foreign corporation which has failed to comply with a statute requiring it to establish an office and appoint an agent on whom service may be made. *Hagerman v. Empire State Co.* 97 Pa. 534.

Service on the general solicitor or counsel of a foreign corporation, which has established a place of business in the state, is sufficient, where the corporation has failed to designate any person on whom summons may be served, and where none of the persons holding the official relation to the company prescribed by statute can be served. *Clews v. Rockford, R. I. & St. L. R.* 49 How. Pr. 117.

Termination of agency.

An agent of a foreign corporation who can be served in Iowa must be one conducting the business out of which the cause of action arose; and where an agency has been discontinued, the

former agent cannot be served, although another agent is kept in the same place to transact other business. *Winney v. Sandwich Mfg. Co. (Iowa)* Dec. 17, 1891.

But service on a former agent of a foreign insurance company, who still resides within the state and who countersigned the policy sued on, is sufficient, under Maine Stat. 1848, chap. 186, authorizing service on the agent or attorney of such a company in an action on a policy countersigned by any agent in the state. *Gillespie v. Commercial Mut. M. Ins. Co.* 12 Gray, 201, 71 Am. Dec. 743.

Expiration of a contract of agency for a foreign corporation will not defeat service of process upon an agent in an action for breach of warranty in a sale made by him where some of the property of the corporation is still in his hands. *Gross v. Nichols*, 72 Iowa, 239; *Brunson v. Nichols*, Id. 763.

A foreign corporation which has been engaged in business within a state, but has withdrawn therefrom, may be sued by serving process in an action growing out of such business on an officer of the company who happens to be in the state accidentally for a purpose not connected with the company's business. *Moulin v. Trenton Mut. L. & F. Ins. Co.* 25 N. J. L. 57.

A foreign insurance company cannot frustrate a suit against it by revoking its agency, after it has been notified that suit is to be brought. *Michael v. Nashville Mut. Ins. Co.* 10 La. Ann. 737.

A statute providing that in case of the death of the agent of a foreign corporation and failure to appoint a new agent, the personal representative of the deceased agent may be served with process as the representative of the company, does not apply to a company which had abandoned its business in the state many years before and whose agent had died before the passage of the statute. *Ellis v. Connecticut Mut. L. Ins. Co.* 19 Blatchf. 383.

The provision in Illinois Rev. Stat. 1874, chap. 73, § 22, authorizing service against a foreign insurance company, which has ceased business in the state, to be made on "the agents last designated or acting for such corporation," means those last acting in the state and not in the county where suit is brought. *Michigan State Ins. Co. v. Abens*, 3 Ill. App. 483.

Where a partnership is designated as agent of a foreign corporation for service of process, service can be made on one partner who continues the business under the same name, with the knowledge of the corporation which makes no change in the designation. *Gibson v. Manufacturers Fire & Marine Ins. Co.* 144 Mass. 81.

Service on a person designated by a foreign corporation for that purpose is valid so long as the designation is not revoked, although he has ceased to be an officer or agent of the corporation for any other purpose. *Eureka Lake & Yuba Canal Co. v. Yuba County Super. Ct.* 66 Cal. 311.

and subject to the service of process. In *Hagerman v. Empire State Co.*, 97 Pa. 534, the supreme court of Pennsylvania said: "When a foreign corporation, transacting business in this state, has failed to establish an office, and report the name of an agent, . . . but has some person residing therein as its agent, it must be presumed that the corporation has substituted such agent as the one on whom service is authorized to be made, to the extent, at least, of its unfinished business in this state." This seems to be the true rule. If a corporation fails to comply with the laws of the state, but is still engaged in business therein, and permitted to carry on such business, it must transact its business here subject to the laws of the state, and its

Cashier.

A man who handles whatever money is received by a corporation within the state in the conduct of its business there is a "cashier" within the meaning of N. Y. Code Civ. Proc., § 432. *McCulloch v. Pallard Non-Magnetic Watch Co.* 38 N. Y. S. R. 406.

Managing agent.

The question who is a "managing agent" presented in the main case has been presented in numerous cases which do not altogether agree but the later of which incline to less strictness in the construction of the words than the earlier ones.

The relation of attorney and client does not constitute the attorney a managing agent of a foreign corporation, within the meaning of N. Y. Code Civ. Proc., § 432. *Taylor v. Granite State Provident Assn.* 136 N. Y. 843.

An agent of a foreign corporation merely for the purpose of receiving what is sent him by the corporation and remitting the proceeds, is not a managing agent for the purpose of serving process upon him. *Gibbin v. Kanawha & O. Coal Co.* 2 Cin. Super. Ct. Rep. 75.

The captain of a steamboat owned by a foreign corporation is not a managing agent for service of process. *Upper Mississippi Transp. Co. v. Whittaker*, 16 Wis. 220.

A telegraph operator having charge of a local telegraph office of a nonresident postal telegraph cable company is not "a managing agent" on whom process can be served, under N. Y. Code Civ. Proc., § 431. *Jepson v. Postal Teleg. Cable Co.* 30 N. Y. Supp. 300.

A mere clerk in a store belonging to a foreign mining corporation is not a managing agent or cashier within the meaning of Cal. Code Civ. Proc., § 542. *Blanc v. Paymaster Min. Co.* 95 Cal. 524.

Local corporations licensed by the American Bell Telephone Company to use its patents and telephone instruments do not, by reason of a partnership interest, represent the main company as "managing agents," so as to make service on an officer of the local corporation sufficient as against the foreign corporation. *United States v. American Bell Teleph. Co.* 29 Fed. Rep. 18.

A person in charge of a branch office of a foreign corporation kept merely for the transfer of stock and for receiving assessments, without any other office or place of business in the state, is not such a managing agent. *Reddington v. Mariposa Land & Min. Co.* 19 Hun, 406.

The assistant secretary of a foreign railroad company, whose only duty shown to have been performed by him was the signing of some scrip certificates, is not such a managing agent. *Sterett v. Denver & R. G. R. Co.* 17 Hun, 316.

In *Brewster v. Michigan Cent. R. Co.*, 5 How. Pr. 188, an agent of a foreign railroad company whose duties relate only to its passenger business, was 28 L. R. A.

assent to service upon its managing agent is implied. The general rule is thus stated by the Supreme Court of the United States, in *St. Clair v. Cox*, 106 U. S. 850, 27 L. ed. 223. "The state may therefore impose, as a condition upon which a foreign corporation shall be permitted to do business within her limits, that it shall stipulate that, in any litigation arising out of its transactions in this state, it will accept as sufficient the service of process upon its agents or persons specially designated; and the condition would be eminently fit and just. And such condition and stipulation may be implied as well as expressed. If a state permits a foreign corporation to do business within her limits, and at the same time provides that, in suits

held not to be a managing agent, and a distinction was made between a manager of a branch or department and of the whole business.

So in *Doty v. Michigan Cent. R. Co.*, 3 Abb. Pr. 427, it was held that a mere ticket agent of a foreign railroad company, having no office in the state for the sale of tickets, and no part of its road in the state, is not "a managing agent" for the purpose of the service of process.

But these cases are not supported by later decisions.

In *Palmer v. Pennsylvania Co.*, 35 Hun. 369, it is held that a freight agent in New York of a foreign railroad company is a "managing agent" within the meaning of such code provision, and the court says: "The statute is satisfied if he be a managing agent to any extent."

And in *Tuehband v. Chicago & A. R. Co.*, 115 N. Y. 437, the court of appeals decided that a general agent of the passenger department of a foreign railroad company at its office within the state, where a substantial portion of its business is transacted, is a "managing agent" on whom service may be made, under N. Y. Code Civ. Proc., § 432, if there is within the state no president, treasurer, or secretary, or person designated for such purpose.

The superintendent and general managing agent of a foreign company operating a railroad within the state may be served with process, under N. Y. Code Proc., § 134. *Bank of Commerce v. Rutland & W. R. Co.* 10 How. Pr. 1.

A division superintendent may be served with process, in a suit against a foreign corporation for injuries received on his division, though in another state. *Hills v. Richmond & D. R. Co.* 37 Fed. Rep. 660.

The superintendent of the business of a nonresident railroad company at its office in the state may be served with process, although he resides in another state, in which he also has an office. *Porter v. Chicago & N. W. R. Co.* 1 Neb. 14.

One who has the management and control of a manufactory owned by a foreign corporation, and carries on the business within the state, is a "managing agent" within the meaning of a statute as to service of process on foreign corporations. *Hat-Sweet Mfg. Co. v. Davis Sewing Mach. Co.* 31 Fed. Rep. 294.

An assignee of a foreign corporation engaged in the business out of which the suit arises may be served with process as a "managing agent," where the statute authorizes service on a managing agent. *Estes v. Belford*, 23 Fed. Rep. 275.

A managing agent of a foreign corporation may be served under Nebraska Code, § 912, although he is but temporarily within the state, where the suit is for a debt contracted in the state. *Klopp v. Creston City Guarantee Water Works Co.* 34 Neb. 308.

The managing agent at an office in the state of a

against it for business there done, process shall be served upon its agents, the provision is to be deemed a condition of the permission; and corporations that subsequently do business in the state are to be deemed to assent to such condition as fully as though they had specially authorized their agents to receive service of the process." *Thomas v. Placerville Gold Quartz Min. Co.* 65 Cal. 600; *Funk v. Anglo-American Ins. Co.* 27 Fed. Rep. 336; *Knapp v. National Mut. F. Ins. Co.* 80 Fed. Rep. 607; *Moch v. Virginia F. & M. Ins. Co.* 10 Fed. Rep. 696; *Pringle v. Woolworth*, 90 N. Y. 503; *Pope v. Terre Haute Car & Mfg. Co.* 87 N. Y. 187; *Tuckband v. Chicago & A. B. Co.* 115 N. Y. 437.

foreign corporation at which it transacts its business may be served for the corporation, under Nebraska Code, § 912. *Chicago, B. & Q. R. Co. v. Manning*, 23 Neb. 558.

Service on a managing agent of a foreign corporation may be made, where the corporation has failed to designate a person on whom service may be made, as required by statute. *Thomas v. Placerville Gold Quartz Min. Co.* 65 Cal. 600.

One by whom, and under whose supervision, the business of a foreign company is managed, is a managing agent within the meaning of N. Y. Code Civ. Proc., § 432, subd. 3. *Shackleton v. Wainwright Mfg. Co.* 7 N. Y. S. R. 872.

In the case of domestic corporations the words "managing agent" have also been considered in several cases; and it is held that a division superintendent of a large and important division of a railroad remote from the general office of the company is such an agent. *Brayton v. New York, L. E. & W. R. Co.* 73 Hun, 602; *Rochester, H. & L. R. Co. v. New York, L. E. & W. R. Co.* 48 Hun, 190.

So is an insurance agent having charge of a New York city office of a company whose home office is at Utica. *Bain v. Globe Ins. Co.* 9 How. Pr. 443.

So is the general superintendent of a domestic telegraph company. *Barrett v. American Teleph. & Teleg. Co.* 56 Hun, 430.

But a mere clerk at the home office of a corporation is not a managing agent. *Rutland v. Canfield* Pub. Co. 18 N. Y. Civ. Proc. Rep. 283.

Neither is the baggage master at a railway station. *Flynn v. Hudson River R. Co.* 6 How. Pr. 308.

Neither is the assistant treasurer of a domestic corporation, although the treasurer is a nonresident. *Winslow v. Staten Island Rapid Transit Co.* 51 Hun, 298.

A decision on a conflict of evidences as to whether an alleged managing agent of a foreign corporation was in fact thus employed will not be reversed on appeal. *Norton v. Atchison, T. & S. F. R. Co.* 97 Cal. 394.

Other agents.

One who has authority to sign for general agents of a foreign corporation by himself and to draw important papers and contracts for the company may be served under Wis. Rev. Stat., § 2337, subd. 11, as an agent "having charge of or conducting any business" for the foreign corporation. *Burgess v. Aultman*, 80 Wis. 232.

A person employed by a foreign mercantile agency to furnish information as to commercial standing of merchants and business men to be used by the company in its reports is an agent of the company for the service of process. *Bradstreet Co. v. Gill*, 2 L. R. A. 408, 72 Tex. 115.

Whether a person is thus employed or not is a question for the jury, if the evidence is conflicting. *Ibid.*

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This brings us to the consideration of the second question: Were the parties upon whom the service of the summons in this case was made the managing agents of the defendant? The defendant, in support of its motion to vacate and set aside the judgment, read the affidavit of the president and secretary of said defendant. The material part of the affidavit of the president is as follows: "That on the 1st day of December, A. D. 1890, H. J. Benedict, Esq., assuming to act as the sheriff of said county of Grant, in the state of South Dakota, . . . did levy upon and take into his custody, as said sheriff, under said writ, a large quantity of lumber, lath, shingles, and other personal and real property of and belonging to the

An attorney of a foreign corporation employed in collection of claims and having jurisdiction of some of its property may be served with process for the company, if no other agent can be found, under Utah Laws, § 3203, subd. 5, authorizing service if no acknowledged agent can be found on "any person in its employ, or who has any of its property in charge." *Saunders v. Sioux City Nursery & Seed Co.* 6 Utah, 431.

But an attorney employed merely to aid in the collection of certain claims is not a local agent of a foreign corporation, under N. C. Code, § 217, making "any person receiving or collecting money" for a foreign corporation a local agent for that purpose. *Moore v. Freeman's Nat. Bank*, 98 N. C. 500.

If the officers and agents of a foreign corporation willfully conceal themselves to avoid service of an order to show cause why a corporation should not be adjudged guilty of contempt, service may be made upon the attorney of record for the corporation in the proceeding out of which the alleged contempt arises. *Eureka Lake & Yuba Canal Co. v. Yuba County Super. Ct.* 116 U. S. 410, 29 L. ed. 671.

A person acting as agent for a foreign corporation in matters relating to the loaning of money and receiving payments may be served with process for the company in an action to set aside a mortgage given for such a loan obtained through him. *Taylor v. Granite State Provident Assn.* 47 N. Y. S. R. 382.

The receiver and forwarder of advertisements to a foreign newspaper corporation is not an agent on whom process can be served. *Mulhearn v. Press Pub. Co.* 11 L. R. A. 101, 53 N. J. L. 153.

The fact that a foreign railroad company pays one half the expenses incurred in the maintenance and operation of a joint warehouse does not make an employé or agent in that warehouse, who is selected and approved by another company, to whom he gives bond and makes reports, "a local agent" of such foreign company within the meaning of the Texas statute authorizing service of process on the local agent of a foreign corporation. *Mexican Cent. R. Co. Limited v. Pinkney*, 149 U. S. 194, 37 L. ed. 699.

Process against a foreign corporation, which has no property, officer, or office for the transaction of business within the state, cannot be served on persons who are mere solicitors of business for the corporation, who occupy a room rented by the company. *Fairbank v. Cincinnati, N. O. & T. P. R. Co.* 54 Fed. Rep. 420.

A mere solicitor of passengers, with no authority to sell tickets, cannot be served with process for a foreign railroad company which has no office or place of business in the state, even if foreign corporations are within the provisions of a statute as to service on corporations having an office or

said Charles Betcher Lumber Company, then and there being at and situate in Millbank, and also Big Stone City (each and both of said places are in the said county of Grant, and state of South Dakota), and which said personal and real property was then and there of great value, to wit, of the value of sixteen thousand (\$16,000) dollars. . . . The said personal and real property of said Charles Betcher Lumber Company at said Big Stone City, in said county, was on said day of said levy in the charge of Albert Wihlborg, a hired employé of said corporation; and the said personal and real property of said Charles Betcher Lumber Company at said Millbank, the day of said levy, was in charge of said A. J. Fairchild, Esq., an em-

ployé of said corporation." The affidavit of the secretary is substantially the same. It will be noticed that the affidavits admit that the defendant was engaged in the lumber business at Millbank and Big Stone City; that the two persons named were in their employ, and inferentially had charge of defendant's business at the places named. It will be further noticed that it is not in terms denied that they were managing agents, but they are designated in the affidavits as "employés." It is nowhere stated in the affidavits that the defendants had any other agents or persons in charge of their business in this state. On the part of the plaintiff, a number of affidavits were read on the hearing two being made by the two agents on whom the

agency within a county. *Chicago & A. R. Co. v. Walker*, 9 Lea. 475.

A local ticket agent of a foreign railroad company is not a "general or special agent," within the meaning of the Michigan statute, but these words contemplate an agent who has a controlling authority in some matter either general or special. *Lake Shore & M. S. R. Co. v. Hunt*, 50 Mich. 470.

But one who sells tickets for a foreign railroad company may be served at his place of business, under Neb. Code, § 912, authorizing service on the person in charge of the office or usual place of business of such corporation, when none of the officers previously mentioned can be found within the county. *Chicago, R. & Q. R. Co. v. Manning*, 23 Neb. 552.

A foreign railroad corporation which forms a combination with other companies, one of which operates a railroad within the state, the combination having a duly authorized ticket agent acting on behalf of all the associate companies, is bound by service on such agent. *VanDresser v. Oregon R. & Nav. Co.* 48 Fed. Rep. 202.

A section foreman is a "local superintendent of repairs" within the meaning of Kan. Civ. Code, § 68a, on whom process may be served, if there is no other officer or person in the county on whom it can be served. *St. Louis & S. F. R. Co. v. DeFord*, 38 Kan. 290.

Under Tex. Rev. Stat. 1879, art. 1223, service may be made on the local agent of a foreign corporation. *Société Foncière et Agricole des Etats Unis v. Milliken*, 135 U. S. 804, 34 L. ed. 208.

A local agent of a foreign corporation may be served with process in the county in which he has an agency, under Tex. Rev. Stat. 1879, art. 1198, exception 21. *Angerhoefer v. Bradstreet Co.* 22 Fed. Rep. 305.

Persons called distributing agents of a foreign corporation, to whom alone the corporation sells goods in that state, and who buy from the corporation exclusively, with certain provisions as to rebate from the established price in case they keep the contract in good faith, are not "agents" within the meaning of a statute authorizing service upon an agent of the foreign corporation. *Gottschalk Co. of Baltimore City v. Distilling & Cattle Feeding T. Co. of Illinois*, 50 Fed. Rep. 681.

Service on a local agent of a foreign railroad company, under Ind. Code, § 80, is valid only when the cause of action grows out of, or is connected with, the business of his agency. *Ætna Ins. Co. v. Black*, 80 Ind. 513.

Service on a traveling salesman for a foreign corporation which is not doing business in the state was held insufficient in a case referred to but not named in *Block v. Atobison, T. & S. F. R. Co.* 21 Fed. Rep. 520.

In *Central Trust Co. of New York v. St. Louis, A. & T. R. Co.*, 40 Fed. Rep. 428, the federal court made 28 L. R. A.

an order allowing service of process from a state court on a station agent employed by a receiver of a railroad company, whose office was established in another state.

Service on a local agent of a foreign insurance company as prescribed by statute is sufficient. *Walker v. Continental Ins. Co. of New York*, 2 Utah, 331.

The Maryland act authorizing service upon any agent of a foreign corporation does not apply to a foreign insurance company which, by statute applicable especially to such companies, requires them to appoint agents for the purpose of receiving service of process and authorizing service on the insurance commissioner in case of the death or absence of the attorney so appointed. *Oland v. Agricultural Ins. Co. of Watertown*, 69 Md. 248.

And the provision of Indiana Rev. Stat. relating to foreign corporations in general have no application to service on a foreign insurance company, which is provided for by the Act of 1883. *Rehm v. German Ins. & Sav. Inst. of Quincy*, 125 Ind. 135.

Any agent of an unlicensed foreign insurance company may be served with process for the company, under Wis. Rev. Stat., § 2337, includes any person who solicits insurance, transmits an application or a policy, makes a contract of insurance, collects premiums, or in any manner aids or assists in doing either, or in transacting any business for such company, or advertises to do any such thing. *State v. United States Mut. Acc. Assn.* 67 Wis. 624; *State v. Minnesota Endowment & L. Assn.* 62 Wis. 174.

The secretary of a local division of a foreign mutual insurance company, who is the medium for dealings between the members and the company, is an "agent" of the association under Wis. Rev. Stat., § 2337, subd. 9. *Dixon v. Order of Railroad Conductors of America*, 49 Fed. Rep. 910.

One who has power to take an application, deliver a policy, and collect a premium for a foreign insurance company, although he has no power to issue policies or adjust losses, may be served with process for the company as a local agent, under Tex. Rev. Stat., art. 1223. *Southern Ins. Co. of New Orleans v. Wolverton Hardware Co. (Tex.)* April 26, 1892.

A local secretary of a foreign accident association, who receives and transmits money to the association and does some other business on its account, may be served with process against the association as an agent, under the Indiana statute, where its chief officer is not found in the county. *Reyer v. Odd Fellows Fraternal Acc. Assn. of America*, 157 Mass. 367.

Under Miss. Code, §§ 1073, 1085, and 1087, while a foreign insurance company cannot do business without a resident agent who may be served with process, any person who collects and remits for another any premium due such company is such

service of the summons and complaint was made. The material part of the affidavit of A. J. Fairchild is as follows: "A. J. Fairchild, being duly sworn, says that for the last past twenty-two months, and until the 1st day of December, 1890, and on that date, he was the duly authorized, acting, and managing agent, and the only agent, of Charles Betcher Lumber Company, the defendant in the above-entitled action, and also a foreign corporation, whose main office and principal place of business is in the city of Red Wing, in the state of Minnesota, at the city of Millbank, in the county of Grant, and state of South Dakota; that, as such agent, he had full charge of the business of said corporation at said city of Millbank,

and was subject to no authority from any other person or agent in said state of South Dakota; that he accounted to said corporation, and received all instructions from the main office thereof, at said city of Red Wing, Minn.; that he conducted and managed the affairs and business of said corporation at said city of Millbank, and, in its behalf, he received and disbursed all moneys, sold lumber and merchandise, paid freight, made contracts and agreements with customers as to terms of payment of accounts, issued receipts for money for said corporation, as agent thereof, employed all necessary temporary assistance for said corporation, and transacted all of the business of said corporation at said city of Millbank." The affidavit of

an agent. *Sadler v. Mobile L. Ins. Co.* 60 Miss. 391.

The fact that agents of a foreign insurance company, who are actually engaged in its business, have not given bond or been formally commissioned, will not prevent valid service on them of process against the company. *Pacific Mut. L. Ins. Co. v. Williams*, 79 Tex. 638.

A person acting as agent of a nonresident co-operative insurance company in receiving pay for assessments and delivering receipts of the company may be served with process in a suit against the company. *Vorhies v. People's Mut. Ben. Soc. of Elkhart, Ind.* 86 Mich. 31.

A local or branch secretary of a mutual benefit association who receives assessments from members and countersigns and delivers receipts, may be served with process, under Kan. Gen. Stat. 1889, par. 4152, where the company has no other officer in the county on whom service can be had. *South Western Mut. Ben. Assn. v. Swenson*, 49 Kan. 449.

Prior to the Louisiana Act of 1877, relating to service on foreign insurance companies, such a company could not be sued by serving process on a local agent in a country town, when it had a general agent and a local board of directors in New Orleans. *Weight v. Liverpool, L. & G. Ins. Co.* 30 La. Ann. 1183.

An assistant manager of agencies for a mutual benefit association, who is sent out into another state to look up testimony in lawsuits and at times to look after local agents, investigate the facts and report to the general manager, cannot be served with process in a state in which he has no office or headquarters, under a statute authorizing suit on an agent employed in the general management of the office business, or an agent in charge of an office or agency in a county other than that in which the principal resides. *Philp v. Covenant Mut. Ben. Assn.* 62 Iowa, 632.

A mere volunteer who takes an application for insurance is not an agent of the company on whom service of process can be made in an action growing out of or connected with the business of an office or agency in a county other than that in which the principal resides. *State Ins. Co. v. Waterhouse*, 78 Iowa, 674.

Service on state officer

A foreign corporation doing business in a state will be presumed to have complied with the law requiring the designation of a person on whom process may be served, and where the designation of an officer of the state is required, service on him is at least prima facie sufficient. *Knapp v. National Mut. F. Ins. Co.* 30 Fed. Rep. 607.

Service on an insurance commissioner, as prescribed by statute, is sufficient as against a foreign insurance company that has appointed him agent

for that purpose. *Osborne v. Shawmut Ins. Co.* 51 Vt. 273.

The provision of Maine Rev. Stat., title 4, chap. 49, § 63, authorizing service of process against a foreign insurance company to be made on the insurance commissioner, applies only to companies doing business in the state. *Hazeltine v. Mississippi Valley F. Ins. Co.* 55 Fed. Rep. 743.

The individual name of the superintendent of insurance need not be stated in a certificate appointing him as the agent of a foreign insurance company for service of process. *Laffin v. Travelers Ins. Co.* 121 N. Y. 713.

The plaintiffs in an action against a foreign insurance company are not deprived of the benefit of the provision authorizing service of process upon the auditor of state because they happen to be the agents of the corporation. *Rehm v. German Ins. & Sav. Inst. of Quincy*, 125 Ind. 125.

But an appointment of the superintendent of insurance as attorney for a foreign corporation for the purpose of service of process sent with an application for permission to do business in the state to insurance agents and brokers, who had proposed to procure the admission of the corporation into the state, is ineffectual, at least for the purpose of an action by such agents for services and expenditures, where the superintendent has refused to admit the company to the state, and the application has been withdrawn. *Richardson v. Western Home Ins. Co.* 20 N. Y. & R. 320.

Insurance effected by correspondence through the mails by a foreign corporation, having no place of business or agent in the state, is held not to constitute "doing business" in the state, within the meaning of a statute authorizing service upon the insurance commissioner for a foreign insurance company. *Romaine v. Union Ins. Co.* 55 Fed. Rep. 751.

Service on the deputy of the secretary of state is held in *Lonkey v. Keyes Silver Min. Co.*, 17 L. R. A. 351, 21 Nev. 312, to be insufficient, under a statute authorizing service on the secretary of state, as agent of the corporation.

But in *South. Pub. Co. v. Fire Asso. of Philadelphia*, 67 Hun. 41, the clerk of the superintendent of insurance, who was specially designated by him for the purpose, was held his representative to receive service for a foreign insurance company, where the superintendent had been appointed to receive and accept service, and himself gave a written admission of service.

Service of summons by mail on the superintendent of insurance of which he makes a written admission was held insufficient by the circuit court of the United States in *Farmer v. National L. Asso. of Hartford, Conn.*, 50 Fed. Rep. 823, 28 Abb. N. C. 421, under New York Laws 1834, chap. 846, § 1, authorizing service on him in a suit against a foreign

Albert Wihlborg, the agent at Big Stone City, was more full and specific as to the nature of the agency, but we will insert only a few paragraphs of the same: "Affiant further states, on oath, that at the instance, and by and with the consent and instructions, of the said Charles Betcher Lumber Company, he inserted in a certain newspaper, the Western Wave, published at said city of Big Stone City, an advertisement of the business of the said Charles Betcher Lumber Company, including the name of affiant as agent thereof; . . . that affiant had full power and authority to hire laborers as he deemed best from time to time, to make contracts with them for the amount of their hire, and to pay the same, and that affiant had power

and authority from the said Charles Betcher Lumber Company to bring suits in the name of said Charles Betcher Lumber Company whenever he deemed the same to be necessary for the protection of the interests of said corporation, to engage attorneys for the prosecution of said suits, and to settle and adjust the claims upon which such suits were based; . . . that affiant at all times during his connection with the said Charles Betcher Lumber Company, at the city of Big Stone City [has been], held out to be, and has been, and has been authorized by the said Charles Betcher Lumber Company to hold himself out to be, the sole agent of the said corporation at the city of Big Stone City, for the general transaction of its business in all its

insurance company which has appointed him its attorney on whom process "may be served" with the same effect as if the company or association existed in this state.

This was in a case removed from a state court. But on the same state of facts and apparently in the identical case (though how it came back into the state court does not appear) it was subsequently held by the general term of the supreme court in New York that written admission of service by the superintendent of insurance in New York, who has been appointed an attorney to receive service for the foreign insurance company, constitutes a sufficient service, although the summons was sent him by mail. *Farmer v. National L. Asso. of Hartford, Conn.* 67 Hun. 119.

The refusal of the insurance commissioner to receive process against a foreign insurance company, which he has power to receive, will not prevent such attempted service from being effectual. *Knapp v. National Mut. F. Ins. Co.* 30 Fed. Rep. 607.

Although a summons in an action in the city court of New York cannot ordinarily be served outside of the city, an implied exception is made in respect to service on a foreign insurance company by the statute authorizing service upon the superintendent of insurance, and he may be served at his office in Albany. *People v. New York City Ct. Justice*, 33 N. Y. S. R. 147.

Summons served on the superintendent of insurance in Kansas in a suit against a foreign insurance company must be directed to the superintendent, but otherwise the same in form as a summons in other cases. *Westchester F. Ins. Co. v. Coverdale*, 43 Kan. 446.

Admission of service.

An agent of a foreign corporation who may be served with process may acknowledge service. *Atlantic & G. R. Co. v. Jacksonville, P. & M. R. Co.* 51 Ga. 458.

Service on a foreign corporation accepted by its attorney, who had been appointed in pursuance of statute as one upon whom process against it might be served, is sufficient. *Wilson v. Martin-Wilson Automatic Fire Alarm Co.* 149 Mass. 24. See also *supra*, *Farmer v. National L. Asso. of Hartford, Conn.*

Return of service.

A return of service on a "state agent" of a foreign insurance company sufficiently shows that he is the person appointed, under Mo. Rev. Stat. 1879, § 6013. *Stone v. Travelers Ins. Co.* 78 Mo. 655.

Where the statute authorizes service upon an agent "in charge of any office or place of business" of the corporation, the return of service must show that the agent served was in charge of such office or place of business. *Klufeke v. Merchants Dispatch Transp. Co.* 3 McCrary, 547.

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The return of service on a person named is insufficient as against a corporation, if it fails to connect him with the corporation. *Willamette Falls Canal Mill & Transp. Co. v. Williams*, 1 Or. 112.

The return of service on "one of the agents" of a foreign insurance company is insufficient to show service on an agent designated by the company to acknowledge or receive service, as the statute contemplates the designation of but one such agent. *Gates v. Tusten*, 39 Mo. 18.

The return of service on a person named as "lawful attorney" of a foreign corporation sufficiently states that he was appointed as attorney to receive process. *Webster Wagon Co. v. Home Ins. Co.* 27 W. Va. 514.

The return of service stating that it was made on a person named "as president" does not sufficiently state the fact as to the character of the person served. *Illinois & M. Teleg. Co. v. Kennedy*, 24 Ill. 319; *Michigan State Ins. Co. v. Abens*, 3 Ill. App. 488.

But the return of service on a person named, with the words "secretary of" the corporation added to his name, sufficiently shows that he is its secretary. *Benwood Iron Works v. Hutchinson*, 101 Pa. 359.

A return of service upon a "ticket agent and general agent" of a railroad company is insufficient, under Ohio Rev. Stat., § 5044, to show service upon "any regular ticket or freight agent." *Tallman v. Baltimore & O. R. Co.* 45 Fed. Rep. 158.

The return of service on an agent of a foreign corporation is not conclusive as to the fact of his agency. *Mineral Point R. Co. v. Keep*, 23 Ill. 2, 74 Am. Dec. 124.

A return of service on a person named, reciting that he is authorized "to acknowledge service" is not insufficient as failing to show that he received it, where the statute authorizes him to "acknowledge or receive service." *Swallow v. Duncan*, 12 Mo. App. 622.

In garnishment cases.

An attorney appointed to receive service in "actions upon any liability or indebtedness incurred or contracted" by the company, under Mich. Comp. Laws, § 1624, cannot be served in a garnishment proceeding. *Moore v. Speed*, 55 Mich. 84.

A resident agent of a foreign mining company, whose duties consist in acting as custodian of property in the county where its mining is done and inspecting work of contractors in that county, may be served in garnishment proceedings against the corporation, under How. Stat. (Mich.) § 8086, as amended in 1889, authorizing service "upon the president . . . the general agent, or such other officer as the corporation may appoint or the court direct." The agent served need not be a general agent. *Shafer Iron Co. v. Stone*, 38 Mich. 464.

Garnishment of the chief or managing agent of a foreign corporation doing business in the state

details; that at no time during affiant's connection with the said Charles Betcher Lumber Company has any person or persons in the state of South Dakota had or executed any authority or superintendency over him in his connection with the business of said corporation at the city of Big Stone City, and that he was, up to and including the said 1st day of December, 1890, the sole agent of said corporation at said Big Stone City, as aforesaid, and not otherwise; that affiant, as such agent, received from said corporation an annual salary." It was also shown that from August 8th to the 17th day of October, 1889, the said Fairchild had an advertisement published in the Grant County Review, a newspaper published in said

county, as follows: "Chas. Betcher Lumber Co. A. J. Fairchild, Manager. Office and Yards, Third Av. and Second Street, Millbank, South Dakota." It was also shown that from May, 1890, to January 15, 1891, the following advertisement was published in the Western Wave, a newspaper published in said Grant county: "Charles Betcher Lumber Company. . . . Albert Wihlborg, Manager." It was also shown that said Wihlborg had filed several mechanics' liens on behalf of said defendant, and as the agent of said company, some of which he had settled and released as such agent.

While the term "managing agent" has no strict legal definition, and it is not easy to

may be upheld, under Missouri statutes, authorizing garnishment of corporations by service on such an agent. The statute applies to foreign corporations. *McAllister v. Pennsylvania Ins. Co.* 28 Mo. 214.

A foreign corporation doing business in the state is subject to garnishment by service on its agent. *Hannibal & St. J. R. Co. v. Crane*, 102 Ill. 249, 40 Am. Rep. 561.

A foreign corporation is subject to garnishment in a state in which it owns property, or in which the cause of action arose. *Brauser v. New England F. Ins. Co.* 21 Wis. 507.

In *Bushel v. Commonwealth Ins. Co.* 15 Serg. & R. 176, a foreign corporation was held subject to garnishment, and it was said that a foreign corporation was not exempt from suit, but that the difficulty as to suits against such corporations arose from the fact that there was no person within the limits of the state on whom process could be served.

A corporation qualified to do business in the state by compliance with its statutes is subject to garnishment there. *Barr v. King*, 96 Pa. 485.

A foreign railroad corporation, accepting the privilege of extending its road into the state on condition of keeping a resident manager or officer on whom process may be served, is subject to garnishment in the state. *Pithlan v. New York & E. R. Co.* 31 Pa. 114.

But in *Dawson v. Campbell*, 2 Miles (Pa.) 171, it was held that a bank incorporated in another state could not be garnished by service on its president while he was passing through the state.

The agent of a foreign insurance company for South Carolina and Florida, who resides in Georgia, in which state the company does no business, cannot be served in Georgia in proceedings of garnishment or attachment. *Schmidlapp v. La Confiance Ins. Co.* 71 Ga. 246.

Serving process of federal court.

A circuit court of the United States may take jurisdiction of a suit brought against a foreign corporation by service of process upon an agent of the company whom it has designated for that purpose as a condition of doing business in the state, if the other requisites of jurisdiction exist, as by such appointment the company consents to be found within the state. *Ex parte Schollenberger*, 96 U. S. 269, 24 L. ed. 853; *Wotherspoon v. Massachusetts Ben. Assn.* 38 Fed. Rep. 623; *Eaton v. St. Louis Shakespear Min. & Smelting Co.* 2 McCrary, 362; *Albright v. Empire Transp. Co.* 18 Alb. L. J. 813, 14 Pat. Off. Gaz. 523; *Knott v. Southern L. Ins. Co.* 2 Woods C. C. 479; *Wilson Packing Co. v. Hunter*, 3 Biss. 429; *Hat-Sweat Mfg. Co. v. Davis Sewing Machine Co.* 31 Fed. Rep. 294; *Gray v. Quicksilver Min. Co.* 21 Fed. Rep. 238; *Hussey Mfg. Co. v. Deering*, 20 Fed. Rep. 795.

The same is true of the appointment of an agent 23 I. R. A.

in the District of Columbia in order to be allowed under act of congress to extend business into that District. *Baltimore & O. R. Co. v. Harris*, 79 U. S. 12 Wall. 66, 20 L. ed. 854.

Ex parte Schollenberger, *supra*, expressly overrules the cases of *Day v. Newark India Rubber Mfg. Co.* 1 Blatchf. 623, *Pomeroy v. New York & N. H. R. Co.* 4 Blatchf. 120, and *Stillwell v. Empire F. Ins. Co.* 4 Cent. L. J. 463, and also overrules, without mentioning it, the case of *Hume v. Pittsburgh, C. & St. L. R. Co.*, 8 Biss. 31.

A corporation whose sole place of business is in New York, where all its directors and corporators reside, although it was organized under the laws of Colorado, may be sued in a circuit court of the United States by service on its officers in New York. *Hunter v. International Railway Imp. Co.* 26 Fed. Rep. 299.

Service of process in a suit in a circuit court of the United States against a foreign corporation, under the provisions of a state statute requiring service on one of certain officers, if any such is within the county, must be made on such an officer if he is within the district or territorial limits of the court's jurisdiction. *Lung Chung v. Northern Pac. R. Co.* 19 Fed. Rep. 264; *Miller v. Norfolk & W. R. Co.* 41 Fed. Rep. 431.

Where the cause of action did not arise within the state so as to authorize service of process upon an agent of a foreign corporation under a state statute, it was held that the corporation was not found within the district for the purpose of suit in a federal court merely because it had a passenger agent there whose sole duty it was to solicit travel, but without authority to sell tickets. *Maxwell v. Atchison, T. & S. F. R. Co.* 34 Fed. Rep. 286.

A foreign corporation not engaged in business in the state is not "found" there for the purpose of service of process of the federal court, because its president is temporarily there on behalf of the corporation. *Good Hope Co. v. Railway Barb Fencing Co.* 22 Fed. Rep. 635; *St. Louis Wire-Mill Co. v. Consolidated Barb Wire Co.* 32 Fed. Rep. 302.

Nor because its officers have run a train into the state for mere exhibition and advertising. *Carpenter v. Westinghouse Air Brake Co.* 32 Fed. Rep. 434.

As to the residence or citizenship of a corporation for the purpose of federal jurisdiction in a state other than that of its creation, see *note* to *Stephens v. St. Louis & S. F. R. Co.* (C. C. W. D. Ark.) 14 L. R. A. 184.

English cases.

Where a foreign corporation is actually carrying on business at an office in that country, it may be sued in an English court, and the service of the writ of summons on the head officer at the place of business in England is good service on the corporation, under Order LX. r. 8. *Haggin v. Comptoir D'Escompte de Paris*, L. J. 167.

formulate or lay down a general rule that will govern all cases, yet we are of the opinion that the facts in this case show that both Fairchild and Wihlborg were "managing agents," within the meaning of the statute. The latest and perhaps the most satisfactory definition of a managing agent is that laid down by the court of appeals of New York in *Tuchband v. Chicago & A. R. Co.*, *supra*. The court says: "(2) Whether Oberg, within the meaning of the Code [*supra*], was the 'managing agent.' The defendant like other railroad corporations, necessarily has not only directors, a treasurer, and secretary, but other officers and agents. By these persons, or, under their direction, by others, the business of the company is conducted. From the very nature of a body corporate, service of process cannot be personal, and at common law it was made by serving it on a proper officer; so that it might come to the knowledge of the company, and then further proceedings by distress. 1 Tidd, Pr. 121. Under the statute [*supra*] the same object was in view; and when the corporation has an office in this state where a substantial portion of its business is transacted by a person designated by itself as a 'general agent,' although followed by words indicating some one department, it may safely be assumed that the object of the statute will be accomplished. It, of course, intends a managing agent in this state; and, where a corporation created by the laws of any other state does business in this state, the person who, as its agent, does that business, should be considered its managing agent; and more especi-

ally should that be so where the foreign corporation has an office or place of business in this state, and when that office is in charge of that person, and he there acts for the corporation. He is there doing business for it, and so manages its business. Such person is, in every sense of the words used in the statute, a managing agent. . . . So far as the cases cited by the appellant hold a contrary doctrine, they cannot be approved. To limit service by requiring the person served, in case of an action against a railroad corporation, to be one who controls 'the general and practical operations and business of running the road,' would so restrict the meaning of the statute as to render it useless. Such an agent would naturally find his occupation and engagement in the state where the road was domiciled or operated; and if his incidental presence in this state subjected him to process, as representing the corporation, it cannot be supposed that the legislature intended to confine the remedy to him alone." The case of *American Exp. Co. v. Johnson*, 17 Ohio St. 641, is directly in point, and the law is so clearly stated that we quote the decision in full: "By the Court. The plaintiff, who was defendant in the original action, is a foreign corporation, and the principal ground of error relied upon is the alleged insufficiency of the service of the original summons. At the time of service the company had a general 'superintendent' for the state, residing at Cleveland, and two or more 'local agents' in the county of Madison, one of whom resided in London, in said county, and kept an office there,

Service may be made on the head officer of a foreign corporation at its place of business in England, under Order IX, r. 8. *Haggin v. Comptoir D'Escompte de Paris*, L. R. 23 Q. B. Div. 519.

The manager of the London agency of a foreign bank, which does banking business in London, may be served for the company as "its head officer." *Lhonneux v. Hong Kong & S. Banking Corp.* L. R. 38 Ch. Div. 446.

But the agent of an American hotel company, which has an English agent and office merely for convenience of dealing with its shares which are mostly owned in England, cannot be served with process for the company as a "head officer." *Babcock v. Cumberland Gap Park Co.* [1898] 1 Ch. 362.

But an American corporation having a branch office and place of business in which it carries on its operations in England, may be sued there by service on its resident agent, distinguishing this case from one in which a foreign corporation has a mere agency, and not a branch office or place of business in England. *Newby v. Van Oppen & Colts Mfg. Co.* L. R. 7 Q. B. 236, 41 L. J. Q. B. 148, 26 L. T. N. S. 164, 20 Week. Rep. 883.

A London agent of a company having head offices in Paris, Bordeaux, and Marseilles, was held not to be the head officer, clerk, secretary, or treasurer of the company, within the meaning of Order IX, r. 8, relating to service on corporations. *Nutter v. Messageries Maritimes de France*, 54 L. J. Q. B. 527.

A foreign corporation is held not to be within the provisions of §§ 18 and 19 of the Common Law Procedure Act of 1852, relating to service on persons out of the jurisdiction. *Ingate v. Austrian Lloyd's Co.* 4 C. B. N. S. 704, 27 L. J. C. P. 823, 4 Jur. N. S. 975.

As the clear language of the rules does not allow Scotchmen or Irishmen domiciled in their native 23 L. R. A.

country to be sued in England, a corporation which has its registered office in Scotland, though it does business also in England, cannot be served in England. *Watkins v. Scottish Imperial Ins. Co.* L. R. 23 Q. B. Div. 285.

So a Scottish accident insurance company registered in Scotland is not suable in England, because of an agency there. *Jones v. Scottish Acc. Ins. Co.* L. R. 17 Q. B. Div. 421, 55 L. J. Q. B. 415, 55 L. T. N. S. 218.

The manager of an English branch of a Scotch corporation cannot be served with process for the company, where the companies act under which the corporation was registered requires summons to be served at its "registered office." *Wood v. Anderson Foundry Co.* 36 Week. Rep. 918.

A Scotch railroad company, whose charter under act of parliament includes the English companies clauses act so far as necessary to permit the operation of a few miles of road in England, was held to have its "principal office" for the purpose of serving process in Scotland only, and that its English incorporation was for a limited purpose and insufficient to justify service in England. *Palmer v. Caledonian R. Co.* [1892] 1 Q. B. 823, reversing [1892] 1 Q. B. 607. This decision seems to overrule that of *Wilson v. Caledonian R. Co.*, 5 Exch. 822, 6 Ry. Cas. 772, 1 L. M. & P. 731, 20 L. J. Exch. 6, 16 Jur. 17, in which service on the secretary of such company while temporarily in London at a meeting of shareholders was held good.

A booking clerk or ticket agent of a Scotch railroad company, which runs for a few miles over an English road cannot be served as the "head officer" of the company, under the Common Law Procedure Act of 1852, § 18, although he is the one officer resident in England. *Mackereth v. Glasgow & W. R. Co.* L. R. 8 Exch. 149. B. A. R.

where he received and forwarded packages for the company, and did all the business of the company usually transacted in such receiving and forwarding offices. Service was made upon the said agent at London alone; and the question is, whether he was the 'managing agent' of the company, within the meaning of the sixty-eighth section of the Code? We think he was such managing agent, and that the service was sufficient." In *McAllister v. Pennsylvania Ins. Co.*, 28 Mo. 214, the court says: "It would seem to be a reasonable interpretation of the language of the twenty-sixth section of the Attachment Law that an agent of a foreign insurance company located here, and doing business under this Law of 1855, should be deemed a 'managing officer' of such corporation for all the purposes of an attachment or garnishment. Such agents do in fact represent the corporation here, although, in the foreign country where the corporation has been chartered and its chief place of business is, there is another chief officer of such corporation. We are not aware of any principle of public policy which could induce the legislature designedly to discriminate between domestic insurance companies and these agencies of foreign insurance companies which they have allowed to transact business here with all the privileges of domestic corporations, so as to exempt the latter from liability to a process to which the former is undoubtedly liable." *White Lake Lumber Co. v. Stone*, 19 Neb. 402. The case of *Tuchband v. Chicago & A. R. Co.*, *supra*, shows that the principles laid down in some of the earlier cases in New York, cited by appellant's counsel, are in effect overruled. As showing what agents are not regarded as managing agents, we quote briefly from *Reddington v. Mariposa Land & Min. Co.*, 19 Hun. 405: "Hence arises the material question upon this appeal, viz., whether Brumagim can be regarded a 'managing agent' of the corporation, within the meaning of said statute, so as to authorize the service upon him of a summons, in order to commence an action in this state. The duties which were assigned to Brumagim by the company were restricted in regard to their nature and extent, and the performance of such duties was subject to the direction and control of the company. We do not perceive that any exercise of independent judgment was confided to him, and he seems to have acted entirely in a subordinate capacity. . . . It is quite clear that the legislature attached importance to the term 'managing agent,' and employed it to distinguish a person who should be invested with general power, involving the exercise of judgment and discretion, from an ordinary agent or employé, who acted in an inferior capacity, and under the direction and control of superior authority, both in regard to the extent of the work and the manner of executing the same. The distinction thus attempted to be drawn we deem reasonable, and in harmony with

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the obvious purpose of the statute in regard to the service of process upon a foreign corporation. It would, indeed, be a great hardship to allow actions to be commenced against foreign corporations by the service of a summons upon an inferior agent or servant, who by reason of ignorance or heedlessness, would be quite likely not to apprehend the purpose of such service, and therefore neglect the same." In the latter case, Brumagim was simply employed in the city of New York as transfer agent of the defendant's stock, and was authorized to collect assessments, and remit them to the company. In the former case, decided by the court of appeals some ten years later, Oberg, the agent, was described in the company's time table as "General Agent, Passenger Department, 261 Broadway, N. Y." He had nothing to do with the freight department, but he occupied an office over which was the sign "Chicago & Alton R. R.," etc., which, as the court says, indicated that the office was a general office, for the transaction of railroad business connected with the defendant's line in that city. It seems to us that the facts in the case at bar clearly bring the agents within the principle of the case in 115 N. Y. Fairchild had charge of the entire business of the defendant at Millbank, paid freights, made contracts, hired and discharged men, and held himself out to the public and advertised himself as manager. He exercised, in all the business of the defendant at that point, discretionary powers and independent judgment. He was subject only to the control of the company, with which he corresponded directly. The defendant had an office and lumber yard entirely under the control of Fairchild, subject, of course, as are all managing agents, to the control of the corporation. The same may be said of Whilborg, at Big Stone City. He occupied a place of business, where the lumber of the defendant was sold and dealt in, under his sole charge; and he held himself out and advertised himself, under instructions of the defendant, as manager. He, too, exercised discretion and an independent judgment in the management of the business, and received, as such manager, an annual salary. Neither of these agents occupied the position of "inferior agents" or "servants," in the ordinary sense in which these terms are used, or were used by the court in the cases quoted from, 19 Hun. We have examined all the authorities cited by counsel for the appellant to which we have access, but they were, in nearly all cases, decided under provisions of statutes so dissimilar to our own, or the agent's powers were so limited as to afford us but little aid in deciding the question before us. Our conclusions are that the learned circuit court was clearly right in denying the appellant's motion to set aside and vacate the judgment rendered in this case, and that the order appealed from should be affirmed.

The order of the Circuit Court is therefore affirmed.

NEBRASKA SUPREME COURT.

OMAHA & REPUBLICAN VALLEY R.
CO., *Plff. in Err.*,

v.

Bernard CLARKE.

(25 Neb. 387.)

***1. In an action against a railway company for negligently, wrongfully, and unlawfully blowing off steam from its engine, whereby the plaintiff's horses were frightened and ran away, breaking his leg, etc.,—Held, that the words employed implied that steam was blown off needlessly and unnecessarily, and, as no objection had been made to the petition by demurrer, it was sufficient after demurrer.**

2. A railway company, in the legitimate transaction of its business, has the right to use steam, and is not liable for the proper and necessary use of the same, even if it result in injury to others, as by frightening horses and causing them to run away. If, however, an engineer, within a city where teams are constantly passing, needlessly and unnecessarily opens the valves of his engine and frightens such horses, and causes them to run away and commit injury, the company will be liable, provided the plaintiff is free from contributory negligence.

3. There being testimony which would warrant the jury in finding a verdict against the defendant, it was properly submitted to them, and the court did not err in refusing to direct a verdict for the defendant.

On rehearing.

***4. In order to render a railroad company liable for injuries caused by horses running away in consequence of fright caused by steam escaping from the valves of an engine, it must appear, not only that the opening of the valves was unnecessary, but also that it was done under such circumstances as to imply a failure to exercise that care which a prudent and reasonable man would exercise under similar circumstances.**

5. While negligence is an inference to be drawn from the facts, the existence of the facts themselves must not be left to conjecture, but facts must be established by evidence which would warrant a reasonable man in inferring negligence.

6. The evidence in this case re-examined, and held insufficient to sustain the verdict.

(January 3, 1892.)

ERROR to the District Court for Madison County to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been

*Headnotes by MAXWELL, Ch. J.

†Rehearing headnotes by LEVINE, C.

NOTE.—The liability of a railroad company in respect to frightening horses by blowing off steam while a locomotive is standing in or near a street is shown by the above case, which though deciding no new principle, illustrates the subject very clearly.

As to liability for blowing whistle even when the signal is required by statute, see *Butler v. Camden & A. R. Co. (N. J.) ante*, 283.

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caused by the defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. J. M. Thurston, W. R. Kelly, and E. P. Smith for plaintiff in error.

Messrs. F. P. Wigton and E. F. Gray for defendant in error.

Maxwell, Ch. J., delivered the opinion of the court:

This action was brought by the defendant in error against the plaintiff in error to recover for personal injuries, and on the trial the jury returned a verdict in his favor for the sum of \$4,835, upon which judgment was rendered. The questions presented are many of them new to this court. The cause of action is set forth in the petition as follows: "That, at the time of the committing of the wrongs and injuries hereinafter complained of, the said defendant was, and still is, a corporation duly incorporated and organized under and pursuant to the laws of the state of Nebraska, and then and ever since owned and operated with its locomotive and cars a railroad leading from Columbus, in Platte county, Neb., to and through the city of Norfolk, in Madison county, Neb. That, at said time of the committing of the wrongs and injuries hereinafter mentioned, said city of Norfolk was a city of the second class, compactly built up, of the population of 5,000 inhabitants, and then had, and long prior and ever since has had, a street named 'Norfolk Avenue,' and also called 'Main Street,' passing through said city in its most central and business portion, and running east and west, which said street then was, long had been, and still is the principal street, roadway, and thoroughfare of said city. That at said time of the committing of the wrongs and injuries hereinafter complained of the defendant's said railroad and its side tracks crossed the said principal street, roadway, and thoroughfare, in the central and most public business portion of said city, running north and south. That, at said time of the committing of the wrongs and injuries hereinafter complained of, the said defendant, by its servants and agents, negligently, wrongfully, and unlawfully stopped, left, and permitted its locomotive engines to stand and remain headed south for a long time, viz., for the space of twenty minutes, on its side track, at the north margin of said principal street, at the point of the said crossing of the same by said railroad and side tracks, and at the same time negligently, wrongfully, and unlawfully omitted and neglected to have at said crossing any flagman or person to give warning. That on the 13th day of August, 1888, the said plaintiff was engaged in hauling dirt, with his team of horses and wagon, upon said principal street, roadway, and thoroughfare in said city, to grade the same and other streets, and necessarily had to pass and repass over the said crossing of the same by said railroad and side tracks with his said team and wagon; and having unloaded his said wagon of dirt in

one of the said streets, and the plaintiff then standing upon the dirt bed or planking floor of his wagon, necessarily, without any negligence, wrong, default, or want of due care on his part, drove his said team of horses and wagon west in the center of said principal street, roadway, and thoroughfare to pass over said crossing, when, as plaintiff had so driven his team upon said crossing, in the center of said principal street in front of said locomotive engine, and about fifty feet from it, so left standing as aforesaid, the said defendant, by its servants in charge of its said locomotive engine, negligently, wrongfully, and unlawfully, suddenly, and without warning to the plaintiff, let off and discharged steam from said locomotive engine, and from the cylinders thereof, in great volume, noise, and hissing sound, by means of which, and the several negligent, wrongful, and unlawful acts, omissions, and defaults of the defendant, its servants and agents, above stated, the said team of horses took fright, became unmanageable, ran away, and threw the plaintiff off from said wagon, down under the same, and ran said wagon, and the wheels thereof, over him, whereby he was greatly injured, his right leg, between the knee and ankle, was crushed, and both bones thereof broken in several places, and mashed into several pieces, the thigh of the same leg was bruised and injured, his left leg and thigh and ankle were bruised and injured, his head was cut and bruised, and he was otherwise bruised and injured, from which injuries he became and was, from thence hitherto, sick, sore, and crippled, and unable to carry on his usual work and business, and from which injuries he has, from thence hitherto, suffered great pain and anguish, and from which injuries he is permanently crippled and injured, and will continue to suffer pain and anguish for the remainder of his life; and that he has necessarily incurred, expended, and paid out for surgical and medical attendance, medicine, and nursing, in endeavoring to be cured of said injuries, the amount of \$325, and that the plaintiff's entire damages in the premises are \$10,000." To this petition the railway company made answer, in substance, denying that its employes wrongfully, negligently, and unlawfully permitted its engine to stand on the track at the point indicated, or that there was no watchman at the crossing named; denies that the plaintiff was driving in the streets, and that the locomotive in question, suddenly, without warning, let off steam from the cylinders; with other special denials, which need not be noticed. It will thus be seen that the question of negligence of the company, and the contributory negligence of the plaintiff below, were fairly presented to the jury.

It is insisted with great earnestness on behalf of the plaintiff in error that the petition fails to allege actionable negligence, and we are referred to the case of *Atchison & N. R. Co. v. Loree*, 4 Neb. 446. In that case it was held, in effect, that there was a failure to allege that the arrangement of material on the cars was unusual and unnecessary in the legitimate transaction of the business of the

company. It was also held, in effect, that the words "scarecrow," "horrid," and "frightful appearance," without stating in what respect, were not sufficient to raise an issue upon, and therefore, taking the whole petition together, it failed to state any dereliction of duty on the part of the company; and in our view the decision is correct. The petition in this case, however, charges that the railway crosses one of the principal streets of the city; that no flagman was placed there; that the plaintiff below, without notice or knowledge of the presence of the engine, drove to the center of the street to pass over the railway, and about fifty feet in front of a locomotive, when the person in charge thereof, "negligently, wrongfully, and unlawfully, suddenly, and without warning to the plaintiff, let off and discharged steam from said locomotive engine, and from the cylinders thereof, in great volume, noise, and hissing sound," etc., by means whereof his horses were frightened and ran away. If steam was blown off "negligently, wrongfully, and unlawfully," then it was unnecessary, and in violation of its duty. Had any question been raised upon the petition, a demurrer should have been interposed, and its legal effect determined, before going to trial. This was not done, but its sufficiency, in effect, is conceded; and, liberally construed, it states a cause of action. In saying this, we are not to be understood as deciding that where the cylinder cocks are opened, and steam necessarily blown off, and horses frightened thereby, the company is liable for the damages. *Hahn v. Southern Pac. R. Co.* 51 Cal. 605; *Beatty v. Central Iowa R. Co.* 58 Iowa, 242; *Abbot v. Kalbus*, 74 Wis. 504. In the case last cited, it is said, in effect, that the evidence did not show that the locomotive made any other than the usual noises, and all the cases cited by the plaintiff in error are to the same effect.

But it is said that, even if the law is as contended by the defendant in error, still there is no evidence in support of the charge.

One George R. Latimer, a civil engineer, called as a witness by the plaintiff below, testified that he was about 600 feet away from the engine at the time of the occurrence; that his attention was called to the scene of the accident by the escape of steam. "Question. You may state what attracted your attention, and what you saw. Answer. Well, I think there was several of us there together, and a remark something like this was made.—I think that the remark was made by some of us,—that that engine was making an unusual amount of noise. That was about the remark. Q. A remark was made by some one in regard to the engine? A. Yes, sir. Q. Did you look up then to see? What did you do when that remark was made? A. I turned around, and saw a team running away. Q. You remember looking around, and seeing a team running away? Whose team was that? A. I learned afterwards that it was Mr. Clarke's team. Q. Bernard Clarke, the plaintiff? A. Yes, sir. Q. Did you see the man that was hurt? A. Yes, sir. Q. State whether or not he was the same man that was driving that team. A. Yes, sir. Q. Now, you may state whether or not that was Bern-

ard Clarke, the plaintiff. A. Yes, sir. Q. It was? A. Yes, sir. Q. Now, as you looked up and saw this team running away, did you see an engine near to the team? A. Yes, sir. Q. Where, as you looked up, was the team and was the engine? Where was the team,—that part of the street or that crossing,—that railroad crossing? A. Well, it was just near the crossing, just on the crossing, or coming to the crossing going west. Q. Just on the crossing, or just coming to the crossing? A. Yes, sir; the team. Q. Now, where was the team with reference to the middle of the street? A. It was very near the middle of the street. Q. Now, where was this engine that you saw, with reference to the team? A. It was north of the street. Q. Now, how near to the north. That street runs east and west? A. Yes, sir. Q. And the railroad tracks run north and south, or nearly so? A. Yes, sir. Q. Now, where was the engine, with reference to the north margin of the street? A. Well, it was very close. It was not very far away. It was not very far from the street." On the cross examination he testified: "Q. Which direction was you looking at that particular time? A. Well, my recollection is that I was facing a little bit northwest. Q. Well now, what were you looking at at the time, or just before, you heard the noise that you have testified to, and what were you doing? A. I was looking at the winding up the tape. Q. You was looking at the tape, was you not? A. Yes, sir. Q. Who was with you there? A. I don't remember who the parties were. Q. Do you remember who they were, or how many there were? A. I think that there was two. Q. Well, now, what do you remember as to buildings on that side of the street where you were, between you and the Elkhorn Valley track and the U. P. tracks? A. Well, my recollection is that there was this building that we have been speaking of,—the Gravel grocery. That is my recollection of it. Q. Do you remember of any other buildings along there? A. I don't call to mind just now. There may have been a house. Q. What grocery did you call that? A. I think it is called the 'Gravel Grocery.' There may have been a residence or two there, also. Q. Well, now, while you was winding up this tape, and paying attention to the tape, what was it that first called your attention to the runaway team? A. Well, I think it was the noise of the steam that I heard. Q. Well, now, did you hear steam any more after you observed the runaway? A. I don't remember of hearing any noise after the team was excited, at that time that I looked around, and saw both of them. Q. You was in the habit of passing up and down that street frequently? A. Yes, sir. Q. And was in the habit of seeing trains and engines passing over this particular street? A. Yes, sir. Q. As you came to and from your place of residence? A. Yes, sir. Q. Had you not frequently heard these engines letting off steam and making a noise? A. Yes, sir. Q. Was there anything particular about this noise which called your attention, more than any ordinary noise that happens as you go up and down that street when you have heard other engines letting off

steam? A. I presume, probably, that I have heard the noise before and since."

Mr. Phillips, a carpenter, testifies that he was at work on the roof of a story and a half building about one block from the engine at the time of the accident, and saw what transpired. "Question. You may state what you saw and heard with reference to the engine at the time that you saw the team. Answer. Well, I heard an unusual amount of steam. That is what attracted my attention. That is the reason that I looked that way,—and the same time I saw the team. Q. State whether you saw the team or not. A. Yes, sir. Q. Where did the steam escape from? A. I think that the engine was going off at the time,—and also escaping from the cylinder cocks. Q. In referring to the cylinder cocks, what part of the engine do you refer to? A. The steam chest. Q. You mean down on the sides of the engine? A. Yes, sir. Whereabouts is that, with reference to the front trucks? A. It is right over the front trucks. Q. And about how high up are these steam cylinders? A. Just about a couple of feet. Q. What kind of a sound was this escaping steam? A. It was a hissing sound, the same as steam escaping. Q. Now, what was it that first attracted your attention, and caused you to look that way? A. It was the noise of the steam. Q. When you first looked up, on your attention being so attracted, was that the time you spoke of as first seeing the team? A. Yes, sir. Q. After you first looked up, and first saw the team, what was the team doing then,—where were they? Just state what the team was doing, and what the driver was doing. State all the facts, as you first looked up. A. Well, the team was running. It had started to run. It was under pretty good headway. Q. Did you notice it when it had started to run? A. No, sir; I did not. Q. It was running when you looked up and saw it? A. Yes, sir. Q. State whether it went faster after you first looked up. A. Yes, sir; it went faster afterwards. Q. Well, now, about the driver. Did you notice that he was holding onto the lines when you first looked up? A. Yes, sir; he was on the wagon, holding onto the lines. Q. Did you notice his position on the wagon? A. I think that he was sitting down. Q. When you first looked up and saw the team, as you spoke of a little while ago, what was its position? I want to locate its position when you first looked up and saw the team. Where was it, with reference to the front of the engine? A. It was between me and the engine, and a little west. Q. Of what? A. When I first looked up to see, it was a little bit west of the engine,—probably the length of the wagon west of the engine. Q. It was a length of the wagon west of the engine, then? A. Yes, sir; when I first noticed it. Q. How long did that engine keep letting off steam from the cylinder cocks, so far as you noticed it at that time? A. I did not pay any more attention to the engine. I kept my eye on the team a while after they passed by where I was at work. Q. Did you notice, by hearing or seeing, whether the steam kept on blowing, or let up? A. I could not say about that."

The plaintiff below testifies: "Answer. I drove carefully up to within about 100 feet of the crossing. Then I tightened on the lines and braced myself up. I did not know but what the engine might move, and I prepared myself for any emergency that might take place, the best I could. Question. Did you still remain standing? Was you standing? A. Yes, sir. Q. That was within about 100 feet of the crossing? A. Yes, sir. Q. What occurred then? A. I went on slowly. I could not tell whether I was trotting or walking. I could not tell which, as I was on the crossing and entering on the track in front of the engine. The engine blew off steam,—a loud, hissing noise. Q. At that time was you still standing up? A. When the engine blew off steam, and the team jumped, I sat down on the wagon, and pulled on the lines. Q. How did you sit down? A. Well, in pulling on the lines, I sat down quietly. Q. Stand up, and just show us how you pulled on the lines and sat down. A. Pulled that way, and sat down (witness showing the jury how he did). Steadied yourself with the lines? A. Yes, sir. Q. You held the lines as tight as you could? Your feet were towards the horses? A. Yes, sir; towards the horses. Q. Just tell us again what point you were at when the team took fright and jumped, with reference to the front of the engine. A. I said that I was entering on the railroad or railway,—just entering on it. My team was just entering the railroad track that the engine was on. Q. When the team jumped? A. Yes, sir. Q. Had you got on past the engine when they first jumped? A. The team was entering the track that the engine was on at the time the noise was made from the engine. Q. Now, this noise from the engine,—state the appearance of any steam that you saw or heard. A. I did not see any steam. I heard a loud, hissing, continuous blowing off of the steam. Q. You say that you did not see it? A. No, sir. Q. Did you have time to look at it? A. No, sir. Q. What did you say that the sound was? A. It was a hissing sound. Q. Now state, with reference to the time the team started to run, whether the steam escaped just before or after. State when you heard the hissing sound, with reference to the time that the horses started. A. Why, the horses started when they heard the noise of the steam,—not until then."

There is considerable other testimony to the same effect. Some of the witnesses on behalf of the company testify that the noise was made by the escape from the pop valve, over which the engineer has no direct control. The question thus became proper to submit to a jury, and, under the state of proof in this case, the court will not disturb their findings. It is unnecessary to review the instructions at length. The principal contention of the plaintiff in error is that there is no liability shown, and in effect, that the jury should have been so instructed; but, in our view, the court below did right in submitting the questions to the jury. The questions of fact seem to have been fairly submitted. That a railway company, when necessary in operating its road, may blow off

steam in the crowded thoroughfare of a city, as well as other places, is undoubted, even if by doing so horses will be frightened, and losses thereby sustained. But it has no right to do so wantonly, or when unnecessary to do so. While the rights of the company are to be respected and protected, other persons also have rights which in like manner must be respected by the company and its employes. The right of the public to use the streets of the city is equally as broad as the right of the company to use its tracks and neither can willfully commit an injury, whereby loss is sustained to the other, without liability. The case of *Andrews v. Mason City Ft. D. R. Co.*, 77 Iowa, 669, is very similar in its facts to this case, and it was held that the company was liable. In that case the plaintiff's team was frightened by the discharge of steam, and ran away and committed injury, for which the plaintiff was permitted to recover. The same rule was applied in *Manchester, S. J. & A. R. Co. v. Fullarton*, 14 C. B. N. S. 54; *Toledo, W. & W. R. Co. v. Harmon*, 47 Ill. 298, 95 Am. Dec. 489; *Nashville & C. R. Co. v. Starnes*, 9 Heisk. 52, 24 Am. Rep. 298,—and is approved by Judge Thompson in his valuable work on Negligence (vol. 1, pp. 351, 352). He says: "Whilst no liability attaches for damages arising from the doing of these acts, under proper circumstances, yet it will be different if they are done without necessity, negligently, or wantonly; for although, as will be shown in a subsequent chapter, the rule obtains in England, and generally in this country, that a master is not answerable in damages for the wanton and malicious acts of his servant, yet enlightened American courts have refused, on cogent grounds of public policy, to extend this immunity to railway corporations, whose servants are intrusted with such extensive means of doing mischief. Accordingly, it has been held that if such a servant, while in charge of the company's engines and machinery, and engaged about its business, willfully perverts such agencies to purposes of wanton mischief, the company must respond in damages. This doctrine has been applied where the person in charge of a railway locomotive frightened a traveler's horse by blowing off steam and sounding the steam whistle with a loud noise, when it was wholly unnecessary." This, we think, is a correct statement of the law.

Upon the whole case, the questions were proper to submit to a jury, and there is no material error in the record, and the judgment is affirmed.

The other Judges concur.

A rehearing was subsequently granted after which on January 16, 1894, *Irvine, C.*, on behalf of the court filed the following opinion:

An opinion in this case, affirming the judgment of the district court, was filed January 8, 1893, and reported in 85 Neb. 867. A rehearing has been granted upon the question of the sufficiency of the evidence, the question being raised upon the proof of negligence upon the part of the plaintiff in error. The statement of facts in the former opinion

suffices, without much by way of addition, for this. The facts alleged for the purpose of establishing negligence on the part of the plaintiff in error may be analyzed as follows:

First. That the railroad company negligently permitted its engine to stand for an undue length of time at the north margin of the street. There is absolutely no evidence tending to establish these averments, and a further consideration of the point is unnecessary.

Second. That the railroad company unlawfully neglected to have any flagman at the street crossing. The duty of a flagman is clearly to keep a lookout, and warn persons using the street of the approach of trains. Necessarily, he cannot have any knowledge of the fact that locomotives receding or standing on the track are about to let off steam, and it is not his duty to warn passers-by of the fact that the steam is about to escape. The presence or absence of a flagman could not in any manner affect the case, and there could be no recovery upon these averments. The jury was expressly so instructed, and the instruction was correct.

Third. That, as the plaintiff below approached the crossing, the railroad company, by its servants, negligently, wrongfully, and unlawfully, suddenly and without warning, let off and discharged steam from the locomotive and from its cylinders in great volume and with noise, whereby plaintiff's horses were frightened, ran away, and threw the plaintiff from his wagon, causing the injuries. It is upon these averments that the judgment must stand, if at all, and the court so treated the case upon the former hearing. The conclusions reached by the court upon the legal questions thus presented were stated in the former opinion as follows: "A railroad company, in the legitimate transaction of its business, has the right to use steam, and is not liable for the proper and necessary use of the same, even if it result in an injury to others, as by frightening horses, and causing them to run away. If, however, an engineer within a city, where teams are constantly passing, needlessly and unnecessarily opens the valves of his engine, and frightens such horses, and causes them to run away and commit injury, the company will be liable, provided the plaintiff is free from contributory negligence." It was also held that the allegations that steam was blown off negligently, wrongfully, and unlawfully implied that such action was unnecessary. We have no doubt that the petition stated a cause of action correctly. It was held, in the former opinion, that the railroad company would be liable for an injury sustained by reason of such an accident, where the horses were frightened by an engineer's negligently permitting steam to escape from his engine; but, where it is said that the company is liable when such act is done unnecessarily, the term "unnecessary" must not be limited in its application to an absolutely unavoidable escape of steam. As said by the court in the syllabus of the former opinion, a railroad company has the right to use steam, and is not liable for the proper and necessary use of the same, even if it results in an injury

to others. The railroad company is in such cases liable for injuries caused by its negligence, and its negligence alone. Its liability is to be measured by the same rules as that of an individual under similar circumstances. It is not for the consequences of every act not strictly necessary that one is responsible. I may drive along a highway for pleasure, no motive except seeking my own amusement inducing me to do so. The fact that I am so driving may cause an injury; but I am not responsible in damages therefor simply because it was not necessary for me to be driving at that place, and at that time, but, if I am to be held responsible, it must be because I failed to exercise reasonable care in the manner of my driving. I may make alterations in my sidewalk and some one passing during the progress of those alterations may be injured; but I cannot be held responsible solely because it was not a matter of necessity for me, at the time, to make such alterations, but, if I am responsible, it must be because I failed to observe reasonable care in making such alterations at the time, and under the circumstances. In other words, an act cannot be determined negligent simply from the fact that it was not strictly necessary; but, in order to constitute negligence, there must either be the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or the doing of something which a prudent and reasonable man would not do. *Forworthy v. Hastings*, 23 Neb. 772. We think, therefore, that the terms "needless" and "unnecessary" in the former opinion are not to receive a strict construction, but are to be taken in connection with the rule that the railroad company was liable only for negligence, and that in the legitimate conduct of its business it had a right to discharge steam from its locomotive, even within the limits of a city, and near traveled thoroughfares, provided, in so doing, it acted as a person of prudence would act under similar circumstances.

Numerous authorities have been cited upon this branch of the case. Many of them are from states where the courts undertake to say, as a matter of law, whether or not a given state of facts constitutes negligence. Where this is done, it is equivalent to saying that the circumstances only are questions of fact, and the inference to be drawn from them a question of law. This is not the rule in this state, but, upon the contrary, the rule here is that even where the facts are undisputed, but where, upon such facts, different reasonable minds may honestly draw different conclusions as to whether or not such facts establish negligence, the inference to be drawn is a question for the jury, and not for the court. *Lincoln v. Gillilan*, 18 Neb. 114; *Chicago, B. & Q. R. Co. v. Landauer*, 36 Neb. 642; *American Waterworks Co. v. Dougherty* (Neb.) 55 N. W. Rep. 1051.

Starting, then, from these premises, let us examine the evidence. The engine, at the time the accident occurred, was engaged in switching. It is not absolutely certain whether, at the time the team took fright,

the engine was at a standstill, or moving very slowly. It had crossed the street, and had either come to a stop, or was moving very slowly away from the street, and was about to stop. There is much evidence to show that steam was escaping from the pop valve, and it was within the ordinary experience of men that steam, in so escaping, makes a loud noise likely to frighten horses. There is also much evidence in regard to these pop valves. They are necessary appliances for the safety of the engine. In fact, they are safety valves so adjusted as to open automatically when the steam reaches a certain pressure, and so permit the escape of steam before the pressure becomes so great as to endanger lives and property. The evidence shows, without contradiction, that an engine, especially when engaged in switching, must necessarily be kept at a steam pressure near the limit, and that while engineers endeavor, so far as possible, to prevent the accumulation of steam to such an extent as to cause the pop valves to open, exigencies are such that it is impossible to absolutely regulate the accumulation of steam, and an escape from the pop valve, necessarily frequently occurs. Had this engine not been provided with a pop valve, or had the pop valve been permitted to get out of repair, whereby an explosion occurred, there can be no doubt that negligence might be inferred from such a state of facts. It follows necessarily that negligence cannot be predicated, under ordinary circumstances, because there was a proper pop valve and because it did perform its proper office by permitting steam to escape in order to prevent a dangerous pressure. Did the evidence show that the engine had been permitted to stand a long time at the crossing, with the steam unnecessarily kept at a high pressure, it may be that such facts, followed by an escape of steam at the pop valve, would justify an inference of negligence. But there is no evidence to show such a state of affairs. On the contrary, the uncontradicted evidence shows that, owing to the varying loads to be hauled by an engine engaged in switching, the steam must be kept at a high pressure; that the quantity of steam to be used from time to time cannot be accurately predetermined; and that the engine, upon this occasion, had not been allowed to stand with the steam unnecessarily kept up, but that it was then engaged in switching, and had either not yet stopped, or had just been brought to a stop, when the accident occurred.

We are thus brought to a consideration of the averment that steam was unnecessarily allowed to escape from the cylinders, and that caused the accident. As to whether or not steam was escaping from the cylinders the evidence is conflicting. Several witnesses testify positively that they saw steam escaping from such a part of the engine that it must have come from the cylinder cocks. The weight of this evidence was subject to criticism. In the first place, these witnesses were all persons whose attention was casually attracted to the affair, and, while it seems it was first drawn to the escaping steam, it was almost instantly diverted to the runaway

horses, and then to the injured plaintiff. The means of observation of these witnesses were therefore limited, and their recollections not entirely to be trusted. In the next place, their testimony upon this point met with direct and positive contradiction. These were questions, however, to be considered by the jury, and the evidence was sufficient to permit a finding that steam did escape from the cylinder cocks. It also appears that, when steam escapes from the cylinder cocks, it is because of a voluntary act on the part of the person in control of the engine in opening the valves. It further appears that these cylinder cocks are provided for the purpose of allowing condensed steam to escape from the cylinders, and that it is necessary to use them for that purpose in order to prevent the cylinder heads from being blown out. When the plaintiff rested his case, the evidence upon this point simply showed that steam was escaping from the cylinder cocks. A motion was then made to direct a verdict for the defendant, which was overruled. We think there was nothing at this stage of the case to permit an inference of negligence. Negligence cannot be inferred from the mere fact that an accident happened. Negligence cannot be inferred from the mere fact that an act was done which it is proper, and even necessary, to do at some times, and under some circumstances. Some evidence must be given of facts and circumstances from which a reasonable man might infer that in doing the act at that particular time, and under these particular circumstances the defendant failed to exercise due care and prudence. There was no evidence on the part of the plaintiff to show at what times and under what circumstances it was necessary to open the cylinder cocks. The evidence produced by the defendant certainly did not strengthen the plaintiff's case. The engineer testified that the cylinder cocks might have been open at the time, but, if they were, there could have been no forcible discharge of steam, under the circumstances existing as to the operation of the engine at that moment. He did not see the plaintiff until after the horses were frightened. His train was moving away from the street, or had practically at that instant come to a stop after moving in that direction, and, if he were observing his duty, his attention would probably be turned away from the street, and not towards it. There is no evidence to show that he willfully or wantonly, within the rule set out in *Thompson on Negligence*, cited in the former opinion, opened the cylinder cocks, and we can find no evidence permitting an inference that a state of facts existed which would have induced a reasonably prudent man to have kept them closed at the time in question. While negligence is an inference to be drawn by the jury from facts established, facts warranting such an inference must be established by evidence, and a jury must not be left to conjecture,—to infer not only negligence, but the existence of facts which would constitute negligence. *Kilpatrick v. Richardson* (Neb.) 56 N. W. Rep. 481. Where one generally has a right to do an act, in order to predicate negligence upon the doing of it in a partic-

ular instance the burden is upon the plaintiff to show such facts and circumstances as rendered the doing of it in that instance negligent. The burden is not upon the defendant to show that the act was not negligent. Such is the case here. The opening of the cylinder cocks was, in general, a proper and reasonable act to be performed. It could only be negligence to open them in a particular instance, when there was no necessity of so do-

ing, and when, in addition to that, the circumstances were such that a reasonably prudent man would not do so. The burden was upon the plaintiff to show that such special circumstances existed, and there is a complete and total failure of evidence upon the point.

Reversed and remanded.

The other Commissioners concur.

KANSAS SUPREME COURT.

Frederick LEWIS *et al.*, *Piffs. in Err.*,

v.

L. D. LEWELLING *et al.*

(.....Kan.....)

*1. Under the constitution of the state, and chapter 142, Sess. Laws 1885, providing "for the organization, government, and compensation of the militia of the state," the governor as commander in chief of the militia, has the power to disband and muster out, at any time, any company of the national guard, comprising the active militia of the state. Such power has always

*Headnotes by HORTON, Ch. J.

NOTE.—*Power of the governor to disband militia.*

Although the above case, as to the power of the governor to disband a company of militia, is based on the constitution and laws of Kansas, and the court cites no similar case, there have been a few cases in which a similar question has been presented. Quite recently it was decided in New York that the military code of the state, Laws 1883, chap. 290, giving authority to the governor as commander in chief to alter, disband, and reorganize companies of uniformed militia "whenever in his judgment the efficiency of the state force will be thereby increased," did not violate the Federal Constitution. *People v. Hill*, 126 N. Y. 497. One ground of the decision was that the officers thus rendered supernumerary were not "removed." The case also decided that if it was necessary to find this power to disband such a company in the federal statutes, it was impliedly given in U. S. Rev. Stat., § 1630, which provides that state militia may be arranged into divisions, brigades, regiments, battalions, and companies, as the legislature of the state may direct.

It has been previously held in the same state that the governor, as commander in chief of the militia, had the power to consolidate companies. *People v. Ewon*, 17 How. Pr. 375.

In Massachusetts also it is decided that the governor, as commander in chief, with the advice and consent of the council, may disband any of the militia companies. *Proctor v. Stone*, 1 Allen, 198; *Opinion of the Justices*, 1 Allen, 197, *note*.

In Maine on the other hand, under the Militia Law of 1882, chap. 45, § 5, providing that on report of the commander of a regiment that the company has refused or neglected to choose officers, the governor, as commander in chief, may disband them, a report by such commander, from which it appears that some of the members of the company did vote for officers, without showing that the persons voted for were intelligible, although it states that they were persons unfit for officers, will not give the governor power to dis-

band the company. *Gould v. Hutchins*, 10 Me. 145.

2. Enlistment in the national guard—the active militia—is not to be construed, upon the part of the state, as a contract; but the state, through the governor, as commander in chief, may put an end to the term of enlistment before it has regularly expired.

3. The provision in section 4, chap. 142, Sess. Laws 1885, authorizing officers to be commissioned for a term of five years, is violative of section 2, art. 15, of the Constitution forbidding the legislature to create any office, the tenure of which is longer than four years. Military officers are within the provisions of the constitution.

4. Where the statute fixes a term of

band the company. *Gould v. Hutchins*, 10 Me. 145.

That the power of the governor as commander in chief to control the militia is beyond the jurisdiction of the civil courts is held in *People v. Scrugham*, 23 Barb. 218, refusing by mandamus to the appointee to review the governor's order relieving one officer from the command of a brigade and appointing another in his place.

And a similar decision as to changing the command of a regiment was made in *State v. Harrison*, 84 Minn. 523, on application for quo warranto.

So in *Mauran v. Smith*, 8 R. I. 192, 5 Am. Rep. 564, mandamus was refused to control the action of the governor as commander in chief in respect to the removal of a militia officer.

A similar question as to the power of a division commander to disband a company of the national guard for mutiny, under N. J. Rev. p. 673, was raised in *State v. Mott*, 46 N. J. L. 323, 50 Am. Rep. 424, in which it was held that the order of the division commander was not reviewable by a civil court.

Somewhat connected with the question above presented is the decision in *North v. Appleton*, 25 Abb. N. C. 389, holding that no request or consent of an enlisted man is necessary to his discharge, under a provision of section 219 of the regulations of the national guard, that when an enlisted man is entitled to a full and honorable discharge, his immediate commander may apply for the discharge.

Whether or not the tenure of office in the militia is established by the constitution is a question suggested, but not decided, in *Opinion of the Justices*, 62 N. H. 706, holding that the statute requiring service for five years, unless sooner discharged, did not limit the right to continue service to five years necessarily, but was a limitation on the right to resign.

As to power of the governor to call out militia for service, see *Chapin v. Farry* (Wash.) 15 L. R. A. 116, and *note*.

R. A. R.

office at such a length of time that it is unconstitutional, the tenure thereof is not declared by law, and the office is held only during the pleasure of the appointing power.

(April 7, 1894.)

ERROR to the District Court for Marion County to review a judgment in favor of defendants in a proceeding brought to enjoin defendants from disbanding a company of the Kansas National Guard. *Affirmed.*

Statement by *Horton, Ch. J.*:

The plaintiffs filed their petition on July 15, 1893, against L. D. Lewelling, as commander in chief of the Kansas national guard, H. H. Artz, as adjutant general of the state, and S. A. Maginnis, as acting colonel of the second regiment of the Kansas national guard, alleging that they (the plaintiffs) were the officers and privates of company G of the second regiment, duly commissioned and enlisted as such; that their term of service, as provided by the terms and conditions of their enlistment, and by the laws of Kansas, is for the period of five years; that the term of their enlistment had not expired in the case of any one of them; that company G was duly organized in pursuance of the laws of the state, and the rules and regulations of the military board thereof, on or about October 1, 1885, and that the company had, during all said time, kept its membership of noncommissioned officers and privates up to a number in excess of forty, and not in excess of the number of sixty; that the company had been provided with arms, uniforms, and other military equipments, as provided by law, and had at all times since its organization conformed to the military laws of the state, and all the rules and regulations of the military board, concerning meetings, drilling, instruction, practice in the manual of arms, and annual muster, and fully complied with all other lawful rules, regulations, and orders promulgated by the military authorities of said state; that neither the company nor any of its members had been guilty of any neglect of duty, breach of discipline, disobedience of orders, or violation of law, nor of any conduct which would authorize their discharge or dismissal from the military service of the state before the expiration of their term of enlistment; that, notwithstanding the premises, L. D. Lewelling, as commander in chief of the national guard, without any lawful authority, and in excess of his power as such officer, had issued an order directing that all the officers and enlisted men of the company be mustered out of the military service of the state, and discharged therefrom, on July 15, 1893, at 4 o'clock P. M., and that the company then surrender to a mustering officer all its arms, equipments, and other military property of the state in its possession, and the said H. H. Artz, as adjutant general of the state, was proceeding to, and would, unless restrained by the court, carry out the order at the time, and that he had for that purpose detailed S. A. Maginnis as a mustering officer to meet the company at its armory at Marion, in this state, on the said day and hour, to muster it out, and discharge each of the plaintiffs from the military service of the state, all of which orders and acts are and will be

illegal, and without the authority of any law whatever, and in violation of the rights and privileges of the company, and each of its members, and for which threatened wrongs and injuries the plaintiffs are wholly remediless at law, and without the means of protection from the threatened injuries and wrongs, except by and through the orders, injunctions, and processes of the court. The petition closed with a prayer for an order restraining the defendants, and each of them, from mustering out the company. To this a demurrer was filed by all the defendants, as follows: "And now come said defendants, and severally demur to the petition filed against them herein, for the reason that it appears on the face of said petition—First, that this court has no jurisdiction of the persons of these defendants, nor of the person of either of them, nor of the subject of the action: second, that the plaintiffs have no legal capacity to sue; third, that there is a defect of parties plaintiff and defendant; fourth, that several causes of action are improperly joined; fifth, that the petition does not state facts sufficient to constitute a cause of action." On September 29, 1893, the demurrer was submitted to the court, after argument, and sustained. The plaintiffs excepted, and bring the case here.

Messrs. Keller & Dean, for plaintiffs in error:

L. D. Lewelling as commander in chief and H. H. Artz as adjutant general are subject to the restraining process of the courts to prevent them from committing an unlawful and wrongful act.

Sedgw. Stat. & Const. L. chap. 1.

The governor is not the sole judge of what his official duties are.

Re Gunn, 19 L. R. A. 519, 50 Kan. 155; *Burnham v. Morrissey*, 14 Gray, 226, 74 Am. Dec. 676.

The demurrer concedes that the defendants were proceeding to disband a large portion of the national guard without any sufficient cause, and without warrant of law; that the defendants had no power to muster out of the service company G, under the circumstances disclosed in the petition. If we are correct in this, then the judicial branch of the government has jurisdiction to restrain the defendants from the commission of the threatened wrong.

Louisiana Board of Liquidation v. McComb, 93 U. S. 541, 23 L. ed. 628; *Noble v. Union River Logging R. Co.* 147 U. S. 165, 37 L. ed. 128.

The legislature has, in section 18, specifically provided under what circumstances the commander-in-chief may increase the active military force, and when he may decrease it. Does it not logically follow that the intention was to withhold the power to increase or decrease the force under any other circumstances and conditions?

Under our system of government, no officer is placed above the restraining authority of the law, which is truly said to be universal in its behest—all paying it homage, the least as feeling its care, and the greatest as not exempt from its power.

State v. Chase, 5 Ohio St. 534; *Greene v. Mumford*, 5 R. I. 472, 73 Am. Dec. 79.

Meers, Frank Doster and G. C. Clemens, for defendants in error:

In the absence of a constitutional provision casting upon the legislature the burden of providing for the organization and discipline of the militia, it would rest upon the executive, because historically it always rested upon him.

1 Bl. Com. 262; *Mauran v. Smith*, 8 R. I. 192, 5 Am. Dec. 564.

Unless the legislature discharges its duties in the premises, under the grant of power to it, they are to be discharged by the executive, because the power to do so inheres in the commander in chief, and must of necessity be exercised by him.

That the power to muster out these troops, in the absence of some restraining statute, when the exigencies of the service permit, is a power inherent in the commander in chief, is a proposition too plain to require argument. This being the case, suppose the statute does take the form of an enabling act; suppose it does, in words, confer power to muster out and discharge troops. The mere phraseology of the statute will not avail because the "expression of those things which are tacitly implied operates nothing."

Dwarris, Stat. 17th rule.

Suppose it be claimed that the governor does not intend to replace the discharged company with another, to keep the alleged complement full. Shall he be compelled to come into court to establish the integrity of his contemplated official act, and submit his personal veracity to the countervailing testimony of incredulous witnesses? This court has even decided that it will not hear evidence that a railroad company does not intend to discharge its corporate obligations.

State v. Martin, 51 Kan. 462.

It is said that the secret intent is to reorganize the militia upon a partisan basis, and to secure its subservency to partisan ends. Shall the purity of motive of the head of a co-ordinate department in respect to his constitutional acts be made a subject of crimination and countercharge in the courts?

The uniform practice of the commander in chief, attested by the records of the adjutant general, has been to muster out military companies without hindrance, let, or reason. While the specific instances of its practice may not be judicially noticed, yet the general and uniform exercise of the authority by a co-ordinate department of the government will be so noticed.

Lanfear v. Meitner, 18 La. Ann. 497, and note to the same case, 89 Am. Dec. 658.

Enlistment in the army is a contract, and is to be construed, as far as the soldier is concerned, according to the principles which regulate contracts generally. The government, however, is not bound by the conditions of the contract, although such conditions are imposed by itself; thus, it may reduce the pay which was a part of the original consideration, or it may put an end to the term of enlistment before it has regularly expired.

15 Am. & Eng. Encyclop. Law, 899, and cases cited.

The statute authorizing commissions for the period of five years is void, because opposed to the tenure-of-office clause of the constitution, 23 L. R. A.

which prohibits the creation of any office to be held for a longer period than four years.

The tenure of these offices is, therefore, not declared by law; and all military officers hold their commissions at the pleasure of the governor who appointed them.

People v. Perry, 79 Cal. 105; *Blake v. United States*, 108 U. S. 227-231, 26 L. ed. 463-464.

Upon the general subject of the invasion by the judiciary of the jurisdiction of other co-ordinate powers,—

See *Hawkins v. The Governor*, 1 Ark. 570, 33 Am. Dec. 361; *State v. Harrison*, 34 Minn. 526; *Mauran v. Smith*, *supra*; *Hartranft's App.* 85 Pa. 433, 27 Am. Rep. 667.

Horton, Ch. J., delivered the opinion of the court:

The question for our determination in this case is whether the governor of the state, as commander in chief of the national guard, comprising the active militia of the state, has the power to disband or muster out a company of the guard before the expiration of the term of its enlistment, except for insubordination, breach of discipline, insufficiency of service, or other like cause. The constitution ordains that "the governor shall be commander in chief, and shall have power to call out the militia to execute the laws, to suppress insurrection, and to repel invasion; that the officers of the militia shall be elected or appointed, and commissioned in such manner as may be provided by law; that the legislature shall provide for organizing, equipping and disciplining the militia in such manner as it shall deem expedient not incompatible with the laws of the United States." Sections 2-4, art. 8, of the Constitution. Chapter 142, Sess. Laws 1885, provides "for the organization, government and compensation of the militia of the state." Gen. Stat. 1889, pars. 8762, 8798. Section 5 declares that "in time of peace, the national guard shall consist of not more than thirty companies of infantry, two companies of cavalry, and one battery of light artillery." Section 8 provides that the governor of the state shall be the commander-in-chief of the militia, with power to appoint certain military officers. And section 7 provides that the major general, four brigadier-generals, and the adjutant-general, appointed by the governor, shall be a military board; and section 8, in prescribing the duties of this board, constitutes it an advisory body to the commander-in-chief on all the military interests of the state. The board is given authority to prepare and promulgate the necessary provisions, rules, and regulations for "the organization, government, and compensation of the national guard;" such provisions, rules, and regulations to have force when approved by the governor, as commander in chief. The board has also the power, with the consent of the governor, to make any changes in the military organization of the state that may be necessary to conform the same to the laws of the United States.

The statute does not make it compulsory upon the governor or the military board to keep the military force of the state up to its maximum of thirty-three companies. We have recently had occasion in the case of *Re*

Sanders (just decided) 36 Pac. Rep. 348, to construe the words "organization" and "management" or "government." Without unnecessarily repeating what was said in that case, we are of the opinion that the power to organize and govern the national guard of the state, conferred upon the governor, as commander-in-chief of the militia, by the constitution and the statute, gives him the authority to recruit or fill up the national guard or active militia to the maximum limit permitted by the statute, and also to disband or muster out, at any time, any company thereof. Such power has been uniformly exercised by the governors of the state ever since the adoption of chapter 142. On October 1, 1887, six companies of the guard were disbanded and mustered out of the service upon the written order of Gov. John A. Martin, as commander-in-chief, signed by A. B. Campbell, as adjutant-general. In 1889 and 1890 Gov. Humphrey found it necessary, from various causes, to muster out of the service ten companies. They filled their places with new companies. In 1890-91 the same governor mustered out eight companies. Other instances of disbanding of companies of the guard might be mentioned. Report of Adjutant-General, State Pub. Docs. 1887-88, vol. 1, p. 29; Id., Pub. Docs. 1889-90, vol. 1, p. 5; Id., Pub. Docs. 1891-92, vol. 1, p. 81.

The general and uniform exercise of the authority by a co-ordinate department of the government, under any particular statute, is entitled to some consideration in the interpretation of its provisions, if it is at all doubtful in its terms.

Section 4 of chapter 142, providing that enlistments in the national guard shall be for the term of five years, might limit the power of the governor, as commander-in-chief, to disband or muster out any company before the expiration of five years, if enlistments in the militia were a contract to be considered according to the principles which regulate contracts gener-

ally. But the state is not bound by the terms of an enlistment, and may put an end to the term before it has regularly expired. 15 Am. & Eng. Encyclop. Law, 399; *United States v. Cottingham*, 1 Rob. (Va.) 615, 40 Am. Dec. 710.

The provision in section 4 permitting officers to be commissioned for a term of five years is violative of section 2, art. 15, forbidding the legislature to create any office, the tenure of which is longer than four years. Military officers are within the provisions of the constitution. Where the statute fixes a term of office at such a length of time that it is unconstitutional, the tenure thereof is not declared, and therefore the office is held only during the pleasure of the appointing power. *People v. Perry*, 79 Cal. 105.

Various other questions were discussed upon the hearing of this case,—among others, the alleged unconstitutionality of the provisions of chapter 142, upon the ground that said chapter did not provide for organizing, keeping, or disciplining all of the militia, but limited its operation, in times of peace, to thirty-three companies only. As the conclusion we have reached permits the disbandment of any company of the national guard by the governor, as commander-in-chief of the militia, and affirms the judgment, it is unnecessary to pass upon the other questions presented. If the statute, with the interpretation given to it by this court, is unwise or dangerous in any of its provisions, the legislature, which will convene in a few months, may, within the terms of the constitution, modify, amend, or repeal it, or any part thereof, as seems best to them, as the representatives of all the people. As a general rule the constitutionality of a whole statute ought not to be passed upon, unless directly involved in the final disposition of the case.

The judgment of the District Court will be affirmed.

All the Justices concur.

MINNESOTA SUPREME COURT.

John W. DAY *et al.*, *Appts.*,
v.

H. C. AKELEY LUMBER CO., *Repts.*

(.....Minn.....)

*1. One who employs the element of fire for any purpose under circumstances which render it especially dangerous to others is held to the exercise of more care and caution than is one who employs the same element for a less dangerous purpose. Yet the degree of care is the same in either case. Reasonable care, or,

*Headnotes by COLLINS, J.

NOTE.—The question of the *degrees* of care necessary in the use of fire is discussed with more than usual directness in the above case and the conclusion is that which is becoming established by modern cases concerning negligence.

As to liability for setting fires which spread to property of others, see *note* to *Brown v. Brooks* (Wis.) 21 L. R. A. 265.

23 L. R. A.

what is the same thing, ordinary care, only, is required; and this must be proportionate to the risks to be apprehended and guarded against.

2. When fire used for manufacturing purposes is communicated to and destroys property belonging to another, negligence or misconduct on the part of the manufacturer must be shown in order to recover damages sustained by the person whose property has been destroyed.

3. Various specifications of error considered and disposed of.

(September 7, 1896.)

APPEAL by plaintiff from an order of the District Court for Hennepin County refusing to grant a new trial, after verdict in favor of defendant, in an action brought to recover the value of certain property destroyed by fire alleged to have been set out by defendant's negligence. *Affirmed.*

The following is the order rendered by the lower court:

"Plaintiffs' motion for a new trial of the above-entitled action was brought on for hearing at special term, January 28, 1898, and both parties appeared by counsel. The ground of motion is alleged errors in law, occurring at the trial, and excepted to by plaintiffs.

"1. It is urged that the court erred in excluding the testimony offered to show that repairs were made by defendant on its burner a few days after the fire. The ruling of the court in this offer was in accordance with the rule laid by our supreme court in *Morse v. Minneapolis & St. L. R. Co.*, 80 Minn. 465. That case is not only a binding authority, but its reasoning seems conclusive and unassailable. The plaintiffs were permitted to show the condition of the burner at this time by the many witnesses who examined it. The mere fact that the defendant caused repairs to be made was the only fact excluded.

"2. The question asked of the witness W. H. H. Day as to his opinion about the effect upon the quantity of sparks and coals emitted from the Akeley smokestack and burner which would result from turning in the exhaust steam was rightly excluded. The question called for the opinion and conjecture of the witness. It was entirely different from the questions afterwards put to the witness Hume as to his observations where that course was taken with other smokestacks and burners.

"3. The evidence as to the experience and competency of Joseph Turnbull, who had been employed by the defendant to construct its burner, was competent. In the construction of such an appliance, it is some evidence of care that defendant had it done under the charge and supervision of a workman of experience and reputed skill in the construction of such appliances.

"4. It was competent, on the question of ordinary care, to compare the burner, as to its material and construction, with other burners in use here and elsewhere in connection with steam sawmills. The kind of danger to be guarded against is similar in them all. The degree of danger may differ, depending upon circumstances and surroundings, calling for greater precaution, perhaps, in one case than another; and, therefore, any differences in the circumstances and surroundings may be shown and considered by the jury. But whether or not ordinary care has been used in a particular case can be fairly determined only after comparing the care taken in that case with the care taken in other like cases, and having regard for any differences in risk or danger to be apprehended from differences in situation, surroundings, or other circumstances.

"5. As to the alleged error in respect to a statement of fact to the jury in the charge of the court, the jury were cautioned and instructed at the outset that 'all questions of fact are for the jury to determine, and it is for the jury to remember and apply the evidence given by the different witnesses upon the trial; . . . and if in what I shall

say to you I should refer to any of the testimony either generally or as to any of the witnesses, for the purpose of applying what I shall say, it will be merely stating my remembrance, and, if that differs from yours in any respect, you will take your own recollection, and not my statement, as to the testimony of any of the witnesses or any of the evidence given in the case.' With such instruction the jury could hardly have been misled, even had the court failed to remember accurately, and therefore misstated some item of the evidence. But there was no such lapse of memory or misstatement. The part of the charge objected to is that portion where, after referring to the testimony about the notice given to Mr. Akeley and Mr. Farr as to previous fires, the court added: 'I think the testimony does not show that any specific defect was pointed out to those gentlemen by Mr. Day or Mr. Robinson or any one else. But the general fact was stated to them that the property was endangered by the burner. I think that there is no testimony that any specific defect, either in the stacks or in the burners, was mentioned or pointed out. The testimony which plaintiffs claim is ignored by this portion of the charge is that of the witness W. H. H. Day, where he speaks of being near the Akeley burner shortly before the fire, and seeing and sending for Mr. Farr. He proceeded: 'When he came down where we were, the fuel burner—the top of it—was all of a blaze; a flame of fire going out through it, and I called his attention to it. He didn't say much about it. I says: "Mr. Farr, that smokestack there, that fuel burner, is in bad shape, and something ought to be done to it." He said it was not in bad shape at all. I says: "There is holes through it there. You can see it; you can see it with the naked eye." He said there wasn't any. I says: "Well, yesterday we had seven fires in our yard, and you didn't pay any attention to it," etc. The calling of Farr's attention to the fact that a blaze was passing out through the top of the burner was not calling his attention to any specific defect. Blaze, as well as smoke, would pass through meshes fine enough to arrest sparks. Saying it was in 'bad shape' did not call attention to any specific defect; neither did the statement that there were holes through it that could be seen with the naked eye. This was a mere general assertion of defective condition by having holes. It was not a mentioning, pointing out, or calling attention to any specific defect,—any particular hole or holes. The testimony was just this: that Day told Farr that the top of the fuel burner had holes in it that could be seen with the naked eye, but did not mention or point out any in particular, and Farr denied that it had any holes. To amount to notice, the particular defect, if any existed, should have been pointed out, or mentioned in such a way as to describe and designate it, and thus had attention directed to it. The statement to the jury was therefore strictly accurate. The motion for new trial is therefore denied."

Messrs. Koon, Wheelan & Bennett and R. W. Barger, for appellant:

If defendant erected, near to the lumber-yards of said plaintiffs, a refuse burner, which, on account of its nature, use, and operation and essential character was dangerous, and necessarily tended to the damage of the property of others in that immediate vicinity, and fire escaped therefrom and was carried by the wind into and upon the lumberyard of said plaintiffs, and there, by igniting, burned and consumed their said lumber piled thereon, defendant is liable to the plaintiffs in this action for the value of lumber so destroyed.

Lawton v. Giles, 90 N. C. 874; *Aycock v. Raleigh & A. A. L. Railroad*, 89 N. C. 331; *Ellis v. Portsmouth & R. R. Co.* 24 N. C. 138; 1 Shearm. & Redf. Neg. § 59; *Cahill v. Eastman*, 18 Minn. 324, 10 Am. Rep. 184; *Mullen v. St. Johns*, 57 N. Y. 567, 15 Am. Rep. 530; *Kearney v. London, B. & S. Coast R. Co. L. R.* 5 Q. B. 411; *Fletcher v. Rylands*, L. R. 1 Exch. 265; 1 Thomp. Neg. 2; *Fried v. New York Cent. R. Co.* 32 N. Y. 339.

Testimony offered by plaintiffs to show that immediately after the fire occurred which destroyed plaintiff's property, the defendant shut down its mill, stopped its burner, and at once, among other things, under direction of the building inspector of the city of Minneapolis, repaired its burner by closing the holes therein, and also placing a bell-shaped netting on its smoke-stacks, covering them completely, was admissible, not to prove an admission by defendant of its negligence, but to prove affirmatively that the holes were actually there in that burner, and that they were dangerous.

Such evidence was held proper in this court in—

O'Leary v. Mankato, 21 Minn. 65; *Phelps v. Mankato*, 23 Minn. 276; *Kelly v. Southern Minn. R. Co.* 28 Minn. 98; *Pennsylvania R. Co. v. Henderson*, 51 Pa. 320; *Westchester & P. R. Co. v. McElwree*, 67 Pa. 814; *McKee v. Bidwell*, 74 Pa. 218; *Morse v. Minneapolis & St. L. R. Co.* 30 Minn. 465; *Dale v. Delaware, L. & W. R. Co.* 73 N. Y. 468; *Westfall v. Erie R. Co.* 5 Hun, 75; *Harvey v. New York Cent. & H. R. R. Co.* 19 Hun, 556; *Brehn v. Great Western R. Co.* 34 Barb. 256; *St. Joseph & D. O. R. Co. v. Case*, 11 Kan. 47; *Atchison, T. & S. F. R. Co. v. Retford*, 18 Kan. 249; *Emporia v. Schmidling*, 33 Kan. 485; *Kansas Pac. R. Co. v. Miller*, 2 Colo. 442; *Butcher v. Vaca Valley & C. L. R. Co.* 67 Cal. 518, 23 Am. & Eng. R. R. Cas. 357.

Plaintiff knew that this burner was essentially and intrinsically a dangerous thing. It knew that a large amount of dry and inflammable property was exposed to danger therefrom—knew the situation and all surrounding circumstances, and knew that fire was constantly escaping from the burner. Under these facts it was bound to make the burner absolutely safe, or cease its use, or stand liable for all damages done thereby.

Lawton v. Giles, 90 N. C. 874; *Hoyt v. Jeffers*, 30 Mich. 181; *Kendrick v. Towle*, 60 Mich. 363; *Parker v. Boston & H. S. B. Co.* 109 Mass. 449.

Messrs. Kellogg & Laybourn and J. M. Shaw, for respondent:

It is impossible to say that the use which defendant was making of his premises was not an ordinary and lawful use; it was not extraordinary in any sense. It is also impossible to say that the result which accrued, if it did accrue,—the burning of the plaintiff's lumber yard,—was a necessary or inevitable result of such use.

Loose v. Buchanan, 51 N. Y. 476, 10 Am. Rep. 623.

Negligence or misconduct is the gist of the action, and this must be proven.

Batchelder v. Heagan, 18 Me. 32; *Clark v. Foot*, 8 Johns. 421; *Read v. Morse*, 34 Wis. 315; *Mahoney v. St. Paul, M. & M. R. Co.* 35 Minn. 361.

A careful setting and keeping of fires in one's dwelling house, field, or elsewhere, for a useful purpose, creates no liability to another injured by its spreading through some accident, not reasonably to be anticipated. But a fire set or looked after negligently, if by reason of such negligence it communicates to a neighbor's property and destroys it, will give the neighbor an action for damages.

Bishop, Noncont. L. § 833; McNally v. Colwell, 91 Mich. 527; *Atkinson v. Goodrich Transp. Co.* 69 Wis. 5.

If the defendant used ordinary and proper care in looking out for such things as were liable to occur from appliances of this kind, and did not discover or have notice of them, and an accident should occur, the defendant would not be liable.

Read v. Morse, 34 Wis. 318.

If the defendant was bound in the construction of this burner, to use no more than ordinary diligence, and to do no more than to adopt and put in use the most approved and tested safeguards in ordinary use in connection therewith, it was proper for it to show that it had fulfilled that duty in the given case, and it could not be shown in any other way than by bringing its appliance in comparison with others which had been before and were in ordinary use for the purpose for which defendant was using the same.

Montgomery v. Muskrone Boom Co. 88 Mich. 633; *Nitro-Glycerine Case*, 82 U. S. 15 Wall. 524, 21 L. ed. 206, and especially *Daly v. Chicago, M. & St. P. R. Co.* 43 Minn. 319, and cases cited.

Collins, J., delivered the opinion of the court:

Plaintiffs J. W. Day & Co. and defendant corporation were extensively engaged in the manufacture of lumber at Minneapolis. Their plants, operated by steam, and their lumber yards, were separated by a street only, and on the morning of May 21, 1891, fire destroyed a large quantity of lumber belonging to and piled in the yards of J. W. Day & Co. This lumber was insured, and the insurance companies, having paid the amounts due on their respective policies, are made coplaintiffs herein, the action having been brought to recover the value of the destroyed lumber. It is alleged in the complaint that the fire was caused by defendant's carelessness and negligence in the operation of its mill, and particularly that it allowed a sawdust burner, used in connection, to become so out of repair that large

quantities of coals and burning brands escaped through the netting on top, and set the fire in question. This, as might be presumed, was the main question of fact on the trial of the action; but, as the action comes before us on a bill of exceptions, not on a settled case, we are not to review the evidence or to pass upon appellants' forty-ninth specification of error.

There have been fifty assignments of error made by appellants, very few of which need be referred to. The others are without merit. Taking those which require mention in the order of discussion by appellants' counsel, we first come to an instruction to the jury requested by plaintiffs which the trial court declined to give. This request eliminated from the case any consideration by the jury of defendant's alleged negligence, and planted the plaintiffs' right to recover upon grounds independent of such negligence. The fire used by defendant was for manufacturing purposes, and, if used with proper safeguards and without negligence, no liability attached for damages caused by its escape. Any other rule would make the person who uses fire for manufacturing or mechanical or propelling purposes, or even for heating, an insurer against accidents. The element of negligence—an essential element in pleadings, as well as in proofs in cases of this nature—cannot be ignored when the cause is given to the jury. Counsel have confounded the question they argue with one relating to the burden of proof when damage is caused by fire. Doubtless, one who employs the element of fire for manufacturing or mechanical or propelling purposes, or who employs it for any purpose under circumstances which render it especially dangerous to others, is held to the exercise of more care and caution than is one who employs the same element for a less dangerous purpose. Yet the degree of care is the same, for in either case reasonable care, or, what is the same thing, ordinary care, only, is required. *Read v. Morse*, 34 Wis. 818; *Atkinson v. Goodrich Transp. Co.* 69 Wis. 5. Reasonable care is all that is required, but it must be proportionate to the risks to be apprehended and guarded against. *Hoy v. Chicago, M. & St. P. R. Co.* 46 Minn. 269. To state it briefly, negligence or misconduct is the gist of the action, and it must be proven.

All of the questions to witnesses covered by assignments of error from one to eight, inclusive, relate to the exclusion of testimony tending to show that, immediately after the fire, defendant, under the direction of the city building inspector, repaired the top of its sawdust burner. In the case of *Morse v. Minneapolis & St. L. R. Co.*, 80 Minn. 465, this court, after twice holding to the contrary, concluded that evidence of this character was inadmissible and its previous rulings wrong on principle. Several cases were cited in support of the changed position, and we are satisfied that the rule last adopted is the correct one, without regard to the time when the repairs are made. Scarcely a court in the country now holds that evidence of that kind should be admitted. We cannot agree with appellants' counsel that this tes-

timony was offered for the purpose of showing that there were holes in the netting of the burner when the fire occurred, for their argument in support of their assignments of error clearly repudiates the assertion.

What we have said in respect to the request to charge which eliminated from the consideration of the jury all question of negligence on defendant's part, as an essential element in the case, disposes of several alleged errors in the charge, and the balance have been so clearly shown to be unfounded in the opinion of the learned court below when refusing plaintiffs' motion for a new trial that we can add nothing to what was there said. This last remark is applicable also to the fourth specification of error, relating to the exclusion of an answer to a question asked one of plaintiffs' witnesses.

Evidence was admitted, over plaintiffs' objection, tending to show that defendant's burner was as safe as any burner used or known. In the adoption and use of such appliances as a refuse burner, parties are not held to adopt and use appliances which are perfect. The defendant was bound to exercise care proportionate to the risks to be apprehended. It could do no more than to adopt and use the most approved and tested safeguards, and that it did was a fact perfectly proper to be shown. This could be done by comparing the burner it used with those elsewhere used in connection with sawmills, and it was not necessary to show that the situation and circumstances were precisely alike in all cases. As was said by the trial court, the kind of danger to be guarded against is the same, but the degree may differ, depending upon surroundings. The differences in situation, surroundings, and circumstances are all proper to be shown and considered when determining whether, in a given case, ordinary care has been observed in providing a burner for the consumption of refuse matter at a sawmill.

The burner in question was built under the direction of one Turnbull, who had large experience in this work, it was claimed. One of the members of defendant corporation was asked, "What is and what had been Turnbull's reputation as to competency in this line of business?" We see nothing wrong in the ruling of the court whereby an answer to this question was allowed. It was proper for defendant corporation to show that, when erecting this burner, they employed a competent man, one of good reputation as to competency for the work. It tended to show the degree of care used by defendant.

It appears that, shortly before the fire, one of the firm of J. W. Day & Co. complained to Mr. Akeley, of defendant corporation, in respect to the condition of the netting on top of the burner, and that Akeley immediately sent for Turnbull. When testifying as to this, the witness Akeley was asked to state what he told Turnbull he wanted done when the latter came to the mill. Akeley was permitted to answer, in effect, that he directed him to examine the burner, and, if anything could be done to make it safer, to do it. It is contended that the court below erred when receiving this answer, and again in refusing

to strike it out. The evidence was proper, for it showed that a competent man was called, and told to do what plaintiffs claimed should be done. It tended to prove that defendant was not negligent in its efforts to

make the burner safe, when attention had been called to its condition. We discover no error in the record.

Order affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

Charles DILLINGHAM, Receiver of the
Huston & Texas Central R. Co., *Appt.*,

v.

Leona P. HAWK.

(60 Fed. Rep. 494.)

The judgment of a state court against a receiver appointed by a federal court is conclusive as to the existence and amount of the claim, but the time and manner of its payment must be controlled by the court appointing the receiver.

(February 27, 1894.)

A PPEAL by defendant from a judgment of the Circuit Court of the United States for the Eastern District of Texas in favor of plaintiff in a proceeding brought to have a judgment recovered against the receiver in a state court paid out of the estate in his hands. *Affirmed.*

The facts are stated in the opinion.

Argued before Pardee, *Circuit Judge*, and Locke and Toulmin, *District Judges*.

Mr. F. M. Etheridge, for appellant:

It is conceded that appellee had, under the third section of the Act of Congress of March 3, 1887, the right to sue appellant in the district court of Navarro county, Texas, without leave of the court appointing him receiver (*Texas & P. R. Co. v. Cox*, 145 U. S. 593, 36 L. ed. 829); but it is contended that the judgment obtained in such suit is not conclusive upon, but only advisory to, the chancellor.

A judgment obtained against a receiver in a suit at law, instituted by leave, whether such leave is granted by the court appointing the receiver, or is conferred by statute, is but the trial of an issue out of chancery. Granting leave to sue at law is but another method of directing an issue to be tried by a jury in a court of common law, and the verdict obtained in the one instance is not more conclusive than in the other.

2 Dan. Ch. Pl. & Pr. 5th ed. p. 1071.

The verdict of a jury upon an issue out of chancery is only advisory and never conclusive upon the court. It is intended to inform the conscience of the chancellor. It may be disregarded and a decree rendered contrary to it.

1 Foster, Fed. Pr. § 805; *Watt v. Starks*, 101 U. S. 247, 25 L. ed. 826; 2 Dan. Ch. Pl. & Pr. 5th ed. p. 1148; *Kohn v. McNulta*, 147 U. S. 233, 37 L. ed. 150.

The party dissatisfied with the verdict upon

an issue out of chancery must move for a new trial to the court of chancery and not the court of law trying the issue.

1 Foster, Fed. Pr. § 805; *Johnson v. Harmon*, 94 U. S. 871, 24 L. ed. 271; *Watt v. Starke*, *supra*.

Said Act of March 3, 1887, expressly provides that "such suit shall be subject to the general equity jurisdiction of the court in which such receiver was appointed so far as the same shall be necessary to the ends of justice," thereby precluding any legitimate contention that there should be any departure from the established chancery practice.

Under the provision above quoted the chancellor, to the end that justice may be done, has the right, and it is his duty, to determine whether or not the judgment rendered in such suit is a valid claim against the receiver.

Jesup v. Wabash, St. L. & P. R. Co. 44 Fed. Rep. 665; *Missouri Pac. R. Co. v. Texas Pac. R. Co.* 41 Fed. Rep. 314.

What remedy did the new law afford? An absolute, unqualified, undeniable and indisputable right of trial by jury. A right to the aggrieved party of trial by jury in the forum of his own selection. But the very statute which accords this valuable right, out of abundant precaution, couples with it an express condition that the established chancery jurisdiction and practice in other regards should neither be invaded nor departed from. "But," says appellee, "if this be true the statute has, indeed, afforded no right. If my judgment is not conclusive then the statute is a farce." To which we respond: "The statute confers upon you the right of trial by jury in a forum of your own selection, a right that theretofore did not exist. When you obtain a verdict and judgment in such trial and in such court you bring it, for enforcement, to the court of original jurisdiction. This verdict and judgment comes appealing to the conscience of the chancellor, advising him of your right. If unattacked it will find acceptance and enforcement. It is *prima facie*, and the party attacking it must take the laboring oar and overcome its advisory effects, but if shown to be inequitable and unconscionable you can reap no benefit therefrom. The chancellor will not blindfold himself to justice and decree that as just which is manifestly unjust.

Kohn v. McNulta, 147 U. S. 238, 37 L. ed. 150.

Mr. R. S. Neblett, for appellee:

Under the Act of Congress March 3, 1887, the state court, where the judgment sought to

NOTE.—The Act of Congress of March 3, 1887, permitting suits to be brought in state courts against receivers appointed by federal courts as a matter of right, has made the question presented in the 23 L. R. A.

above case very practical and important. The above decision, though not the first upon the point, is, we believe, the first from the circuit court of appeals.

be enforced was rendered, had jurisdiction of the receiver (appellant) and such judgment conclusively determines the cause of action and the amount of the claim.

Texas & P. R. Co. v. Cox, 145 U. S. 608, 36 L. ed. 882; *Dillingham v. Anthony*, 3 L. R. A. 634, 78 Tex. 50; *Central Trust Co. v. St. Louis, A. & T. R. Co.* 41 Fed. Rep. 551.

Appellee's judgment having been rendered in a proceeding at law in a state court of competent jurisdiction, when carried to the federal court and there made the basis of her claim, is entitled to full faith and credit, and is subject only to the plea of *nul tiel record*, or a plea calling in question the jurisdiction of the court pronouncing the judgment.

Such is the plain provision of the Constitution of the United States, § 1, art. 4.

It will not be contented that a judgment rendered in one state when sued on in a sister state can be reopened. In such case the plea of *nul dabit* has never been allowed.

Christmas v. Russell, 72 U. S. 5 Wall. 290, 18 L. ed. 475.

The question is, Does the provision of the constitution apply, when a judgment has been rendered in a state court, and is made the basis of a claim in the federal court? In support of the affirmative of this question the authorities are numerous and certain.

Mills v. Duryee, 11 U. S. 7 Cranch, 481, 3 L. ed. 411; *Hampton v. McConnell*, 16 U. S. 8 Wheat. 234, 4 L. ed. 378; *McElmoy v. Cohen*, 38 U. S. 18 Pet. 312, 10 L. ed. 177; *Freem. Judgm.* § 578.

The facts constituting appellee's cause of action having been tried by a jury in a law proceeding in a state court of competent jurisdiction cannot be again re-examined in a federal court when made the basis of her claim and carried there to be enforced against property under the control of the federal court.

A construction of the act of congress under consideration which would leave the facts tried by a jury in a state court open to review in the federal court would make it violative of the 7th Amendment of the Constitution of the United States.

Why should the verdict bind the conscience of the judge and not the chancellor?

In the proceeding at law a jury trial is given by constitution and by statute, while in the chancery proceeding it is given by neither.

In the chancery case the litigants are not entitled to a jury trial; the chancellor is without power to summon a jury; on him rests the responsibility of finding the facts.

Barton v. Barbour, 104 U. S. 181, 26 L. ed. 676; 8 Greenl. Ev. §§ 261, 262.

What was the character of the suit in the state court where the judgment was rendered which appellee now seeks to enforce? Simply a suit to reduce to judgment an unliquidated demand for damages arising out of the negligence of the receiver in operating property as a common carrier. There was involved in it no element of equity. It asserted no liens on or claims against the funds in the hands of the receiver. It was purely a common-law proceeding.

By what right was the suit instituted and maintained in the state court in the common-law proceeding? Not by permission of the 23 L. R. A.

chancellor appointing the receiver nor at his direction to "relieve his conscience" on an issue involved but by virtue of act of congress under consideration.

The Seventh Amendment to the Constitution is as follows:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by a jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

In *Barton v. Barbour*, 104 U. S. 181, 26 L. ed. 676, it is held receivership cases are equity cases, and parties seeking to establish claims against the receiver have no right to a trial by jury; and the trial of questions involved belong to the court, no matter what may be its importance or complexity. The act of congress sought to relieve the chancellor from this responsibility and at the same time confer the right of trial by jury.

When appellant seeks to have the court appointing the receiver review the facts on which the judgment sought to be enforced is founded, he gives to the act of congress a construction violative of the constitution quoted. The expression in the constitution referred to "than according to the rules of common law," has been held to mean an application for a new trial in the court trying the case or on appeal to the court of last resort in that jurisdiction.

Parsons v. Bedford, 28 U. S. 3 Pet. 446, 7 L. ed. 773; *New York Sup. Ct. Justices v. United States*, 76 U. S. 9 Wall. 274, 19 L. ed. 658; *Stevenson v. Williams*, 86 U. S. 19 Wall. 672, 23 L. ed. 162.

A construction harmonious with the constitution can only be given to the act by limiting the expression, "such suit shall be subject to the general equity jurisdiction of the court appointing the receiver so far as the ends of justice may require,"—to the collection and enforcement of the judgment and not to the establishment of the claim by the verdict of a jury in a law trial.

Dillingham v. Anthony, 3 L. R. A. 634, 78 Tex. 50.

Toulmin, District Judge, delivered the opinion of the court:

On October 20, 1890, appellee recovered in the district court of Navarro county, Tex., against appellant, as receiver of the Houston & Texas Central Railway Company, judgment for \$2,500, with interest and costs. On February 3, 1891, appellee filed, in consolidated cause No. 198, entitled "*Nelson S. Easton and James Rintoul, Trustees, et al., vs. The Houston & Texas Central Railway Company et al.*" then pending in the circuit court of the United States for the eastern district of Texas, wherein appellant had been appointed as such receiver, her petition of intervention, based upon the aforesaid judgment rendered in her favor by the said district court of Navarro county, Tex., praying that said receiver be ordered to pay the same. Said petition was on February 12, 1891, referred to the special master for examination and report. On January 14, 1892, the special master reported that the said district court of Navarro county was without jurisdiction

to render the aforesaid judgment, and that same was void. To such report appellee excepted,—“Because it appears from the records of this cause, and from the report of the master, that intervenor's cause of action accrued against defendant after the passage of the Act of Congress of March 3, 1887, and that she instituted her suit in the district court of Navarro county, Tex., and recovered the judgment she now seeks to enforce October 20, 1890, which judgment has never been reversed nor appealed from, and is in full force and effect, and neither the master nor this court can now inquire into the facts on which such judgment was rendered.”

The said circuit court sustained appellee's said exception, holding that the aforesaid judgment declared upon by her was final and conclusive, and decreed accordingly. Appellant's assignments of error are as follows:

“(1) The trial court erred in holding that the judgment obtained by intervenor in the district court of Navarro county, Tex., and made the basis of her intervention herein, was conclusive, and in sustaining the exceptions of intervenor to the report of the master, which set forth all the testimony adduced upon the hearing before the master.

(2) The trial court erred in rendering judgment for intervenor, and not rendering judgment in favor of defendant, in that intervenor's judgment, which formed the basis of her intervention, was not conclusive, but only prima facie, and the facts adduced before, and reported by, the master, showed that such judgment was inequitable, unconscionable, against and without evidence to support it, and the facts so reported by the master imperatively demanded judgment for the defendant.”

The sole question presented for our decision is raised by appellant's first assignment of error. That question is whether the judgment obtained by the appellee in the state court was conclusive upon the federal court, or only advisory to it. The contention of appellant is that all judgments obtained against a receiver in suits at law are but the trial of issues out of chancery, and are not conclusive on the court appointing the receiver. We cannot agree with this contention. The trial of an issue out of chancery is where the chancery court directs an issue to be tried by a jury. “It is intended to inform the conscience of the chancellor,” or to aid him where there is great difficulty in deciding upon the facts of a case. The order of a chancellor directing the issue at law is discretionary. In such case the verdict of the jury is only advisory, and never conclusive upon the court. The court renders the decree, but in doing so may disregard the finding of the jury, and render a decree contrary to it. 2 Dan. Ch. Pl. & Pr. p. 1071; 1 Foster, Fed. Pr. § 805; *Watt v. Starke*, 101 U. S. 247, 25 L. ed. 826; *Kohn v. McNulta*, 147 U. S. 238, 37 L. ed. 150.

As said by Mr. Greenleaf in his work on Evidence, in section 262, vol. 3: “It is only where no right of the party is recognized by law, and where the resort to a jury is left to the discretion of the judge, in aid of his own judgment, that he is at liberty to disregard

the finding of the jury, or to determine the facts for himself.”

Such is not this case. The court whose receiver appellant was did not direct the issue on which appellee's judgment was obtained to be tried by a jury, and did not render the judgment thereon. The suit in which the judgment was obtained was not instituted by leave of the court, but was brought as a matter of right,—a right conferred by the Act of Congress of March 3, 1887, which provides that every receiver appointed by any court of the United States may be sued without the previous leave of the court. Prior to that act of congress the rule was that a receiver could not be sued without leave of the court of equity which appointed him. That act abrogates the old rule. The court now has no discretion to say when its receiver may be sued. The act of congress gives the right without condition or qualification. It gives the right to sue the receiver in any court having jurisdiction of the subject-matter and of the parties. The counsel for appellant concedes that the act referred to gave appellee “an absolute, unqualified, and indisputable right of trial by jury, and in the forum of her own selection.” She selected the state court, and the proceeding therein was on a legal claim, and was purely a common-law proceeding. It had no element of equitable jurisdiction in it. The suit was to recover damages for a personal injury caused by the negligence of the receiver, or his agents, in operating a railroad as a common carrier. On such a cause of action a receiver can be sued in any court of competent jurisdiction. *Central Trust Co. v. St. Louis, A. & T. R. Co.* 40 Fed. Rep. 426, 41 Fed. Rep. 551; *Dillingham v. Anthony*, 73 Tex. 50, 3 L. R. A. 634.

If, then, the right of trial by jury was given by the act of congress, it was given subject to the constitutional provision that “no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law.” U. S. Const. Amend. 7.

In *Parsons v. Bedford*, 28 U. S. 3 Pet. 446, 7 L. ed. 773, the court says, in speaking of this provision of the constitution: “This is a prohibition to the courts of the United States to re-examine any facts tried by a jury in any other manner.

The only modes known to the common law, to re-examine such facts, are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable, or the award of a *venire facias de novo* by an appellate court for some error of law which intervened in the proceedings.”

In the case of *New York Sup. Ct. Justices v. Murray*, 76 U. S. 9 Wall. 274, 19 L. ed. 658, the supreme court says that the provision in the Seventh Amendment of the Constitution of the United States which declares that “no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of common law,” applies to the facts tried by a jury in a cause in a state court. The claim on which appellee's judgment was obtained was a legal, not an equitable, demand. It was adjud-

ated in the state court of Texas, wherein appellant, being duly served with process, appeared as defendant, and contested the same. The federal court having no appellate or supervisory jurisdiction over such proceedings, it cannot re-examine the facts constituting the cause of action on which the judgment was rendered, or annul, vacate, or in any manner modify, the judgment. *Central Trust Co. v. St. Louis, A. & T. R. Co. supra.*

But, it is said that, while the act of congress grants leave to sue, it expressly provides that "such suits shall be subject to the general equity jurisdiction of the court in which such receiver was appointed so far as the same shall be necessary to the ends of justice;" and it is contended that this provision of the act precludes any departure from the established chancery practice. It is true that the act does contain such provision. But considering it in the light of, and as in harmony with, the Seventh Amendment of the Constitution of the United States, we must construe it as applying only to suits which seek to interfere with the receiver's possession of property, and to process the execution of which would have that effect; any process, whether for the recovery of such property, or for the enforcement and collection of a judgment out of it. These shall be subject to the control of the court appointing the receiver, so far as the ends of justice may require. The time when, and the manner in which, a judgment against the receiver shall be paid; the adjustment of equities between all persons having claims against the property in his hands; the just distribu-

tion of the funds according to the rights of the several parties interested in it,—all must necessarily be under the control of the court having custody of the property by its receiver, and shall be subject to its general equity jurisdiction. *Dillingham v. Anthony, supra.*

This, we think, is the true meaning of the statute referred to. We can perceive no other reasonable interpretation of it. Any other interpretation would impute to congress a very useless act. We agree with the learned judge who pronounced the opinion in the case of *Central Trust Co. v. St. Louis, A. & T. R. Co., supra*, when he says that "the right to sue the receiver in the state court would be of little utility if its judgment could be annulled or modified at the discretion of this [federal] court," to which it is presented as a claim against the fund or property in the hands of the receiver. The judgment of the state court is conclusive as to the existence and amount of the appellee's claim, but the time and manner of its payment must be controlled by the court appointing the receiver. A judgment may be complete and perfect, and have full effect, independent of the right to issue execution. *Mills v. Duryee*, 11 U. S. 7 Cranch, 481, 8 L. ed. 411.

The decree of the circuit court is in accordance with the views expressed in this opinion, and it is affirmed.

Pardee, Circuit Judge:

I concur with the conclusion reached, but not with all the reasoning of the majority.

NORTH CAROLINA SUPREME COURT.

STATE of North Carolina, *Appt.*,

v.
Charles EASON.

(.....N. C.)

1. The jurisdiction of a municipality, bounded by a navigable river, does not

extend beyond low-water mark, in the absence of anything in the charter extending the limit of its jurisdiction expressly or by fair implication.

2. An ordinance prohibiting the throwing of fish or offal into a river is void for lack of jurisdiction, where the boundary of the municipality is the low-water line of the river.

(February 20, 1894.)

NOTE.—Boundary of municipality on navigable stream.

The attempt to determine the law on the subject of the boundary of municipal corporations by navigable streams is not altogether satisfactory since the decisions exactly in point are few and apparently conflicting.

That the same rule governs as to boundaries on streams of water of incorporated territories, and of lands of individuals, is declared in *Ft. Smith & V. B. Bridge Co. v. Hawkins*, 12 L. R. A. 487, 54 Ark. 609, which was the case of a navigable river, and it is there held, in harmony with the main case, that the boundary of an incorporated town or city on a navigable river in Arkansas, like that of an individual proprietor, extends only to high-water mark, although the county boundary goes to the middle of the channel.

In this case the act of incorporation declared the corporate limits to be "the same metes and bounds as designated" on a map previously made by the owners of the land and as private ownership only 23 L. R. A.

extended to high-water mark, this remained the boundary of the incorporation.

The channel of the Connecticut river between Lyme and Saybrook is not within the patented limits of either town, the former of which is bounded by the "channel of the Connecticut river" and the other is bounded "by" or "on" the Connecticut river; but by virtue of ancient, infallible, and undisputed uses the towns bordering on the river have jurisdiction to the center of the channel, and constables may serve process to that line. *Pratt v. State*, 5 Conn. 388.

A by-law passed by one of these towns in respect to taking oysters in the Connecticut river was held not to have been legally passed, but the court did not consider the question of the power to pass it. *Hayden v. Noyes*, 5 Conn. 391.

In Pennsylvania it is held that the boundary of a city on a navigable fresh water river, like the Susquehanna at Wilkes Barre does not extend below low-water mark, and consequently coal beds under the river cannot be taxed by such city, even if they

APPEAL by the state from a judgment of the Superior Court for Beaufort County acquitting the defendant of a charge of violating a town ordinance. *Affirmed.*

The town of Beaufort was incorporated with the following boundaries: Beginning at a cedar post upon Pamlico River, the eastern corner of the Macnair land and being the same cedar post referred to in the Private Laws of one thousand eight hundred and eighty-five, section three of chapter one hundred and nine, and thence running with the eastern line of the Macnair land north thirty-four degrees east to its intersection with a line drawn two hundred and ten feet north of and parallel with Fifth street; thence with the said intersecting line to the east side of Market street; thence northerly with the east-

ern line of Market street extended a distance of nine hundred and forty-five feet; thence westwardly on a line parallel with fifth street to its intersection with a line drawn two hundred and ten feet west of and parallel with Washington street; thence with the said intersecting line on a line parallel with Washington street to the north side of Fourth street extended; thence with the north side of Fourth street extended westwardly a distance of one thousand five hundred and eighty-four feet; thence on a line parallel with Washington street to Pamlico river, and thence with the river to the beginning. Laws of 1891 (Private), chap. 110, § 2.

The affidavit on which defendant was arrested was as follows: "On the 31st of September, 1893, before me, E. M. Short, mayor

are not taxable elsewhere. *Gilchrist's App.* 109 Pa. 600. No reference is made in this case to *Neal v. Com. Intra*.

These cases clearly proceed on the theory that municipal boundaries are to be regarded the same as those of private property with respect to rules of construction, but they do not in any way deny the possibility of the extension of municipal boundaries to the center of a navigable river or even to the opposite shore when that is the state boundary, and the question becomes one of legislative intent in the creation of the municipality.

The jurisdiction of the mayor's court of Philadelphia extends to the Jersey shore, subject to the limitations specified in the compact between Pennsylvania and New Jersey, giving the states concurrent jurisdiction of the river. The Incorporating Act of 1788 declares that Philadelphia is laid out between the rivers Delaware and Schuylkill and makes a reference to the Penn charter, in which nearly the same words are used, but in which the authority of the city over the building of wharves is recognized. *Neal v. Com.* 17 Serg. & R. 67.

The court in this case says that there is nothing in the statute directly bearing on the question, and bases its decision largely on grounds of expediency.

That the corporate limits of a village bounded by a navigable river extend to the middle of the river is decided in *Marseilles v. Kiner*, 34 Ill. App. 355, and *Marseilles v. Howland*, 23 Ill. App. 101, affirmed 124 Ill. 547, in respect to the liability of a village for negligence in respect to the condition of a bridge across such river. These cases do not show the description of the boundary, but it is said in 28 Ill. App. 106, that this is the boundary "by the terms of its charter and as matter of law."

The west boundary of East St. Louis has been held in several cases to be the state line of Illinois in the middle of the Mississippi river. *Buttenuth v. St. Louis Bridge Co.* 123 Ill. 535; *St. Louis Bridge Co. v. People*, 125 Ill. 226; *St. Louis Bridge Co. v. East St. Louis*, 121 Ill. 238.

The eastern boundary of the city of St. Louis is, like the eastern boundary of the state, the middle of the Mississippi river under its charter, by which its boundary begins at a mill on the bank of the Mississippi, then following several calls returns "to the Mississippi" and "from thence by the Mississippi to the place first mentioned." *Jones v. Soular*, 65 U. S. 24 How. 41, 16 L. ed. 604; *St. Louis Public Schools v. Risley*, 77 U. S. 10 Wall. 91, 19 L. ed. 850.

The court in *Jones v. Soular*, *supra*, applied the general doctrine that "all grants of land bounded by fresh water rivers, where the expressions designating the water line are general, confer the proprietorship on the grantee to the middle thread of the stream, and entitle him to the accretions."

In *Brooklyn v. Smith*, 104 Ill. 429, 44 Am. Rep. 90 38 L. R. A.

the western boundary of Water street in the village of Brooklyn, Ill., is held to be the center of the Mississippi river, so that the village corporation is the owner of ice formed on this part of the river. The town was laid out with a street marked on a plat as running along the river front, although with the width stated at 80 feet, but this width was held not to control.

These decisions by the federal and Illinois courts do not make any distinction between municipal and private boundaries and seem to proceed on the theory that boundary of property by any fresh water stream whether navigable in fact or not will extend to the thread of the stream. In states therefore which deny private riparian ownership of the beds of navigable rivers these decisions are not controlling and it would seem reasonable to say that where municipal boundaries are described in general terms with reference to a navigable river the same construction will be given to the description that would be given if it was a case of private boundary.

Where a river is not navigable this rule is clearly established that the center of the stream is the boundary of an incorporated territory. *Cold Spring Iron Works v. Tolland*, 9 Cush. 432; *Re Pewich*, 13 Pick. 431.

That the center of the river is the dividing line between towns separated by the Kennebec river is recited in *Hall v. Benton*, 69 Me. 346.

In *Perkins v. Oxford*, 66 Me. 545, it is said that the same rule applies to the boundary of towns in an act of incorporation as in a deed, where the boundary is on a fresh water stream.

Towns on the Connecticut and Merrimac rivers are held in *State v. Canterbury*, 23 N. H. 195, to extend to the middle of the river, and it is said that there is no sufficient ground to doubt the propriety of applying the ordinary rules of construction to all unnavigable rivers.

In *State v. Columbia*, 27 S. C. 137, the center of the Congaree river was held to be the boundary of the city of Columbia, where the tract had been laid off by commissioners and marked on a map by lines showing three sides, with the river for the other side. The river seems to have been regarded as not technically navigable, although it is said that the proprietary right to the center of the stream is subject to the right of the public to use such stream for transportation as a highway, where it is in fact, though not technically navigable, or may be made so by removal of obstructions.

In *Louisville Bridge Co. v. Louisville*, 81 Ky. 189, it is recited that the corporate limits of the city of Louisville extend to low-water mark on the opposite shore of the Ohio river, although it is held that municipal taxes cannot be levied on the bridge, because there is no benefit which can amount to

of Washington, N. C., personally appeared J. R. Grist, who, being duly sworn, complains, on oath, and says that Charles Eason did on the 20th of September, 1893, in violation of the town ordinance No. 11, in force in said town, contrary to the statute in such case made and provided, and against the peace and dignity of the state."

The warrant was as follows: "You are hereby commanded forthwith to arrest Charles Eason, and him safely keep, so you have him before me at my office in Washington immediately to answer the above complaint, and be dealt with as the law directs."

The jury rendered a special verdict, as follows:

consideration therefor. The case does not, however, state the grounds on which the city limits are said to extend across the river, whether they are expressly defined by the act of incorporation, or whether they are by implication extended to the state boundary, which as shown in the note to *Buck v. Ellenbolt* (Iowa) 15 L. R. A. 187, is on the north side of the river.

The same declaration as to the boundary of the city of Henderson is made in *Henderson Bridge Co. v. Henderson*, 90 Ky. 498, in which a bridge across the river is held taxable, at least for railroad and school taxes, to the northern shore by the city of Henderson, under a reservation of power to tax in an ordinance giving permission to build the bridge.

The city and county of New York under the statutes includes the whole of the rivers and harbor to actual low-water mark on the opposite shores, and therefore a floating vessel made fast to the end of a wharf or dock on the East river on the Brooklyn or Long Island shore is within the city of New York so as to be outside the jurisdiction of a licensed measurer of grain for the village of Brooklyn. *Stryker v. New York*, 19 Johns. 179.

Whatever rights of property the corporation of New York may have in the made land on Long Island shore of the river, such territory is, for all purposes of police regulation at least, within the city of Brooklyn. *Re Furman Street*, 17 Wend. 649.

A floating elevator lying inside the piers on the Brooklyn side of the East river below the low-water mark is not in Brooklyn so as to charge that city with liability for its destruction by a mob. *Orr v. Brooklyn*, 36 N. Y. 685.

But a pier on piles, although below the original line of low-water mark on the Brooklyn side of the East river is in Brooklyn, and the city may be held liable for its destruction by a mob. *Atlantic Dock Co. v. Brooklyn*, 3 Keyes, 445, 1 Abb. App. Dec. 24.

The village of Brooklyn was held in *Udall v. Brooklyn Trustees*, 19 Johns. 175, to include all the wharves and made land on the Long Island shore of the East river, where it formed the boundary, as well as natural alluvion to the actual line of low-water; and therefore an ordinance as to the measuring of grain is in force on a wharf or dock within those limits.

The jurisdiction of the city of Brooklyn must from necessity follow the shore as it advances into the river or bay whether the accretion proceeds from alluvion or artificial deposits and erections, therefore a grain elevator situated on a dock upon the Brooklyn side of New York bay is within the city of Brooklyn, and the city may be liable for permitting its destruction by a mob. *Luke v. Brooklyn*, 43 Barb. 54.

So a statute authorizing the city of Brooklyn to open a street to the "East river and to the permanent bulk-head line" means that the street may be extended to the shore of the river, wherever it may

"That the town of Washington is bounded on the south by Pamlico river, which is a navigable stream, and the boundaries of the said town are set forth in chapter 110 of Priv. Laws 1891, and the cedar post referred to is on the bank of the said river. That the fish house hereinafter described is situated as follows: The northern sill of the said house rests upon the wharf log, which said wharf log is beyond the natural low-water mark, being the end of the made land which was made prior to 1891. That the wharf at the said point extends further out in the river than the wharves immediately to the east and west of the said wharf, and the said wharves mark the present shore line of said river, and

be at any time by change of line. *Re Brooklyn*, 73 N. Y. 179.

To the same effect the description in the charter of the village of Edgewater of its boundary "along the lower and upper Bay of New York" is not intended to give an absolute and fixed boundary to the shore as it then existed, but to give a boundary which will shift with the change of the shore by natural causes, or by the erection of artificial structures for the purpose of commerce. *Bechtel v. Edgewater*, 45 Hun. 240.

In *Tebo v. Brooklyn*, 134 N. Y. 341, it was said that the boundaries of Brooklyn having been changed, it was claimed that they extended now below low-water mark, but this question was not decided.

The bounds of the city of Albany were, by the Laws of 1826, extended to the middle of the Hudson river. *Hart v. Albany*, 9 Wend. 602, 24 Am. Dec. 165.

An act extending the bounds of the town of Flushing in Queens county, N. Y., over the bay and into the sound of East river, so as to include islands eastward of the main channel, was held in *Palmer v. Hicks*, 6 Johns. 133, to be merely for the purpose of jurisdiction, but did not give the town title to the land under water, or power to prohibit the catching of clams below ordinary low-water mark.

In New Jersey, the town of Camden, formerly incorporated as the city of Camden, was expressly bounded by the Pennsylvania state line in the Delaware river, and, although the states had concurrent jurisdiction of the river, it was held that the court of oyer and terminer in Camden had no jurisdiction of crime on the river beyond the county line (*State v. Davis*, 25 N. J. L. 386), but in a footnote to the case it was said that by Statute March 14, 1856, this defect of jurisdiction was remedied.

But the boundaries of townships and counties as distinguished from municipal corporations are not regarded as within the scope of this note, and will not be here considered.

Under the proclamation fixing the western boundary of a town in Fiji as the seacoast at high-water mark, and the eastern boundary at a specified distance therefrom, the northern and southern boundaries to connect the eastern, all lines of specified lengths with certain points on the high-water mark, the western boundary varies from time to time as the high-water mark shifts, but the eastern boundary is absolutely fixed. *Smart v. Suva Town Board* [1898] A. C. 301.

The fixing of the boundary line by harbor and land commissioners between the tide waters of the town of Hull and the city of Boston has no effect on the title to land never covered by tide water, whether it be an island or on the main land. *Russ v. Boston*, 157 Mass. 60.

The two cases last cited do not touch boundaries on navigable streams but are added as somewhat similar to those above considered. B. A. R.

the present low-water mark. That the water at the end of all of said wharves is of sufficient depth to be navigated. That, from said wharf said house is built on piles driven in the bed of the river, and extending about thirty feet out from said wharf over the water. That the water of the river flows under said house: is of sufficient depth to be navigated, if it were not for said piles. That the southern end of said house borders on the channel of the river. That Wynne and Gas-kill have boats to land at said fish house, from which boats they receive fish. That the river is about four hundred yards wide at this point. That ordinance 11 of the town forbids the throwing of dead fish into said river, and the penalty is five dollars. That on the 20th day of September, 1893, the defendant threw dead fish into said river from said fish house. That the said fish house was built over the said water by one J. R. Wynne, under a license regularly issued by the commissioners of navigation for the port of Washington, granted on March 31, 1892. That if, upon these facts, the defendant is guilty in law, the jury say for their verdict that the defendant is guilty; and if, upon these facts, in law he is not guilty, the jury say for their verdict, "Not guilty." Upon these facts, the court, being of opinion that the defendant was not within the corporate limits of the town, directed the jury to render a verdict of not guilty, and thereupon the jury, under the instruction of the court, rendered a verdict of not guilty. The solicitor for the state, after verdict, moved to amend the warrant by inserting therein, after the figures "1893," the following words: "Did unlawfully and willfully throw dead fish into the Pamlico river in said town, in violation of the town ordinance No. 11 of the town of Washington, N. C." The court allowed this amendment, and the defendant excepted.

Further facts appear in the opinion.

Mr. W. B. Rodman for appellant.

Mr. Charles F. Warren, for the State:

The mayor or chief officer of every city or incorporated town, within the corporate limits, has the jurisdiction of a justice of the peace in all criminal matters arising under the laws of the state, or under the ordinances of said city or town.

Code, § 3818.

The court has the power to amend any warrant, process, pleading, or proceeding of a justice of the peace, either in form or substance, at any time before or after judgment.

Code, § 908; *State v. Norman*, 110 N. C. 484.

While there is an absence of authority here upon such a case in an act defining the boundaries of a city or town, in other states it has been held to extend to the center of the stream.

Horr & Bemis, Mun. Ord. § 142; *Stryker v. New York*, 19 Johns. 179; *Udall v. Brooklyn Trustees*, 19 Johns. 175; *Jones v. Soular*, 45 U. S. 24 How. 41, 16 L. ed. 604; *Palmer v. Hicks*, 6 Johns. 183; *Dill*, Mun. Corp. § 124, note 2.

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Mr. Frank I. Osborne, Atty-Gen., also for the State.

Avery, J., delivered the opinion of the court:

Our numerous long streams and large inland sounds come so clearly within the reason of the rule adopted, on account of the different conditions, in England, exclusively to waters subject to the ebb and flow of the tides, that it became necessary to establish here a new test of navigability, in determining what submerged land should be reserved as the property of the state, and what should be liable to appropriation by private persons by specific entry and grant, or should pass as incident to patents issued to riparian proprietors. The criterion in North Carolina is whether the stream, bay, or sound is navigable for seagoing vessels. *Broadnax v. Baker*, 94 N. C. 681, 55 Am. Rep. 633; *Hodges v. Williams*, 95 N. C. 331, 59 Am. Rep. 242; *Angell*, Watercourses, § 549, note; *Collins v. Benbury*, 25 N. C. 277, 88 Am. Dec. 722; *Fagan v. Armistead*, 33 N. C. 433.

While the bed of a stream navigable, or declared by the legislature to be navigable, for "sea vessels," is not subject to entry, the beds of streams that are large enough to subserve the purpose of highways for smaller boats, floats, rafts, and logs, but insufficient for seagoing vessels, may be granted specifically, or pass by deeds of riparian proprietors on both sides, running with rivers, and extending by construction *ad flum aquæ*, but subject to the easement of the public to use the channel as a highway. *Bond v. Wool*, 107 N. C. 149; *State v. Glen*, 52 N. C. 325; *Williams v. Buchanan*, 23 N. C. 535, 35 Am. Dec. 760; *McNamee v. Alexander*, 109 N. C. 244. The legislation in North Carolina has been generally in affirmance of the new rule so much better adapted to the nature of this country. Our statutes, with the exception of a short interval, have never permitted the issuing of grants to private individuals for the beds of streams navigable for sea vessels, even though not affected by the tides, beyond the deep-water line, at most. *Bond v. Wool*, *supra*; 1 Potter, Rev. 278; Rev. Stat. chap. 42, § 1; Acts 1777, chap. 114; *Hatfield v. Grimstead*, 29 N. C. 139; Code, § 2751; Laws 1889, chap. 555; Laws 1893, chap. 17.

It follows, therefore, that a grant to a riparian proprietor, running with a navigable stream such as the Pamlico river at Washington, from one designated point on its banks to another above or below on the same bank, must be so located as to extend, not *ad flum aquæ*, but only to the low-water mark along the margin of the stream. This court having uniformly interpreted such calls in grants to individuals as designating the low-water line, we know of no recognized rule of construction that would sustain us in giving a widely different meaning to the same language, when used by the legislature to define the limits of a town. Gould, in his work on Waters (sec. 202), says, in ascertaining the boundaries of towns: "The same rules of construction apply as in the case of a grant from one individual to another." A

municipal corporation can exercise only such powers as are expressly granted by its charter, or are necessarily implied in or incident to the powers expressly granted. 1 Dill. Mun. Corp. § 89; *Thompson v. Lee County*, 70 U. S. 8 Wall. 327, 18 L. ed. 177; *Thomas v. Richmond*, 79 U. S. 12 Wall. 349, 20 L. ed. 453. "Any ambiguity or doubt arising out of the terms used by the legislature must be resolved in favor of the public." *Minturn v. Larue*, 64 U. S. 23 How. 436, 16 L. ed. 575. A municipality being thus restricted to the exercise of powers clearly intended to be delegated, it would seem that, if the same rigid rule of construction does not obtain in determining the territorial limits to which its authority extends, the location of the geographical limit of its territorial jurisdiction should, at all events, be determined just as similar calls of grants to individuals are located. "Because the local jurisdiction of the incorporated place is, in most cases, confined to the limits of the incorporation, it is necessary [says Dillon] that these limits be definitely fixed." 1 Dill. Mun. Corp. § 182 (124). But the legislature unquestionably had the power to extend the jurisdiction of the town, for police purposes, to the middle of the river or to the opposite bank; and had the line been described as crossing to the other side when it reached the river, and running thence along that shore to a point opposite the beginning, thence to the beginning, the effect would have been to extend the boundary for the exercise of the power to prohibit nuisance, delegated to the town, across the adjacent bed of the river, while the territorial limit of its authority for all purposes other than the exercise of police powers would have been the low-water mark on the north bank. *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205; *Palmer v. Hicks*, 6 Johns. 133; *Ogdensburgh v. Lyon*, 7 Lans. 215. We are aware that the authorities in this country are conflicting as to the location of boundaries along inland navigable streams, whether the controversy grows out of fixing the limits of a town or locating the lines of grant. We find that as a rule, however, the courts, in ascertaining the limits of towns, have followed their own rulings as to riparian grants. The common-law doctrine was recognized and applied at an early day by the courts of Massachusetts, New Hampshire, Connecticut, Maryland, and Virginia, and later by Ohio, Illinois, Indiana, and some other states. Angell, *Watercourses*, § 547. On the contrary the common-law rule was repudiated by Pennsylvania, North Carolina, South Carolina, Tennessee, Alabama, Michigan, and other states, and a doctrine somewhat similar to the rule of the civil law was substituted for that adopted in England. *Id.* §§ 548-552; 2 Am. & Eng. Encyclop. Law, p. 505; 16 Am. & Eng. Encyclop. Law, p. 236 *et seq.*; *Id.* p. 249 *et seq.*

In the comparatively recent case of *Gilchrist's App.*, 109 Pa. 600, the supreme court of that state held that the limit of a municipality bounded by a navigable river is the low-water mark of that river, unless express language to the contrary is used in the act of

incorporation. The question involved was whether the city of Wilkes Barre had the power to levy and collect a tax upon the coal beds under the bed of the river opposite to that city. The right of the city was denied by the court, and the decision rested upon the ground that a grant to an individual was construed to run with the low-water mark of a navigable stream, and the same rule should be applied in locating the boundaries of towns. The supreme court of Michigan, in *Coldwater v. Tucker*, 36 Mich. 474, 24 Am. Rep. 601, said: "The general doctrine is clear that a municipal corporation cannot usually exercise its powers beyond its own limits. If it has in any case authority to do so, the authority must be derived from some statute which expressly or impliedly permits it. There are cases where considerations of public policy have induced the legislature to grant such power." See also *People v. Bouchard*, 82 Mich. 158, 9 L. R. A. 106; Gould, *Waters*, § 86. In *Palmer v. Hicks*, 6 Johns. 133, and *Stryker v. New York*, 19 Johns. 179, cited for the plaintiff, it appeared that the legislature, in both instances, had extended the line of a city or town across the bed of a navigable stream, to the opposite bank; and the court decided that the statutes extended the jurisdiction of the city for police purposes, with the extended line. Any remark from which an inference may be drawn as to the location of a town limit, where the stream is called for, was therefore obiter, if, indeed, such inference is deducible from the language used by the court. The bed of a navigable stream, said the supreme court of New York in *Ogdensburgh v. Lyon*, 7 Lans. 215, "is still state, not United States, territory; and the state, or its municipalities under its authority, may pass laws or ordinances" not in conflict with the Constitution of the United States, or the laws of congress enacted within its constitutional powers. In the case last cited, the question was whether the state could empower a city council to pass ordinances to prevent the casting into the adjacent harbor of matter calculated to obstruct it, where the authority had been delegated to the town by virtue of an express statute conferring it, not as an incident to the usual municipal powers, in the absence of a direct grant, expressly or by fair implication, of that particular power. In the section of Horst & Bemis (1 Mun. Ord. § 142) cited for the prosecution, it seems that the author, after embodying a sentence from *Coldwater v. Tucker*, *supra*, in which the supreme court of Michigan declared that a municipality could extend its police jurisdiction beyond its territorial limits only by virtue of a statute conferring such authority expressly or by necessary implication proceeds, in the same section, to state, as an inference drawn from the two cases already cited from Johnston's Reports, the proposition that, where two towns are situated on opposite banks of the same river, and the boundaries of both run with the river, though it is navigable, the dividing line will be the thread of the stream. No such conclusion was fairly deducible from those decisions, because, in both instances, as already stated,

the whole bed of the stream had been expressly placed by statute under the police jurisdiction of one of the two riparian municipalities. Indeed, after a patient investigation of the whole subject, we have found but a single authority for the position that a grant calling for a navigable stream should be confined to the low-water mark, while a similar line in the boundaries of a municipality should run with the thread of the stream, and the opinion in that case was evidently not well considered, as the point was decided without any discussion whatever.

We think the rule laid down by the court of Pennsylvania, and approved by Gould, is the correct one,—that the same construction which is given to the description of the *locus* conveyed in deeds and grants to individuals must be placed upon similar language when used to define the boundaries of a municipality. We conclude, therefore, that where the state confers municipal powers upon a corporation, and describes the boundary as running with a navigable river, the jurisdiction of the municipality does not extend beyond the low-water mark, in the absence of some other language in the charter extending the limit of its jurisdiction expressly or by fair implication. We can readily conceive how the decayed fish and offal thrown into a river like the Pamlico, in front of Washington, where the influence of the tides is felt, may become an almost unendurable nuisance. But further annoyance might have been prevented by a proper amendment of the charter of the town, and may still be obviated by legislation in the future. Meantime, unless the powers of the commissioners of navigation, under section 3537, can be invoked to protect those who suffer from the stench by this offensive matter floating upon the river or lodging on the banks, we deem it more important that the court should be reasonable

and consistent in its rulings, so as to inspire confidence in their justice and stability, than that some of its citizens should be relieved, without delay, of even so sore a grievance. We think, therefore, that there was no error in the ruling of the court below that, even upon a warrant sufficient in form, the defendant could not be convicted for a violation of the ordinance prohibiting the throwing of fish or offal into the river beyond the limit of its jurisdiction, the low-water line, and the judgment must be affirmed. In view of the peculiar hardship to the people interested, of enduring this annoyance, we suggest, also, an investigation of the question whether the facts as to the conduct of this particular defendant, or the facts in any other case of creating a stench in the river, which is a public highway, by casting fish or offal into it, would sustain an indictment for nuisance at common law. *Com. v. Sweeney*, 181 Mass. 579; *State v. Wolf*, 112 N. C. 889.

Counsel on both sides discussed the question whether the court had the power, after verdict, to amend the warrant, which before charged that the defendant "did on the 20th day of September, 1893, in violation of ordinance 11, § —, of the ordinances in force of the said town of Washington, contrary to the statute in such case made and provided, and against the peace and dignity of the state," by inserting the specific charge of throwing dead fish into Pamlico river. As the ordinance embraced eight distinct charges that might have been made,—seven others besides that set forth in the amendment,—we deem it a matter of such importance as to make it proper to say that the question is still an open one, which we refrain from discussing, because it is not essential to the final disposition of this particular case to do so.

Affirmed.

NEW JERSEY SUPREME COURT.

STATE of New Jersey; James H. ALEXANDER *et al.*, *Prosecutors*,

v.

City of ELIZABETH.

(.....N. J.....)

*1. The Act of the legislature of this state entitled "An Act Concerning the Maintaining of Race-courses in This State, and to Provide for the Licensing and

*Headnotes by LIPPINCOTT, J.

NOTE.—Special legislation as affecting municipal corporations or territorial divisions of a state is a subject that has been much considered in recent years under the constitutional restrictions of some of the states and is especially perplexing in many of its phases. The opinion in the above is a valuable addition to the subject which had already been treated very fully in some earlier cases in this series, viz.: *Ayar's App.* (Pa.) 2 L. R. A. 577, and *note*; *Re Washington Street* (Pa.) 7 L. R. A. 193, and *note*; *King v. State* (Tenn.) 8 L. R. A. 23 L. R. A.

Regulating of the Same," passed February 27, 1893 (P. L. 1893, p. 23), is a special law, regulating the internal affairs of towns and counties, and also a special law granting to corporations, associations, or individuals exclusive privileges, immunities, or franchises, and is therefore unconstitutional and void.

2. Municipal government is a creation of the statute, and the powers of municipal government may extend to almost every feature of regulation not inhibited by the constitution within the area over which it extends. Such powers then become matters regu-

A. 210; *Ferris v. Vannier* (Dak.) 3 L. R. A. 713; *Land, Log & Lumber Co. v. Brown* (Wis.) 3 L. R. A. 472; *Datz v. Cleveland* (N. J.) 7 L. R. A. 431; *State v. Somers's Point* (N. J.) 6 L. R. A. 57; *State v. Newark* (N. J.) 10 L. R. A. 700; *State v. Toledo* (Ohio) 11 L. R. A. 729; *Cook v. State* (Tenn.) 13 L. R. A. 183; *Edmunds v. Herbrandson* (N. Dak.) 14 L. R. A. 725.

For legislative discretion as to applicability of general statute, see *State v. Kolsen* (Ind.) 14 L. R. A. 566, and *note*.

lating the internal affairs of such municipal governments.

3. This statute affords no proper and appropriate classification of race-courses between those in use prior to January 1, 1893, and those set up after that date, as will support the application to each of a system of legislation so distinctive and different as the two methods of licensing provided by this act.

(January 6, 1894.)

CERTIORARI to the City Council of the City of Elizabeth to review certain resolutions purporting to grant a license to the New Jersey Jockey Club to maintain a race-course in said city. *Resolutions set aside.*

The facts are stated in the opinion.

Argued before Depue, Lippincott, and Abbett, JJ.

Messrs. R. V. Lindabury, John R. Emery, and Joseph Cross, for prosecutors.

Mr. Allan L. McDermott, for defendants:

Before the passage of the Act of 1893 the things authorized to be done under these licenses could be lawfully done on any race-course owned by an incorporated association. Laws 1880, p. 196, §§ 1, 2.

If the license granted by the municipal authorities should, in these proceedings, be set aside, and the law under which that license was granted be held unconstitutional, the association could, nevertheless, proceed to do all those things which this license purports to authorize.

McLean v. State, 49 N. J. L. 471; *Haring v. State*, 51 N. J. L. 886.

If these licenses are nullified, these defendants will not thereupon be placed at any disadvantage. They will not, by such invalidation, become indictable or punishable for doing the things licensed by the municipal authorities.

The authority to license is properly repealed.

State v. Morris County Common Pleas Ct. 86 N. J. L. 76, 18 Am. Rep. 422.

The constitutionality of the Act of 1893 is assailed "because notwithstanding it is private, local, and special, it purports to regulate and does regulate the internal affairs of towns and counties."

It provides that there shall not be any track licensed within the municipal limits of a city "having a population of more than one hundred thousand, according to the census last taken," before application is made for a license. It is not open to the objections sustained in *State v. Jersey City*, 45 N. J. L. 298.

The legislative declaration is that there shall not be, in our largest cities, any race-tracks where horses shall be run for prizes. In all other municipalities such race-courses may be licensed. The only question here is whether there is such a relation between the subject-matter of this legislation (*i. e.*, the maintaining of race-courses within this state), and the magnitude of the population of the places from which such courses are excluded, as will justify such exclusion. If such exists the line of demarcation is for legislative loca-

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tion. *State v. Wood*, 49 N. J. L. 85; *State v. Hoagland*, 51 N. J. L. 62; *Moriland v. State*, 52 N. J. L. 521; *State v. Clayton*, 53 N. J. L. 277.

It is within the legislative power to prohibit the maintenance of these race-courses anywhere in the state, to regulate or prohibit the competitions of speed or the awarding of prizes.

The law does not attempt to differentiate the repository of the licensing power. The system of granting licenses under the Act of 1893 is not open to the objections held in *State v. Morris County Common Pleas Ct.* 43 N. J. L. 681, and *State v. Trenton Board of License & Excise*, 48 N. J. L. 439, and other cases where statutes have been invalidated because of unconstitutional repose of the licensing power. Here the power may be exercised by the same municipal authorities in all counties.

In *State v. Gloucester County Circuit Ct. Judge*, 1 L. R. A. 86, 50 N. J. L. 609, *Justice Van Syckel* says: "The inhibition in the constitution is not intended to secure uniformity in the exercise of delegated police powers, but to forbid the passing of a law vesting in one town or county the power of local government not granted to another."

The objection of the prosecutors is that the act "purports to grant, and does grant to certain corporations and individuals therein mentioned an exclusive privilege, immunity, and franchise."

The section is another exercise of police power, to say within what grounds racing shall be allowed for purses, etc. It is as though the legislature should say that no place not heretofore licensed for the sale of liquor shall be so licensed if two thirds of the licensing power shall not agree.

It is a regulation of the number of places for which licenses may be granted. The law is not regarding ownership, but regulating the places which may be used for purposes properly the subject of police regulation. If, however, the court shall deem this section unconstitutional, it may be rejected without invalidating the balance of the act.

State v. Kelsey, 44 N. J. L. 1; *Central R. Co. v. State Board of Assessors*, 49 N. J. L. 1; *Williams v. Bettie*, 51 N. J. L. 512.

Messrs. Samuel Kalisch, Chauncey H. Beasley, and James A. Connelly also for defendants.

Lippincott, J., delivered the opinion of the court:

This writ brings into this court for review and adjudication certain resolutions of the city council of the city of Elizabeth, passed at a meeting of the city council on April 1, 1893, purporting to grant a license, or to be a license, to or for the New Jersey jockey club, to maintain a race-course in said city, for running, racing, trotting, or pacing horses, mares, or geldings, for a purse, plate, stake, or other thing. On that day the New Jersey jockey club presented a petition to the city council of the city of Elizabeth requesting that a license be granted to them under and by virtue of the provisions of chapter 16, Laws 1893, to maintain a race-course for racing, running, trotting, or pacing of horses.

mares, or geldings, for a purse, plate, or other thing to be run, paced, or trotted for by such horses, mares, or geldings, on their grounds, in the city of Elizabeth, as named in said act. Upon the presentation of his petition, the city council adopted the following resolution: "Resolved, that the New Jersey jockey club is hereby licensed for a period of five years to maintain and use a race-course in this city for the running, racing, trotting, or pacing of horses, mares, or geldings, for a purse, plate, stake, or other thing; the said race-course being the one used by the New Jersey jockey club for such running, trotting, or pacing prior to the first day of January, eighteen hundred and ninety-three." In addition to this resolution there were some other resolutions adopted at such meeting, imposing conditions as to the management of such race-course, and requiring the payment to the city of Elizabeth of the sum of \$5,000 for the privilege granted under and by virtue of the license, and also limiting the time in each year of racing on such race-course to a period of thirty days in the fall and thirty days in the spring of each year during the continuance of the license. The adoption by the city council of those resolutions is attempted to be justified by the defendants under the provisions of an Act of the legislature of this state, entitled "An Act Concerning the Maintaining of Race-courses in this State, and to Provide for the Licensing and Regulating of the Same," passed February 27, 1893 (Pub. Laws 1893, p. 28). By the first section of this Act it is provided "that the board of chosen freeholders of any county in this state, or board of aldermen, common council, township committee, or other body having general charge of the affairs of any city, township, or municipal division of this state, in which there is situated and maintained a race-course for the racing, running, trotting or pacing of horses, mares or geldings, for a purse, plate, or other thing to be run, paced or trotted for by such horses, mares, or geldings, shall have power and is hereby authorized to license the owners of such race-course to maintain and use the same for any running, pacing or trotting of any horses, mares or geldings, for any purse or stake, plate or other thing; such license shall be for a period of not more than five years, and no license shall be granted for the maintenance or use of a race-course within the corporate limits of any city having a population of more than one hundred thousand people according to the census last taken." By the third section it is provided "that it shall be unlawful for any person or incorporated body or association to maintain or use a race-course in this state, for the racing, running, trotting or pacing of horses, mares or geldings, for a purse, plate, or other thing, or to permit such running, racing, trotting or pacing upon any grounds owned or leased or controlled by such person or incorporated body or association, unless license for that purpose shall be granted as in this act provided. Any license granted under this act shall become void upon any breach of any condition upon which it shall be granted." By the fourth section it is provided "that it

shall not be lawful for any person or incorporated body or association to maintain or use in this state, for the running, trotting or pacing of horses, mares or geldings, for a purse, plate or other thing to be run, paced or trotted for by such horses, mares or geldings, any race-course which was not used for such running, trotting or pacing, prior to the first day of January, one thousand eight hundred and ninety-three, unless such person or incorporated body or association shall first file with the secretary of state a certified copy of a resolution adopted by three fourths of the members of the board of chosen freeholders of the county in which such race-course is proposed to be maintained, which resolution shall declare that the maintaining of such race-course is a public necessity."

The question whether this act is one which regulates the internal affairs of towns and counties has been extensively discussed in the arguments and briefs of counsel in this cause, and it has been seriously contended by the defendants that this act is not within the meaning of the language of paragraph 11, section 7, article 4, of the Constitution of this state, referring to laws "regulating internal affairs of towns and counties."

It will be perceived by the first section of this act power to license is conferred upon the boards of chosen freeholders, or the board of aldermen, common council, township committee, or other body having general charge of the affairs of any city, township, or municipal division of this state in which there is situated and maintained a race-course of the character named in this section, and it also provides that no license shall be granted for the maintaining or use of a race-course within the corporate limits of any city having a population of 100,000 people, according to the census last taken. The second section provides that these licenses shall be granted only upon certain expressed conditions, and the third section provides that it shall be unlawful for any person or incorporated body or association to maintain or use a race-course of the character named in the act unless the license for that purpose shall have been granted as in the act provided, and that any license granted under this act shall become void upon the breach of any condition upon which it shall be granted. This act undoubtedly confers power upon the municipalities named in the first and fourth sections in a direction in which it has not been heretofore exercised. It may be that, primarily, racing within this state is not a question which concerns the internal affairs of towns or counties, but it cannot be well contended that a statute which confers power upon these municipalities to restrict, limit, or extend racing is a statute which does not demonstrably affect the internal affairs of such municipalities, within the meaning of the express inhibition of the constitution forbidding the enactment of a certain character of statutes regulating such affairs. The statute, on its face and by its express conditions, renders racing of a certain character unlawful unless the powers conferred on these municipalities are exercised to permit it. The third section of the act expressly declares

that racing of the character mentioned in the act shall be unlawful unless it be legalized by a license which can only be granted by the governing body having general charge of the affairs of such municipalities, and certainly the statute in this respect is dealing with a question of municipal government, and whether it be one of police, revenue, or some other power of municipal government is quite immaterial. Municipal government is a creation of statute, and the powers of municipal government may extend to almost every feature of regulation not inhibited by the constitution within the area over which it extends. It becomes a matter of the internal regulation of the affairs of the municipality by force of the statute, and it cannot be claimed, so far as the statute is concerned, to be a question any longer of state policy, but a matter relating to the internal affairs of the municipality to which it applies. It becomes the power of the municipality. If the general subject-matter here, as contained in this statute, be one over which the legislature has power and jurisdiction, then it cannot be contended, when its power is conferred upon any municipality, aside from the question of whether the statute be invalid or not, that such matter does not become the internal affair of such municipality. It may be superfluous to pursue this subject further, but on decided authority there can exist no question but that this statute is one regulating the internal affairs of towns and counties. In *State v. Camden*, 40 N. J. L. 157 (in this court), Justice Reed says: "The establishment of a municipality, whether by custom, royal charter, or legislative grant, carries with it certain incidental powers essential to its existence as a body politic. In addition to these incidental powers, others are granted, or the incidental powers regulated by express provision in their respective charters. All these matters which are the subject of control by the municipality incidentally, or which already exist, or may thereafter be conferred by grant, concern the internal affairs of the city. Any attempt to strip a city of any such power, or to confer upon it additional power, or to change the manner of exercising the power already existing, is a regulation of such internal affairs. The largest field for the municipal action is afforded in the exercise of the power to suppress nuisances, prevent disorders, preserve the health and safety of the citizens, by virtue of its right to invoke and administer the police power of the state. The control of the vending of spirituous liquors has been the subject of such regulation almost from the beginning of government." The cases of *State v. Camden County Common Pleas Ct.* 41 N. J. L. 497; *State v. Morris County Common Pleas Ct.* 42 N. J. L. 632; *Highstown v. Glenn*, 47 N. J. L. 105-108; *State v. Gloucester County Circuit Ct. Judge*, 50 N. J. L. 609, 1 L. R. A. 86; *State v. Newark*, 40 N. J. L. 550; *State v. Hammer*, 42 N. J. L. 440; *Hammer v. State*, 44 N. J. L. 667,—all illustrate and enlarge this principle. Here under this statute, the machinery provided to accomplish the purposes of this act is municipal. The board which exercises the power conferred by the

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act is a municipal board. The revenues derived by the resolutions of the city council of Elizabeth, resulting from the granting of this license, go into the city treasury. And, within the authority of the adjudicated cases in this state this statute regulates the internal affairs of towns and counties by conferring upon them powers which before this time they did not possess, and placing within their control and regulation matters over which previously they exercised no control. These matters are such as affect the public welfare. Practices affecting the public are made lawful or unlawful by the exercise or nonexercise of a power conferred upon the municipal governing bodies. This power, then, becomes a part of the municipal government. This statute is one which, so far as this case is concerned, clearly regulates the internal affairs of the city of Elizabeth. The contention here, then, on the part of the prosecutors, is that this statute is unconstitutional, in that it is a local or special law, contrary to paragraph 11, section 7, article 4, of the amended Constitution of this state, which provides that "the legislature shall not pass private, local, or special laws in any of the following enumerated cases: . . . Regulating the internal affairs of towns and counties; . . . granting to any corporation, association, or individual any exclusive privilege, immunity, or franchise whatever." I think it requires but a cursory examination of this statute to conclude beyond question that it is affected by both these vices, and is upon these grounds unconstitutional, and therefore invalid.

There was much discussion upon the question whether the Act was not invalid upon the ground that, by the first section thereof, it could have no operation in cities having a population of more than 100,000 people, according to the census last taken. This objection to this statute is not here either discussed or determined. By the first section of the Act, power is conferred upon the governing body of any county, city, township, or other municipal division of this state, in which there was situated and maintained a race-course of the sort therein named to grant a license to the owner of such race-course to use and maintain such race-course for any running, etc., in the manner therein characterized; but this power to thus license is, by the fourth section of the Act, restricted to race-courses used for such purposes prior to the 1st day of January, 1898. This fourth section prohibits any person or incorporated body or association from maintaining or using any race course for the running, trotting, or racing of horses, mares, or geldings, for a purse, plate, or other thing to be run, paced, or trotted for by such horses, mares, or geldings, which was not used for such purposes prior to January 1, 1898, unless such person or incorporated body or association shall obtain a resolution adopted by three fourths of the members of the board of freeholders of the county in which such race-course is proposed to be maintained, which resolution shall declare the maintaining of such race course is a public necessity, a certified copy of which resolution shall be filed

with the secretary of state. It will be seen that a discrimination is at once made by this act in favor of localities, and race-courses therein situated, maintained, and used prior to the 1st day of January, 1898, and against race-courses to be maintained and used after that time. In the former, and with respect to race-courses therein licenses may be granted by the governing bodies of the municipalities named in the first section of the Act, without qualification or restriction; but with respect to the latter—i. e. race-courses to be maintained and used after the 1st of January, 1898—a condition is imposed; that is, a resolution must be adopted by three-fourths of the chosen freeholders of the county, which shall declare the race-course a public necessity. Besides the requirement that a race-course proposed to be maintained and used after the 1st day of January, 1898, shall be licensed by a three-fourths vote of the board of chosen freeholders of the county, there is added the exceedingly onerous condition of a declaration on the part of the board of chosen freeholders that the race-course proposed to be maintained is a public necessity. In passing upon the constitutionality of such discriminative restrictive acts, and the classifications thereby created, the substance of the legislative provision is regarded, giving only secondary consideration to the form in which it is expressed; and while, under the clause of the constitution just cited, objects may be classified for the purposes of legislation, such classification must be founded upon some natural or substantial difference, and such classification must include all the objects to which the legislation enacted for the particular class is appropriate or necessary. *State v. New Brunswick*, 42 N. J. L. 51. The rule of law applicable is stated in the language of the chief justice in *State v. Parsons*, 40 N. J. L. 1, as follows: "Within the sense of these prohibitory clauses of the constitution, a general law, as contradistinguished from one special or local, is a law that embraces a class of subjects or places, and does not omit any subject or place naturally belonging to such class. . . . Interdicted local and special laws are all those that rest on a false or deficient classification. Their vice is that they do not embrace all the class to which they are naturally related. They create preference and establish inequalities. They apply to persons, things, or places possessed of certain qualities or situations, and exclude from their effect other persons, things or places which are not dissimilar in these respects." In *State v. Hammer*, 42 N. J. L. 440, the chief justice again says: "The true principle requires something more than a mere designation by such characteristics as will serve to classify, for the characteristics which thus serve as the basis of a classification must be of such a nature as to mark the objects so designated as peculiarly requiring exclusive legislation. There must be a substantial distinction, having a reference to the subject-matter of the proposed legislation, between the objects or places embraced in such legislation and the objects or places excluded." And in the same case, in the court of errors and appeals (*Hammer v. State*, 44

N. J. L. 637), the chancellor declares that, "normally, there can be under our constitution no such thing as local or special legislation to regulate the internal affairs of municipalities, but all legislation to that end must be general, and applicable alike to all; nor can any departure from the rule be justified, except where, by reason of the existence of a substantial difference between municipalities, a general law would be inappropriate to some, while it would be appropriate to and desirable for others. There it would be warranted, not only by the necessities of the situation, but by a reasonable construction of the constitutional provision. In such a case the municipalities in which the peculiarity exists would constitute a class, and the legislation would in fact be general, because it would apply to all to which it would be appropriate. But distinctions which do not arise from substantial differences—differences so marked as to call for separate legislation—constitute no grounds for supporting such legislation." *State v. Sloane*, 49 N. J. L. 362; *State v. Bloomfield*, 47 N. J. L. 442; *Lodi Twp. v. State*, 51 N. J. L. 404, 6 L. R. A. 56. These rules have been continuously declared by the courts ever since the adoption of our amended constitution. In the latest case on the subject, in *State v. Somer's Point*, 52 N. J. L. 32, 6 L. R. A. 57, Mr. Justice Depue says: "As applied to legislation of this character, a law is special or local, as contradistinguished from general, in the sense of the prohibitory clauses in this paragraph of the constitution, which embraces less than the entire class of persons or places to whose condition such legislation would be necessary or appropriate, having regard to the purpose for which the legislation was designed. A law which so particularizes, and by such means is restricted in its operation to persons or places which do not comprise all the objects which naturally belong to the class, is 'special' or 'local' within the meaning of the constitutional interdict."

It has been inquired, upon what principle can a classification of race-courses into those used and maintained before, and those used and maintained after, January 1, 1898, be sustained? What, in this view, is the substantial difference between them, which requires a different system of legislation applicable to each? Where are the characteristics sufficiently marked and important to make them distinct classes? I can perceive no such differences and no such characteristics; nor can I perceive any reasonable ground on which one class should require any different legislation from that which the other requires. To make a classification good, it must be founded upon differences and characteristics sufficiently marked and important to make them naturally a class by themselves. *State v. Parsons*, 40 N. J. L. 123; *State v. Trenton*, 42 N. J. L. 436; *State v. Plainfield*, 54 N. J. L. 529. There are no qualities in race-courses which are sufficiently marked and important to distinguish those in use prior to January 1, 1898, from those set up after that date. Legitimate classification rests on the quality of its members, not on the par-

ticular time when those qualities were acquired. *State v. Jersey City*, 45 N. J. L. 297; *State v. O'Connor*, 54 N. J. L. 36; *State v. Trenton*, Id. 444. This statute affords no proper and appropriate classification of race-courses which will support the application of a distinctive system of legislation applicable to each class, so distinctive and different as the two methods of licensing appearing in this act. The act is simply special legislation of the most palpable character, and plainly within the interdicting provision of the constitution against special laws regulating the internal affairs of towns and counties, and it must, upon this ground alone, be declared unconstitutional and invalid.

But there is still another obvious defect in this statute. It is not alone special in its character, but it also distinctly and substantially grants to certain corporations, associations, or individuals exclusive privileges, immunities, or franchises. It is clear that this act is a grant of an exclusive privilege to race-courses used before January 1, 1893, to obtain a license without complying with the onerous conditions embraced in the fourth section of the Act. Under the provisions of this latter section, the board of chosen freeholders, supposably exercising only public functions for public welfare, before they could exercise the power conferred upon them of granting a license to a race-course, must declare, in any event, upon their judgment in behalf of the public, that the race-course is a "public necessity." Now, it is manifest that this provision of the statute operates to create such a classification as not to confer upon all race courses alike the benefit which inures from the exercise of the powers under the first section of this Act. The act creates and confers privileges upon one class of race-courses, and grants to certain corporations, associations, and individuals privileges and immunities which can be rarely, if ever, conferred upon others under its provisions. The conditions imposed are not even similar. One class of race-courses may be established without regard to conditions at all; another class can only be established by submitting to the imposition of a condition which may be either of difficult or impossible performance. One class is privileged to the point almost of monopoly, and the other class is discriminated against almost to the point of absolute prohibition; and this is a vice of statutory enactment declared against, and plainly interdicted by the provisions of the constitution against the passage of local or special laws granting to any corporation, association, or individual any exclusive privilege, immunity, or franchise. In the case of *State v. O'Connor*, 54 N. J. L. 36, where the act under review provided that "no person now holding an appointive position in any city or county of this state, and receiving a salary from such city or county, who is an honorably discharged Union soldier, etc., shall be removed from such position, except for cause," *Mr. Justice Knapp*, speaking for this court, said: "This law is hopelessly void, because only those members of the designated body of men who held office at the time of the

passage of the act are given the benefit of its provisions. The great body of this deserving class of our citizens is shut out from its benefits." So far as adjudicated authority can go, it would appear that an analogous point to the very one in this case under consideration has been settled in this court in the case of *State v. Post*, 26 Atl. Rep. 683 (decided at the November term, 1892); and that case is so important in this relation that it may not be amiss to draw at length from it. In that case the act considered read as follows: "Any person or persons, citizens of this state, now using or occupying any grounds lying under the tide water of this state, for the planting or cultivation of oysters thereon, said grounds not being natural clam grounds or natural oyster seed beds, and the same shall have been so used and occupied since January the first, one thousand eight hundred and eighty, shall be confirmed in their right to use such grounds for the purpose of planting and cultivating oysters, and the oysters planted and grown thereon shall be the personal property of the person or persons using or occupying the grounds aforesaid, provided the said grounds shall have been marked by proper stakes, buoys or suitable monuments during the time aforesaid and oysters shall have been actually planted upon the grounds so marked." This act made it a misdemeanor to take oysters from beds so used and marked without the permission of the occupant. *Mr. Justice Van Syckel* says: "The right to plant oysters on lands of the state for the sole use of the occupant is a privilege, and, inasmuch as it [the act] excludes all others from taking them, it is an exclusive privilege, which cannot be granted by special, local, or private laws. . . . The state may grant rights in some of the lands without disposing of all its possessions, but it cannot select individuals or corporations, as the objects of its bounty to the exclusion of other citizens of the state." In the opinion, establishing a principle which seems to be thoroughly applicable to the present case, *Mr. Justice Van Syckel* continues: "This act does not confer its benefits upon all the citizens of the state who may elect to accept them upon the terms prescribed by the lawmaker. It does not shield the property of all who now or hereafter occupy and plant, but is expressly restricted in its operation to those who have used and occupied from January 1, 1880, and who were in occupancy on the passage of the Act in 1890. The law can never apply to any person other than those to whom it applied at the time of its enactment. Occupancy, claiming and staking grounds, constitutes the meritorious ground for the grant and is the basis of the classification upon which a law to be valid must be formed. The legislature in order to increase the product of oysters may declare that all who shall now or hereafter elect to plant and make oyster grounds shall be protected in the enjoyment of such property, but it cannot limit immunity to those who had planted and staked the ground at the passage of the Act in 1890. That is the vice of this law. It does not embrace all of the class according to a legal basis of classification, and the adjudicated cases condemn it."

The court has not considered the other objections urged against the validity of this act. Both upon the ground that it is a special law regulating the internal affairs of towns and counties, and also upon the ground that it is a special law granting to certain corporations, associations, and individuals ex-

clusive privileges, immunities, or franchises, it is held to be unconstitutional and invalid.

Therefore the resolutions of the city council of the city of Elizabeth in this matter, and the license therein and thereby granted, are set aside, and declared to be null and void.

MISSISSIPPI SUPREME COURT.

George Q. WHITNEY, *Appl.*,
v.
HANOVER NATIONAL BANK *et al.*
(Two Cases.)

George Q. WHITNEY, *Appl.*,
v.
BANK OF GREENVILLE *et al.*

(.....Miss.....)

1. A person has no right to intervene as defendant in equity against the objection of the complainant.
2. The appointment of a receiver of a national bank on the *ex parte* application of the directors is utterly void.
3. In a suit by general creditors who have no judgments or specific liens, a chancellor's appointment of a receiver is not so unauthorized and void as to be subject to collateral attack for want of jurisdiction,—especially where the managers of the bank had abandoned it and the chancellor had previously attempted on their application to appoint a receiver, and the constitution of the state has provided that a chancellor may grant relief in equity cases, although the legal remedy may not have been exhausted and that any mistake in respect to the question whether the case was one for equity or common law shall not render the judgment or decree subject to reversal or annulment.

(April 9, 1894.)

APPEALS by complainant from decrees of the Chancery Court for Washington County in favor of defendants in proceedings brought to reach the assets of the Bank of Greenville in the hands of G. D. Thomas, its receiver, to intervene in a proceeding already instituted against the bank in which a receiver had been appointed, and to set aside prior proceedings in reference to the disposition of the assets of the bank, and for an injunction against interference therewith. *Affirmed.*

The facts are stated in the opinion.

Messrs. Nugent & McWille and S. H. King for appellant.

Messrs. Yerges & Percy for appellees.

Campbell, *Ch. J.*, delivered the opinion of the court:

These three cases were argued and sub-

mitted together, and will be so considered. Their history is this: The Bank of Greenville was found to be insolvent, and came to a stop, on the 22d day of December, 1891, when the directors, headed by the president, applied, by petition to the chancellor, to take charge of the assets of the bank, by appointing a receiver to collect and manage its affairs. The chancellor appointed the president of the bank receiver, and, on his application, enjoined all persons from proceeding by suit against it. The receiver appointed entered upon his duties as designated, and continued until he resigned, on the 6th of July, 1892. On the 11th July, 1892, the Hanover National Bank and other creditors of the Bank of Greenville exhibited their bill, in the chancery court in which the receiver had been appointed, against the Bank of Greenville, and averred the foregoing facts, and that since the 22d December, 1891, the officers and directors of the bank had ceased to manage it, and that its affairs had been managed wholly by Pollock, as receiver, who had collected a large sum of money due said bank, and that the appointment of another receiver was necessary for the preservation of the assets of the bank and the protection of the rights of its creditors; with other specific allegations, designed to show the necessity for the immediate appointment of a receiver. Upon due notice to the defendant a receiver was appointed in this proceeding on the 18th July, 1892, and the former receiver was directed to deliver to him all the assets of the bank in his hands. On July 28, 1892, George Q. Whitney and others, creditors of the Bank of Greenville, united in a bill against the bank and G. D. Thomas, who had qualified and was acting as receiver by virtue of his appointment on July 18th, and against other defendants, in said chancery court. This bill set forth the suspension of the bank on the 22d December, 1891, and the appointment by the chancellor of Pollock as receiver on the application of the president and directors of the bank, and that Pollock took exclusive control of all the assets of the bank, and acted as receiver, but that defendant Thomas, at the time of exhibiting said bill, claimed to be receiver of said bank by

NOTE.—The question of the power of a court of equity to appoint a receiver of a corporation on the application of the corporate officers on the ground that such action will be for the interest of the corporation and its creditors also is raised and decided in the negative in the above case and also in the case next following, *post*, 584.

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For an exhaustive note on the power of a court to appoint a receiver when no other relief is asked including some authorities as to appointment on application or consent of the corporation, see Supreme Sitting of the Order of Iron Hall v. Baker (Ind.) 20 L. R. A. 210.

virtue of an appointment by the chancellor of said court; that the application to the chancellor on December 22, 1891, and all the proceedings had, including the procurement of the appointment of Thomas as receiver, were devices to hinder, delay, and defraud creditors, and "invalid and void." Discovery was sought by the bill as to all the assets of the bank, of whatever kind, and a lien upon them prayed to be established from the date of filing the bill, and their appropriation to the demands of the complainants. The Bank of Greenville interposed a plea to this bill of the proceeding by the *Hanover National Bank et al. v. Bank of Greenville*, and the appointment in that case of Thomas as receiver, and that he had qualified as such, and was in possession of the assets of the bank under that appointment, and relied on this plea as a bar to the bill filed 23d July, 1892. The plea was set down for hearing upon its sufficiency, and was sustained, and the bill dismissed. From that decree an appeal was taken, and case No. 7,460 on the docket of this court is that appeal.

On October 4, 1892, George Q. Whitney petitioned the chancery court of Washington county, in which these cases were pending, and which had been consolidated, setting forth that he was a creditor to a large amount of the Bank of Greenville, and had recovered judgment for a large sum against it in the court of the United States at Vicksburg, Miss., July 28, 1892, which had been duly enrolled, and, he claimed, was a paramount lien on all the assets of said bank, notwithstanding all the various proceedings in the said chancery court, which are set forth with detailed particularity, and denounced as void, and no obstacle in law to the application of the assets of the bank to the claim of the petitioner, who prayed to be allowed to be made a party defendant to said cause. At the same time he presented a petition and bond for removal of said cause, in which he prayed to be made a defendant, to the United States court at Vicksburg. The complainants in the cause in which Whitney sought to intervene as a defendant opposed his application, and it was denied by the court, and from this he appealed, and that appeal is contained in No. 7,459 on the docket of this court.

Defeated in his effort to be made a defendant as stated, Whitney made an abortive effort to have the United States court at Vicksburg take charge of his suit, and enforce his claim to be paid out of the assets of the Bank of Greenville in preference to other creditors; but with that we have no concern, and state the fact historically only, being in the record before us. On February 6, 1893, Whitney, who had been baffled in all his efforts to obtain payment as a creditor entitled to precedence out of the assets of the Bank of Greenville, exhibited an original bill in the chancery court of Washington county against the complainants in the bill of the *Hanover National Bank* and others against the Bank of Greenville, exhibited July 11, 1892, and the Bank of Greenville and W. A. Pollock, receiver, and G. D. Thomas, receiver. In this bill is narrated

with detail the history of the dealing by and with the bank from the time of its suspension and taking refuge from creditors in the chancery court to the filing of this bill, which also relates the persistent, but ineffectual, efforts of the complainant, in state and federal courts, to secure recognition of his right, as claimed, to be first paid out of the assets of the Bank of Greenville. It assails the action of the chancery court of Washington county as void for want of jurisdiction over the subject-matter dealt with, and seeks to vacate all orders that stand in his way, and the payment of his as a preferred claim out of the effects of the bank. The bill seeks injunction, which was obtained. This bill was answered, and most of its allegations admitted, but the claim made by it to the right of the complainant to priority of payment out of the assets of the bank was denied. A motion was made to dissolve the injunction, and some affidavits were taken, and some facts were agreed on for the hearing of the motion to dissolve, and it was agreed that the case should be heard on the motion to dissolve, and for final decree on such hearing. The respondents gave notice of a claim for damages to be allowed on dissolution of the injunction to amount of \$2,500 for attorney's fees in defense of the suit. The case was heard in accordance with the agreement, and a decree was made dissolving the injunction, dismissing the bill, and awarding damages against the complainant in the sum of \$2,000 as attorney's fees, the decree reciting that the court had heard testimony in open court as to the attorney's fees, and taxed the costs against the complainant, who appealed, and this is No. 7,749 of the docket of this court.

From this complete but succinct history of this litigation, as disclosed in voluminous form in the three cases before us, it is apparent that the only question presented for decision by the appeal in No. 7,459 is as to the propriety of the action of the court in refusing to permit Whitney to intervene as a defendant in the case of *Hanover National Bank et al. v. Bank of Greenville*, against the objection of the complainants, who protested earnestly against it. The court did right in this refusal. "No such practice is known in equity as making a person a defendant to a suit upon his own application over the objection of the complainant." 1 Dan. Ch. Pl. & Pr. 287, note 2, and cases cited; *Stretch v. Stretch*, 3 Tenn. Ch. 140,—where the subject is fully treated, and the action of the court in the case before us is fully vindicated on principle and authority.

The question presented by cases 7,460 and 7,749 is whether the chancery court of Washington county was so wanting in jurisdiction of the case of *Hanover National Bank* and others exhibited against the Bank of Greenville, July 11, 1892, as to render its action in the case void, and liable to be assailed collaterally, and treated as a nullity, whenever and however called in question; for, if it be conceded that the action of the court was erroneous, unless it was void, the fact that it had assumed jurisdiction, and taken control of the assets of the Bank of

Greenville, and appointed receiver in the case, was an answer to the original bill exhibited by Whitney and others on the 28d July, 1892, and likewise to Whitney's bill of February 6, 1893. We regard the action of the chancellor on the 22d December, 1891, appointing a receiver on the *ex parte* application of the directors of the bank, and his subsequent action in pursuance of that appointment, as utterly void, and of no legal effect. It could be assailed collaterally, and disregarded with impunity, by anybody. The proposition that an insolvent debtor can take refuge in a chancellor's decree on his or its own application, and obtain protection against pursuing creditors, who may be enjoined from pursuing their ordinary remedies, is without foundation. We cannot account for the mistake fallen into in the proceeding of December 22, 1891, and all that was done under it, except by supposing that what is provided for by statute in other states was considered admissible in the absence of statute in this state. The suit of *Hanover Bank et al. v. Bank of Greenville*, instituted July 11, 1892, is evidence of the fact that it was considered necessary to strengthen the grasp of the chancery court on the assets of the bank, and that it was a timely proceeding for the purpose of the complainants in that suit, for it results from what we have said that all that went before was of no legal validity; and, but for that suit, there would have been no barrier to his proper proceeding by any creditor, the injunction issued to the contrary notwithstanding. But, if the court was not wholly without jurisdiction in that suit, it was inadmissible to inject into it other suits, as sought to be done by the bill of July 23, 1892, and that of February 6, 1893.

The question, then, is as to the case of *Hanover Bank et al. v. Bank of Greenville*, begun by original bill July 11, 1892. Was the action of the court as to that case void? It is to be observed that the bill in that case is not one to secure any priority or advantage to the complainant in it, to the injury of other creditors, but it is for all creditors of the Bank of Greenville, as shown by its prayer for the appointment of a receiver to preserve and collect the assets, and distribute the money among all the creditors, according to their rights as ascertained. There was no time when Whitney could not join in this suit as a complainant, or assert his right of priority as claimed, if he had chosen to do so; but his persistent effort was to obtain priority over other creditors and secure full payment, if the assets were sufficient; and he was unwilling to make common cause with all creditors, but, asserting the voidness of all the proceedings in the chancery court as to these matters, he sought, as he had a right to do, to obtain precedence as a creditor by getting judgment against the bank, and enforcing it. He got judgment, and, if that entitled him to be paid out of the bank's assets in the hands of the receiver he might have propounded his claim of priority in the chancery court, and demanded its recognition and payment by an order therefor, but he maintained his attitude of asserting the nul-

lity of all the proceedings in this matter of the chancery court, and attacked them as void; and the maintenance of his bill of February 6, 1893, depends on maintaining the legal proposition on which it rests. His learned counsel has been not only persistent, but consistent, in the many methods employed to obtain for his client an advantage over other creditors. It remains to be stated whether or not he shall succeed in securing the reward of his industry in behalf of his client. By his bill of February 6, 1893, he has pursued the proper course to obtain an adjudication of the question on which the claim made by his client depends. This bill attacks the validity of the proceedings in the chancery court in the case of *Hanover Bank et al. v. Bank of Greenville*, on the ground that it is not the province of a court of chancery to dissolve a corporation, or interfere with the exercise of its franchise, or displace its officers, or appoint a receiver, or otherwise exercise jurisdiction over it, at the instance of creditors who have no judgment against it. In this case there was no interference by the court with the bank or its franchise, and the performance of the ordinary functions of its officers. There was no attempt to dissolve or restrain the corporation. Its directors had voluntarily surrendered its assets to the keeping of the chancellor, and ceased to perform their duties as to them. The chancellor had accepted the trust, and designated a receiver to take charge of these assets, and care for them, and had enjoined all creditors of the bank from suing it, and had proceeded in the administration of the trust he had accepted, as if there had been a creditors' bill; and, although this fell little short of being a mere farce, saved from it only by the seriousness of the performance with judicial gravity, in good faith, it was, nevertheless, the condition in which the complaining creditors found the affairs of their debtor on the 11th July, 1892, when they instituted their suit representing the deplorable conditions existing, and prayed the interference of the chancery court to take charge of the assets of their debtor, the bank, thus abandoned by it, and surrendered to the chancellor, who, though without authority to receive them, had yet taken control of them as if he did have the right to receive them, and had been dealing with them accordingly. The bill urged the necessity for the immediate appointment of a receiver for the preservation of the assets of the bank, which had suspended, and ceased to care for them since December 22, 1891. It is true that none of the complainants was a judgment creditor of the bank, and none had a specific lien on the assets of the bank. Yet these assets constituted a trust fund, in a general sense, for the payment of the creditors of the bank, and, having been abandoned by the managers of that corporation, and transferred to the chancellor, who was dealing with them as of right, when he had no more legal authority over them than a private individual, who might have found them, if it may be said that, under these circumstances, it was erroneous for the chancellor to entertain the suit of general creditors of the bank, and ap-

point a receiver it certainly cannot be maintained that this proceeding was wholly unauthorized and void, so as to be subject to collateral attack for want of jurisdiction to entertain the suit. *Vanfleet, Collateral Attack*, § 100; *Brown v. Lake Superior Iron Co.* 134 U. S. 530, 33 L. ed. 1021; *Mellen v. Moline Malleable Iron Works*, 131 U. S. 352, 33 L. ed. 178; *Graham v. La Crosse & M. R. Co.* 102 U. S. 148, 26 L. ed. 106; *Goodman v. Winter*, 64 Ala. 410, 38 Am. Rep. 13; *Barbour v. National Exch. Bank*, 45 Ohio St. 133; *Rouse v. Merchants Nat. Bank of Cincinnati*, 46 Ohio St. 493, 5 L. R. A. 378.

Many other books might be referred to in support of the proposition asserted, but, if the doctrine announced did not prevail elsewhere, there can be no doubt as to the law here since the Constitution of 1890. By section 160 of that instrument, "in all cases where said court [chancery] heretofore exercised jurisdiction, auxiliary to courts of common law, it may exercise such jurisdiction to grant the relief sought, although the legal remedy may not have been exhausted, or the legal title established by a suit at law." This is in harmony with the scheme of the constitution reversing the former relations of the courts, in which the circuit court possessed general jurisdiction, and was the repository of the power to administer legal remedies, and the chancery court had jurisdiction of certain designated matters, and where there was not a full, adequate, and complete remedy at law. Now the circuit court has original jurisdiction "in all matters, civil and criminal, in this state, not vested by this constitution in some other court." Section 156. A residuary grant is thus made to the circuit court. This manifests the policy of enlarging the domain of chancery, and limiting that of the court of law. What may be the effect of the provisions mentioned in widening the scope of the courts of chancery cannot be determined now, and is not necessary to be decided; but that they will be influential in considering the class of cases in which chancery courts may entertain jurisdiction is undeniable. When we look to section 147 of the Constitution, all doubt as to the proper resolution of the question presented by this case vanishes. Because of that section, error is not predicable of "any error or mistake as to whether the cause in which it was rendered was of equity or common-law jurisdiction." "No

judgment or decree in any chancery or circuit court, rendered in a civil cause, shall be reversed or annulled on the ground of want of jurisdiction to render said judgment or decree, from any error or mistake as to whether the cause in which it was rendered was of equity or common-law jurisdiction," is the mandate of the fundamental law, and sweeps away all distinction between equity and common-law jurisdiction, after it has been entertained, in a civil cause in the chancery or circuit courts. It may be an action of crim. con., or for libel or slander, or trespass, or any other civil cause in the chancery court, or an equity matter in a court of law; if entertained there, error is not predicable, and the decree or judgment shall not be annulled for want of jurisdiction. The chancellor or circuit judge conclusively and finally settles the question of jurisdiction, as between equity or common-law jurisdiction, of the particular case; for it would be the height of absurdity to hold that, while error may not be affirmed of it, such judgment or decree is void. The reason we do not apply the provisions of the constitution mentioned to the matter of December 22, 1891, and uphold it, and what followed, is that it was not a cause. There was no suit or action, and no parties plaintiff and defendant, but a mere *ex parte* surrender by the bank to the chancellor of its affairs, for which there is no authority in law, and therefore the constitution does not apply, but relates to a civil cause, as properly understood, and not to all that a chancellor or judge may do. The case of *Hanover National Bank et al. v. Bank of Greenville* is a suit regularly begun by bill against a defendant, and regularly proceeded with to a final decree; and, while we will not be understood to hold that there was even error in the action of the chancellor,—which question is not before us for decision,—we are sure his action cannot be held void or annulled, and that disposes of cases Nos. 7,749 and 7,460.

The decree allowing \$2,000 for damages in the way of attorney's fees is complained of, but, as the evidence on which the chancellor decided this sum to be reasonable was not put in the record, and is not before us, we cannot disturb the decree for this.

The result is that *the decree in each of the three cases hereinbefore mentioned must be affirmed.*

MISSOURI SUPREME COURT (In Banc.).

STATE of Missouri, *ex rel.* E. G. MERRIAM
v.

Alexander ROSS, Judge of the Cape Girardeau Court of Common Pleas, *et al.*

(.....Mo.....)

1. A receiver cannot be appointed for a corporation on its own petition on the

NOTE.—See case preceding, *ante*, 531, and reference note thereto in connection with the present case.

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ground merely that suits have been, or are about to be, brought against it by small creditors for the purpose of injuring the corporation and doing great harm to its creditors and impairing the value of the property of the corporation, which is alleged to be sufficient to pay all its debts ultimately, if handled under the order of the court where no cause of action against any other party is alleged, although trustees in a mortgage on the property of the corporation are made parties and appear in the suit, and consent to the appointment of the receiver.

2. A receiver appointed by a court of

competent jurisdiction, in a suit brought by him as creditor for himself and other creditors similarly situated, is in a position to make a collateral attack on a void order by another court attempting to appoint a receiver.

3. A writ of prohibition may be issued to prevent a judge from proceeding any further in a so-called suit for the appointment of a receiver, in which the application is made by the insolvent corporation for which the receiver is asked, and fails to state any lawful ground for such appointment.

(March 24, 1894.)

APPPLICATION for a writ of prohibition to restrain the defendant Judge and others from interfering with certain property over which the Circuit Court of Stoddard County was alleged to have appointed a receiver.
Writ granted.

The facts are stated in the opinion.

Mr. H. S. Priest for relator.

Messrs. John W. Noble, George D. Reynolds, M. R. Smith, Alexander & Green, Dickson & Smith, and R. B. Oliver for respondents.

Brace, J., delivered the opinion of the court:

This is an application for a writ of prohibition. On the 3d of March, 1893, the relator, who is the holder of \$76,200 of the bonds of the St. Louis, Cape Girardeau & Ft. Smith Railway Company, secured by deeds of trust on portions of the railway and other property of said company, instituted a suit in the circuit court of Stoddard county against said railway company, Leo Doyle, the trustee in said deeds of trust, and the Mercantile Trust Company of New York, trustee in other deeds of trust made by said company on its property, to recover defaulted interest on said bonds under the following provision contained in said deeds of trust: "That if the interest on any of the bonds so to be issued shall not be paid by the party of the first part when the same shall become due, and if such interest shall remain in arrears for three months, or in case the principal of said bonds, or any of them, shall not be paid at their maturity, then it shall be lawful for said party of the second part, his successor or successors in trust, on the written request of the holders of not less than one-fourth part of said bonds then outstanding, to take possession of all and singular said premises, property, and franchises so conveyed, and, as the attorney in fact or agent of the said party of the first part, by himself, his agent or agents or substitutes, duly constituted, have, use, enjoy, and operate the same, making, from time to time, all needful repairs, alterations, and additions, and after deducting the expense of such use, repairs, alterations, and additions, and the costs and charges of such taking possession, and a reasonable compensation for the services of said trustee in such taking of possession and while in possession, which shall not exceed \$1,500 per annum, apply the proceeds thereof to the payment of the principal and interest of said bonds issued hereunder remaining unpaid, and which have or may have become due, and

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upon the written request of the holders of at least one fourth of said bonds issued hereunder, and then outstanding and unpaid, shall cause said premises, real and personal estate, rights and franchises, to be sold at public auction in the city of Cape Girardeau, giving at least twelve weeks' notice," etc. The petition setting forth the plaintiff's cause of action, verified by affidavit, together with certified copies of said deeds of trust, were on that day presented to the Honorable John G. Wear, judge of said circuit court, at chambers, in vacation of said court, and thereupon he made a provisional order in writing appointing Eli Klotz receiver of said railway company, directing him forthwith to take possession of said railway and restraining said company and its officers from in any manner transferring or disposing of the property, and directing the clerk of said circuit court to issue a summons or notice to said defendants returnable Monday, the 13th of March, 1893, to appear at Bloomsfield, the county seat of said county, before the said circuit court, and show cause, if any they have, why the appointment of said receiver should not be confirmed. The petition, together with the exhibits and the said order, were on said 3d of March, 1893, filed in the office of the clerk of said circuit court. On the next day (March 4th) George Houck, an attorney, and a brother of Louis Houck, the president and general manager of said railway company, and the principal owner of its stock, telegraphed to the latter, advising him of the institution of said suit, and that Klotz had been appointed receiver, and the amount of bond required.

On the same day the following petition was presented to the defendant, the Honorable Alexander Ross, judge of the Cape Girardeau court of common pleas, in chambers: "In the Cape Girardeau Court of Common Pleas within and for the County of Cape Girardeau and State of Missouri. St. Louis, Cape Girardeau & Fort Smith Railway Company, Plaintiff, *vs.* Leo Doyle, Ed. Hidden & Mercantile Trust Company of New York, Defendants. In the Court of Common Pleas of the County of Cape Girardeau, Missouri, May Term, 1893. Your petitioner, the said St. Louis, Cape Girardeau & Fort Smith Railway Company, states that the St. Louis, Cape Girardeau & Fort Smith Railway Company was organized under the laws of the state of Missouri in 1880; that it was originally organized under the name and style of the Cape Girardeau Railway; that afterwards its name was changed to the Cape Girardeau Southwestern Railway; and that more recently the name of said railroad was changed to the St. Louis, Cape Girardeau & Fort Smith Ry. Co., under the laws of said state of Missouri. Your petitioner further states that said railroad issued \$100,000 of first mortgage bonds—bonds under the name and style of Cape Girardeau Railway—on its division of road from Cape Girardeau to Delta, and that Leo Doyle is trustee in said deed of trust securing said bonds, and that said deed of trust is hereto attached and made a part of this petition. Your petitioner further states that it issued \$80,000 of bonds on its line of railroad

from Delta to Lakeville, a large portion of which bonds are outstanding, and that Leo Doyle is trustee of and in the deed of trust by which said bonds are secured, and said deed of trust is hereto attached and made a part of this petition. Your petitioner further states that it issued \$300,000 in bonds on its line of railroad from Lakeville to the St. Francois river, and that Leo Doyle is trustee in the deed of trust by which said bonds are secured, and said deed of trust is hereto attached and made a part of this petition. Your petitioner further states that it issued \$230,000 of bonds on its division of road from the St. Francois river to the main line of the Iron Mountain Railroad, and that Leo Doyle is trustee in the deed of trust by which said bonds are secured, and said deed of trust is hereto attached and made a part of this petition. Your petitioner further states that a large number of the said bonds, and a large number of the coupons of the said bonds, are still unpaid, and held by various parties to your petitioner unknown, to wit, the sum of \$500,000 and that the said coupons and bonds are an underlying security upon the said property. Your petitioner further states that afterwards, in 1888, \$1,000,000 of consolidated bonds were issued upon the said entire railroad of petitioner for the purpose of taking up the said underlying bonds and constructing the said railroad from the main line of the St. Louis, Iron Mountain & Southern Railroad to Hunter, a junction with the Kansas City, Fort Scott & Memphis Railroad, and that many persons to your petitioner unknown are large owners of the said bonds, to wit, the amount of \$1,000,000, and the Merchante Trust Company of New York is trustee in said bonds for the benefit of the holders thereof; and said deed of trust is hereto attached and made a part of this petition. Your petitioner further states that afterwards, to wit, in 1890, a second mortgage income bond of \$150,000 was placed upon the said railroad, and that the said mortgage income bonds have been issued, and that Edward Hidden is trustee in said bonds for the benefit of the holders of the same, and that said deed of trust is hereto attached and made a part of this petition. Your petitioner further states that an Arkansas extension on bond of \$850,000 is authorized on its road, and \$225,000 of said bonds have been issued on said railroad, and said deed of trust is hereto attached and made a part of this petition. Your petitioner further states that the said St. Louis, Cape Girardeau & Fort Smith Railway Company is about one hundred miles long, extending through the counties of Cape Girardeau, Bollinger, Stoddard, Wayne, and Carter, and has an equipment of cars and locomotives, the cost of which was \$250,000, and that the value of the same to the company is as much. Your petitioner further states that the St. Louis, Cape Girardeau & Fort Smith Railway Company is indebted in the sum of \$180,000 on floating debts to various parties, paid out in its behalf, and that for a part of said sum of \$180,000 the said company has issued a first lien upon the steel rails between Williamsville and Hunter, the junction of its road; and, further,

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that it owes on pay rolls about \$25,000 to its employes. Your petitioner further states that the said company is unable to pay its interest, and has not paid the same for a number of years, and that various parties are now making claims against the said company on account of the said interest, amounting to about \$250,000, all of which, on said various bonds, is unpaid. Your petitioner further states that the said property is of great value, to wit, of the valuation of \$1,500,000; and amply sufficient to pay all it owes, if judiciously and carefully managed so as to preserve the same. Your petitioner further states that it is informed that certain parties with small claims to it unknown are now endeavoring to secure control of the said property by useless and expensive litigation, and to so handle it as to be used to the detriment of its bondholders, stockholders, and creditors interested in the same, and to the irremediable injury of all the said bondholders and other creditors. Your petitioner further states that it has been informed that certain parties to it unknown now, without any immediate necessity, are about to institute suit on coupons due from your petitioner, and otherwise to harm it, all of which will be a detriment and injury to a great many of its creditors. Your petitioner further states that these suits instituted for the said purpose will very greatly damage the owners of all of the said bonds, and impair the value of the said property, injure the stockholders, and otherwise create expense and detriment to the same, and do great and irreparable harm to the creditors as a body. Your petitioner further states that it is willing to pay its debts, that it has ample property to pay the same, and that if it has an opportunity to do so, and the same property is handled under the order of the court, as directed by the court, that the same will ultimately pay all liabilities. Your petitioner further states that the said effort to involve this property into litigation by parties to it unknown is made, as it verily believes, for the purpose of greatly injuring the same and destroying its value. Wherefore, your petitioner prays that your honorable court may appoint a receiver for the said railway, its equipment, and all property of whatsoever kind belonging to it, to manage the same for the benefit of all the creditors thereof, represented by the trustees in said deeds of trust heretofore set out, and hereto attached and made a part of this petition, and the trustees made defendants to this petition; and that all parties and individuals, their servants, agents, and attorneys, whatsoever they may be, be restrained and enjoined from in any way interfering with the management and control of the said property; and that the said railway, by its receiver, appointed by your honorable court, use, operate, and control the said property for the benefit of all said creditors, bondholders, and stockholders, as aforesaid, of said railroad company; and for such other and further relief as to your honorable court may seem meet and just. St. Louis, Cape Girardeau and Fort Smith Ry., by Louis Houck, President."

Thereupon the said Ross, judge, made an order in writing appointing the said Louis

Houck receiver of said railway, approved his bond as such, and at half past 7 o'clock in the evening of the same day filed said petition, order, bond, and approval in the office of the clerk of said court of common pleas, and on the same day the said Louis Houck made and filed his oath of office as such receiver in the office of the clerk of said court, took possession of, and since has been holding and managing, said railway as receiver thereof, under and by virtue of such appointment. On Monday, the 6th day of March, 1893, which was the day appointed by law for the opening of the March term of the Stoddard county circuit court, *Judge Wear* failing to appear to open and hold said court, the said George Houck was duly elected special judge of said court, and entered upon the discharge of his duties as such. On the same day the answer of Leo Doyle, trustee, entering his appearance in the suit in the common pleas court, and consenting to the appointment of Louis Houck as receiver, was filed in the office of the clerk of that court. On the 7th of March, Klotz filed his oath of office and bond as receiver, which was approved by the clerk, and a notice issued from the office of the clerk of said court, pursuant to the order aforesaid of *Judge Wear*, addressed to the defendants aforesaid in relator's said suit; and a summons in said suit, returnable to the next term of said court, to be holden on the second Monday in September, 1893, was also issued and delivered to the sheriff on the same day, and the summons and notice of the rule to show cause on the same day served on a station agent of the railway company. On the same day a writ of injunction was issued by *Judge Ross*, of the common pleas court, directed to said Klotz, and a like writ to the relator, E. G. Merriam, prohibiting them from in any way interfering with the said Houck as receiver of said road. On the 8th day of March, Edward Hidden, as trustee, filed his answer in the office of clerk of the common pleas court, entering his appearance in the suit in that court, and consenting to the appointment of Houck as receiver. On the same day another writ of injunction was issued by *Judge Ross*, directed to the attorneys of the relator, of like tenor of those theretofore issued against Klotz and Merriam, and on the same day all three of these injunction writs were served upon the parties to whom directed; and on the same day Klotz appeared before *Judge Ross* in chambers, and presented his petition, together with a certificate of his appointment by *Judge Wear* as receiver, praying for the cancellation of all orders made by him (the said Ross) as judge of the common pleas court in the proceedings aforesaid. Thereupon *Judge Ross* ordered the petition to be filed, and continued until the next term of said court. On the 10th day of March the summons in the suit of relator in the Stoddard circuit court was duly served on Louis Houck and Leo Doyle. *Special Judge* George Houck continued holding the March term of the Stoddard circuit court until the morning of the 18th of March, when the defendant railway company and Leo Doyle, each by their attorneys, appeared in said court, and

filed separate motions to vacate the provisional order theretofore made by *Judge Wear*, appointing Klotz receiver, as aforesaid, in the said cause of the relator, Merriam, in said court. Said motions to vacate were immediately taken up, heard before said special judge, and sustained, and it was thereupon ordered and adjudged by said court "that said provisional order made on the 3d of March, 1893, appointing Eli Klotz receiver of the St. Louis, Cape Girardeau & Ft. Smith Railway Company, be, and the same is hereby, vacated, set aside, and for naught held." Thereupon the railway company and Doyle, by leave of court, filed separate applications for a change of venue in said cause, which were continued until the next regular term for determination, and thereupon, by a general order entered of record, said circuit court was adjourned until court in course. On the same morning, and a short time after said court had been thus adjourned, *Judge Wear* arrived at the county seat, repaired to the court-house, opened court, and caused an order to be entered of record, after reciting his reasons therefor, "that all minutes heretofore made this day by said George Houck, pretending to act as judge of this court, be expunged and stricken from the records, and all proceedings pretended to have been made in this court by said George Houck, as pretended judge, on this day, be also stricken and expunged from the record;" and thereupon proceeded to consider the rule to show cause in the case of *Merriam v. Railway Co. et al.*, returnable that day, confirmed the appointment and qualification of Klotz as receiver, and overruled the application for change of venue for want of notice. On the 16th of March, Klotz made application to this court for a peremptory writ of mandamus commanding the respondents to deliver to him, as receiver as aforesaid, the railway property, effects, and credits of the St. Louis, Cape Girardeau & Ft. Smith Railway aforesaid. An alternative writ directed to the respondents, to show cause why such writ should not be granted, was issued on the 25th of March, to which return was duly made, the issues heard and determined by this court in banc on the 27th of June, 1893, and the writ denied; the court holding, in an opinion written by Gantt, J. (23 S. W. Rep. 196), that the provisional order of *Judge Wear* appointing the said Klotz receiver of said railway had been legally vacated by the circuit court of Stoddard county, presided over by *Special Judge* Houck, on the 18th of March, 1893, and that the subsequent action of *Judge Wear* on that day, after the adjournment of said court by *Judge Houck*, was void and of no effect. Consequently, the said Klotz had no standing in this court for the relief prayed for. Afterwards, on the 25th of July, 1893, there was filed in the office of the clerk of the circuit court of Stoddard county another order made by the Hon. John G. Wear, judge of the said court in vacation, appointing Klotz receiver of said railway, together with his oath of office and bond as such receiver approved by said judge. In the mean time, Louis Houck continued in the management and control of said railway under his ap-

pointment as receiver by Judge Ross, by whom many orders were made at his instance in relation thereto, until the May term of said common pleas court. During said term, and on the 22d of May, 1893, the railway company filed an amended petition. On the 26th, Leo Doyle, trustee, filed his answer thereto. On the 29th, the appointment of Houck as receiver in vacation was confirmed. During the term, many orders were made in respect to said property by said court, and answers were filed by Hidden, trustee, and the Mercantile Trust Company. On the 27th of July, 1893, the relator presented to the chief justice of this court, and filed herein, his suggestion for a writ of prohibition directed to the said Alexander G. Ross, judge of the Cape Girardeau court of common pleas, the said railway company, Louis Houck as president and as receiver thereof, Leo Doyle, the Mercantile Trust Company, and Edward Hidden, prohibiting them, and each of them, from further pursuing and holding cognizance of pleas in said cause in said court of common pleas. A rule upon said respondents was thereupon issued to show cause why such writ should not be issued, returnable to the October term of this court. At the September term, 1893, of the Stoddard county circuit court, the railway company and Leo Doyle, trustee, filed their answers in the suit in that court, and by agreement the venue thereof was changed to the circuit court of Iron county. From the foregoing summary, the condition of affairs when the respondents made return to the rule to show cause at this term of court will sufficiently appear, as well as the issues to be thereupon determined.

Is the power and control which the Cape Girardeau court of common pleas has assumed, and is exercising, over the corpus and affairs of the St. Louis, Cape Girardeau & Ft. Smith Railway Company, through a receiver appointed as aforesaid, authorized by law? and, if not, has this court power, under the constitution and laws, to prohibit the further exercise of such control at the instance of relator?—are the principal questions to be determined in this controversy. The relator contends: That the common pleas court never acquired jurisdiction to appoint a receiver of said railway company's property for two reasons: First, because there was not, at the time the judge of said court assumed the authority to make such appointment, nor since has been, an action pending in said court in which a receiver could be appointed; and, second, because, at the time said judge assumed authority to make such appointment, a receiver had already been legally appointed in a cause pending in the circuit court of Stoddard county, a court of competent jurisdiction to make such appointment. That the property of the railway company is partly within the jurisdiction of the Cape Girardeau court of common pleas, and that, in a proper action pending in that court, it had jurisdiction to appoint a receiver thereof is conceded. Was such an action pending at the time Houck was appointed? A receiver is an indifferent person appointed by the court to receive and protect the property or fund in

litigation *pendente lite*. The appointment is not the ultimate end and object of the suit, but is merely a provisional remedy or auxiliary proceeding. High, Receivers, § 1; 20 Am. & Eng. Encyclop. Law, p. 17; Rev. Stat. 1889, § 2198.

No authority is given by the statutes of this state to its courts, or to judges thereof in vacation, to make such an appointment, except in a pending suit, nor does it inhere in any of them under their general jurisdiction as courts of equity. To ascertain whether there was such a suit pending, it becomes necessary to look at the petition filed in the common pleas court, for there could not be a suit pending unless there was a suit commenced. In this state a suit is instituted "by filing in the office of the clerk of the proper court a petition setting forth the plaintiff's cause or causes of action and the remedy sought." Rev. Stat. 1889, § 2013. When the petition is filed, the suit is commenced. *South Missouri Lumber Co. v. Wright*, 114 Mo. 826. The petition filed in the common pleas court is the petition of the railway company, and sets forth, in substance that it possesses certain property which is incumbered in different ways and to secure different amounts, and owes defaulted interest and floating debt to a large amount and is insolvent; that certain small creditors are about to institute suit on interest coupons due from your petitioner, for the purpose of injuring the same, and doing great harm to creditors as a body, which will interfere with the operation of the road, and impair the value of the security of the bondholders and other creditors; that the value of the property is such that, if handled under the order of the court, it will ultimately pay all liabilities. The court is thereupon asked to take possession of the railroad and its property through a receiver, to enjoin all persons from interfering with the same, and to use, operate, and control the property for the benefit of creditors, bondholders, and stockholders. Where, in this paper called a petition, is to be found a cause of action stated against anybody? What wrong is there complained of, calling for the exercise of the remedial jurisdiction of a court of law or equity? What right of the petitioner, or of anybody else, for that matter, is therein alleged to have been infringed, or even threatened? None whatever. The whole scope of the paper is to inform the judge of the common pleas court in vacation that the railway company is in debt, in embarrassed circumstances, some of its creditors are about to sue upon its overdue obligations, and to pray the court to take charge of its property, and administer it for the benefit of all concerned; in other words, it is simply a petition by a debtor for the appointment of a receiver to manage and carry on its business, so that its creditors cannot enforce their legal rights in the courts of the country, and not a petition stating a cause of action, either at law or in equity, in which, as incident thereto, a receiver might be appointed. The filing of that petition no more instituted an actual controversy between contending suitors in court than would the filing of a copy of the Lord's prayer. It laid no foundation

whatever for the exercise of the jurisdiction of the court to appoint a receiver, unless some ground for the exercise of that jurisdiction can be found other than an actual pending controversy in the court which undertook its exercise. Counsel for respondents Houck and the railway company argue that the jurisdiction of the common pleas court to appoint a receiver on the facts presented in the petition can be maintained on the authority of *Brassey v. New York & N. E. R. Co.* 19 Fed. Rep. 663, and the *Wabash St. L. & P. R. Co. Cases*, 22 Fed. Rep. 269, 23 Fed. Rep. 518, 865, and 29 Fed. Rep. 618.

It must be conceded that the dicta of *Judge Shipman* in *Brassey v. New York & N. A. R. Co.*, *supra*, as quoted in the brief of counsel, would tend strongly to support their contention, producing, as it does, the impression that in that case the action was by an insolvent railroad company, and the relief sought was the appointment of a receiver. This idea is, however, at once dispelled by a correct reading of the extract from the judge's opinion in connection with its context. That was an action by a bondholder against the railroad company. The learned judge, after reciting the contents of the bill, said: "I am of the opinion that when a railroad corporation, with its well-known obligations to the public, has become entirely insolvent, and unable to pay its secured debts, unable to pay its floating debt, and unable to pay the sums due its connecting lines, unable to borrow money, and in peril of the breaking up and distribution of its business, and confesses this inability, although no default has yet taken place upon the securities owned by the orator, but a default is imminent and manifest, a case has arisen when, upon a bill for an injunction against attacks upon the mortgaged property, and a receivership to protect the property of the corporation against peril, a temporary receiver may be properly and wisely appointed. It is next said that this was a case of collusion between the orator and the railroad corporation. There is no claim that there was any collusion on the part of the second mortgage trustees. If by collusion it is meant that the preparation for, and institution of, the suit were known and desired by the directors, or some of them, in the belief that the granting of the prayer of the bill would be prudent and wise, then there was collusion. If by collusion it is meant that the institution of the suit or its management was marked by fraudulent design or purpose, there was not collusion. The complainant was the actual owner of five mortgage bonds. They were not placed in his hands, and were not transferred to him fictitiously, and were not bought by him for the purpose of this suit." The court refused to remove the receiver that had thus been appointed in a suit pending by a creditor against the debtor corporation, and gave no support to the proposition that a debtor can come into court by petition in the form of an action against its creditors, and have a receiver appointed,—a proposition that finds support in no adjudication in this country, so far as we are advised, except in 23 L. R. A.

the single instance of the *Wabash* receivership.

In the several cases to which we have been cited, growing out of that receivership, the validity of the original appointment seems not to have been directly raised or passed upon but rather accepted as an accomplished fact. The original complaint does not appear. Its substance is, however, recited in *Quincy, M. & P. R. Co. v. Humphreys*, 145 U. S. 84, 36 L. ed. 632. In *Central Trust Co. v. Wabash, St. L. & P. R. Co.* 29 Fed. Rep. 618, Treat, J., briefly states the nature and origin of the proceeding as follows: "In order that this matter may not be misunderstood, for it is important in its vast-reaching consequences, it should be stated that it was not an application by a mortgagee to foreclose. It was an application by the corporation itself, concerning which a great deal of comment has been made elsewhere. The application was originally made to myself, in this circuit, which is limited in extent. I hesitated. I found that *Judge Shipman*, a very learned and able judge, had gone over *in extenso* that class of thought. After further consideration with respect thereto, I reached the conclusion that his views were correct, to wit: Here is a vast system, extending through many states and many judicial districts. A default, it was certain, would have been made in a few days. What should be done? The interests of all concerned required that some judicial action should be had for conservation of those interests,—stockholders, bondholders, creditors at large, etc. And after patient thought I reached the conclusion that Brother Shipman was right. Since that time, fortunately, the Supreme Court of the United States has said that it is right. Now, if any one in or out of judicial position chooses to dispute the action of this court, that party may settle that controversy with the Supreme Court of the United States, which is authoritative, so far as the action of this court is concerned."

However prudent and wise the action of *Judge Treat*, concurred in by *Judge Brewer*, may have been from a business standpoint, in taking charge of this great railroad system, we have failed to discover that the Supreme Court of the United States has ever said judicially that upon such an application he had power to appoint a receiver to do so. In the only cases to which we have been cited by counsel as supporting this assertion (*Quincy, M. & P. R. Co. v. Humphreys*, 145 U. S. 82, 36 L. ed. 632; and *St. Joseph & St. L. R. Co. v. Humphreys*, 145 U. S. 105, 36 L. ed. 640), the question of the validity of the appointment of the receiver was neither raised nor passed upon by the supreme court. In one of the cases it was suggested that the bill was without precedent; but the court said, "We are not called on to inquire as to how that may be," nor were they so called by the issues in the other case. The fact is, the *Wabash Case* is *sui generis*. There is no such source of equity jurisdiction as is supposed therein to have been discovered. It is without precedent, and we have found no published case that supports it. The single case

cited by counsel, of *Pressley v. Lamb*, 105 Ind. 171, which the appointment of a receiver in an action by one partner against another for settlement of partnership affairs came collaterally before the court for consideration, manifestly does not support it. *Cox v. Volkert*, 86 Mo. 505. That a court of equity has no inherent power, except in some few cases of particular jurisdiction, to appoint a receiver, except as an incident to and in a suit pending, has hitherto, with the exception of the *Wabash Case*, been a universally accepted doctrine; and outside of that case the doctrine that a court of equity, without statutory authority, has jurisdiction, upon the application of an insolvent corporation, to take charge and administer its affairs through a receiver, not only has no support, but whenever suggested has been repudiated. The following are a few of the many authorities that might be cited in support of these positions; *Jones v. Bank of Leadville*, 10 Colo. 464; *French Bank Case*, 53 Cal. 495; *Smith v. Los Angeles Super. Court* (Cal.) 82 Pac. Rep. 322; *Hugh v. McRea*, Chase, Dec. 466, Fed. Cas. No. 6,840; *People v. St. Clair Circuit Judge*, 81 Mich. 456; *Kimball v. Goodburn*, 82 Mich. 11; *Neall v. Hill*, 16 Cal. 145, 76 Am. Dec. 508; *French v. Gifford*, 80 Iowa, 160; *Whitehead v. Wooten*, 48 Miss. 523; *Atty. Gen. v. Utica Ins. Co.* 2 Johns. Ch. 371, 1 L. ed. 412; *Ex parte Whitfield*, 2 Atk. 815; *Wait, Insolvent Corp.* § 183; *Gluck & B. Receivers*, § 27.

There being no statutory authority in this state for the appointment of a receiver in such a proceeding, the appointment of Houck receiver by the common pleas court was a nullity, as appears from the foregoing authorities and what has been said; and it follows, as a consequence, that his appointment is subject to collateral attack. Is the relator in a position to make the attack? By his petition filed in the office of the clerk of the circuit court of Stoddard county on the 3d of March, 1893, he became the plaintiff in a suit in that court, as one of the creditors of the railway company, in a mortgage security made by the company to trustee for the benefit of such creditors. He sued for himself and all those similarly situated; he sued to enforce a contract by which the company agreed that, in case of default in the payment of interest, the trustee might take possession of the mortgaged property, and apply the income to the payment of the interest, and alleged the default. It was an equitable action *in rem*, of which the court had jurisdiction, and in which a receiver might be appointed. Rev. Stat. 1899, § 2193; *Gluck & B. Receivers*, § 15. It was a real controversy, of which the court had jurisdiction. The court, in the exercise of that jurisdiction, took cognizance of the case, and having taken cognizance of the case "is entitled to retain jurisdiction until the end of the litigation, and incidentally to take possession of the subject-matter of the controversy, to the exclusion of all interference by other courts of concurrent jurisdiction." *Id.* § 80. The subsequent proceedings in that court in that case are important only for the purpose of showing that the jurisdiction thus obtained

has been retained, asserted, and maintained from the beginning. Whatever irregularities, if any, that may have occurred in the exercise of that jurisdiction, can be corrected only in that court, and, to insure such correction, whatever question may arise as to the manner of its exercise by that court may be determined here on appeal or writ of error, but cannot be the subject of the present inquiry, which goes no further than to the jurisdiction of these two courts. What we have to do with here is, on the one hand, a suitor in a court of competent jurisdiction, seeking a legal remedy against the property of his debtor, and, on the other, the debtor, having notice of that fact, fleeing to the shelter of another court of concurrent jurisdiction, and invoking its power to defeat the exercise of jurisdiction by the former court, and to deprive the suitor of the legal remedy to which he may be entitled. We have here no race of diligence between two creditors, seeking to subject their debtor's property to the payment of their demands in courts of concurrent jurisdiction, and between whom many of the interesting questions as priority of right and jurisdiction between such courts, so learnedly discussed by counsel in their briefs, might have arisen. We have a debtor going through the mere form of bringing a suit against his creditors, against whom he had no right of action, by presenting a paper in the form of a petition to the judge in vacation, in which the representatives of the debtor and his creditors, the trustees in the securities, are named as defendants, against whom the debtor had no cause of action, nor made any pretense of having, and praying the court to take possession of its property and administer its affairs upon the sole ground that it would be a good thing for the company and its creditors, some of whom are about to sue upon its obligations. It is folly to attempt to disguise the fact that this proceeding was taken before Judge Ross for the express purpose of defeating the legitimate exercise of the jurisdiction of the circuit court of Stoddard county in relator's suit in that court. That of some such purpose he was advised in the beginning, appears upon the very face of the petition; and that, after full knowledge that such was the object and effect thereof, he has and does still assert and maintain his right, and the jurisdiction of his court over the subject-matter of that suit, so as to impede and hinder the relator in the prosecution of his suit, and the exercise of the jurisdiction of that court therein in his behalf, in a due and orderly manner, is beyond question. The only excuse for so doing that can be found in this voluminous record is that the relator, in bringing his suit, was influenced by a malicious motive, which is alleged in the amended petition, and which is no excuse at all; for it goes without saying that "a malicious motive in asserting a legal right to do a particular thing will not give a right of action." 1 Am. & Eng. Encyclop. Law, 179.

The only precedent for the assertion or maintenance of the jurisdiction of the common pleas court is the case of the *Wabash receivership*, which is without precedent,

and ought to have no following. The exercise of such jurisdiction is not authorized by any statute of this state, and is not found within any source of equitable jurisdiction with which we are familiar, or of which the books speak, and, being without warrant of law, its further exercise ought to be prohibited. By the constitution, this court is invested with "a general superintending control over all inferior courts, with power to issue writs of habeas corpus, mandamus, quo warranto, certiorari and other remedial writs, and to hear and determine the same." Const. art. 6, § 3. The writ of prohibition is a familiar mode of the exercise of this power, and is an appropriate one to restrain the exercise of jurisdiction by a subordinate court over a subject-matter when it has none, and is loudly called for when such jurisdiction is asserted against a court that has jurisdiction and is asserting it, and when the officers of each, acting under its orders, are liable at any moment to come into physical conflict over the possession of the subject-matter in controversy. The writ of prohibition, as prayed for, should go. The grounds upon which this conclusion has been reached obviate the necessity of discussing the many questions raised and argued by counsel, growing out of the action of the parties and the courts after these two proceedings were commenced, none of which go to the question of jurisdiction, upon which this case turns.

*It is therefore ordered that the writ of this court issue, prohibiting the said respondent Ross, as judge of the common pleas court aforesaid, from entertaining any further pleas, or taking any further judicial action, in said so-called suit, entitled the "St. Louis, Cape Girardeau & Fort Smith Railway Company v. Leo Doyle, Ed. Hidden, and the Mercantile Trust Company of New York," of said court of common pleas, and prohibiting the other respondents from further prosecuting any further pleas therein, and commanding the said Houck to turn over all the property of said railroad company that has come into his hands as *de facto* receiver thereof, under the orders of said common pleas court, to the receiver *de jure* thereof, who has been or may be appointed by the circuit court in which this suit aforesaid of relator is pending, and that he account therefor to such receiver under the supervision of said circuit court.*

Black, Ch. J., and Sherwood and Macfarlane, JJ., concur.

Barclay, J., dissenting:

This is an original proceeding for a writ of prohibition. It was begun in July, 1893, during the vacation of the court. A petition was filed by Mr. Merriam the relator, and submitted to the Chief Justice, who then made a rule or order upon the defendants to shew cause, at the opening of the ensuing October term of the court, why a writ of prohibition should not be awarded, requiring them to no further hear or prosecute a certain cause entitled "St. Louis, Cape Girardeau & Fort Smith Railway Co., Plaintiff, v. Leo Doyle, Edward Hidden, and the Mercantile

Trust Company of New York, Defendants," pending in the Cape Girardeau court of common pleas. The defendants in the case at bar are the judge of that court, the said railway company, Louis Houck, as president and as receiver of that company, and the three trustees just mentioned. To this rule, defendants filed returns, setting forth at length the proceedings in the suit in the common pleas court, and asserting the jurisdiction of the latter to determine that suit. To some of these returns "exceptions" have been taken, but upon all of them the relator has moved to make absolute the rule for a prohibition. The facts which we consider decisive of the present application are admitted by all the parties in their respective statements to the court. The merits of the controversy have been fully discussed at the bar and in the briefs, so it is not necessary to further refer to the formal steps by which the merits have been reached. The record here is, however, embellished with a mass of details, many of which are not relevant to the pericase issue for determination now. The St. Louis, Cape Girardeau & Ft. Smith Railway Company (which for convenience we shall call the Cape Railway) filed a petition, March 4, 1893, in the Cape Girardeau court of common pleas, against Leo Doyle and the other above-named trustees in the three deeds of trust in the nature of mortgages, then existing as liens upon the real and other property of that railway. The petition recited fully the history of the railway, and of mortgages and other indebtedness thereof, its present inability to pay its obligations as they matured, that default upon the interest coupons of the bonds secured by the mortgages had occurred, but that the property was ample to meet its debts if "handled under the order of the court," and praying that its property be applied to the discharge of its debts under the direction of the court, to which end the appointment of a receiver for the railroad and all its appurtenances was asked, as well as an injunction against all persons from interfering with the management and control of its property, and for general relief. The petition, without further enlarging upon its contents, may be briefly described as one in which the railway company gracefully sought the refuge of the court to have its own mortgage foreclosed, and meanwhile to remain in charge of a receiver, with a view to prevent seizure of its property, piecemeal, by its creditors. It was modeled after certain noted precedents, the soundness of which, in point of law or equity, we shall not necessarily have to discuss at this time. Upon consideration of that petition Judge Ross of the common pleas court on the same day made an order appointing Louis Houck receiver of the entire railway property in question. Mr. Houck qualified as receiver by giving an approved bond and filing his oath of office. He forthwith took possession of the property, and has remained ever since in possession, operating the railway as such receiver. March 8, 1893, Mr. Hidden, as trustee, filed an answer in the cause consenting to the appointment of Mr. Houck as receiver. On March 7, 1893, an injunction was issued by Judge Ross to Mr.

Klotz and Mr. Merriam, the present relator, prohibiting them from interfering with Mr. Houck as receiver. On the next day a like injunction was issued to the attorneys of Messrs. Klotz and Merriam. On the same day (March 8, 1893) these injunctions were served on the parties to whom they were directed. On that day Mr. Klotz appeared before Judge Ross, and presented a petition reciting his appointment as receiver of the Cape Railway property by Judge Wear, as judge of the Stoddard county circuit court, and praying for an order of delivery of the property to him as receiver. This petition was by Judge Ross ordered filed, and continued to the next term of the common pleas court. May 22, 1893, the railway company filed an amended petition in that court, to the same general effect as the first, but somewhat more elaborately framed. To this the defendant Mr. Doyle, as trustee (who had entered his appearance immediately on the filing of the original petition), appeared, May 26, 1893, and interposed an answer in the nature of a cross-bill, setting up at large his interest as trustee in the property under the mortgages, approving the receivership, asking a sale of the mortgaged property of which he is trustee, and the application of proceeds to the secured debts. The court of common pleas, May 27, 1893, acted upon the amended petition and the answer or cross-bill by entering a renewed or confirmatory order of appointment of Mr. Houck as receiver of all the railway property covered by the mortgages represented by Mr. Doyle as trustee, and made several subsidiary orders respecting the administration of the receivership. At this stage of the suit Mr. Merriam applied to this court for a prohibition, as first above stated. Mr. Klotz had previously applied for a mandamus, with the result shown by the report of that litigation. *State v. Ross* (1893) 23 S. W. Rep. 196. The facts of the proceedings before Judge Wear and in the Stoddard county circuit court in the suit of Mr. Merriam against the Cape Railway and the three trustees above named have been given in the opinions in the mandamus case (23 S. W. Rep. 196), and need not be repeated; but some have since transpired which are supposed to have relevancy to the issue before us. July 24, 1893, Judge Wear, in vacation, reappointed Mr. Klotz as receiver of the railway property, and he qualified as such on that day. Since then that proceeding has been transferred, by change of venue, to the circuit court of Iron county, and in it the Cape Railway has filed an answer, setting up fully the proceedings in the common pleas court, above described, and asserting that because thereof, and of the possession of Mr. Houck as receiver, and of other facts recited, the common pleas court has complete possession and jurisdiction of the property, and should not be disturbed therein by any other court of co-ordinate jurisdiction. Mr. Merriam has at no time appeared, specially or otherwise, in the court of common pleas, or filed any objection to its course of action or jurisdiction in the matter of the receivership. The defendants, however, claim that he is legally represented there by Mr. Doyle, trustee in the mortgages,

securing the bonds held by Mr. Merriam. The foregoing is a sketch of the substance of the controversy. Any other facts that may seem to bear materially on the result will be mentioned in the course of this opinion.

1. The Cape Girardeau court of common pleas, by the law of its creation, has concurrent original jurisdiction with the circuit court of the county "in all civil actions at law." Laws 1851, p. 201; Rev. Stat. 1889, p. 2219. This language was held, in *Reich v. Tiedeman* (1878) 53 Mo. 489, to confer jurisdiction co-extensive with that of the circuit court over all civil actions of whatever nature; and in *Fulenwider v. Fulenwider* (1878) Id. 489, it was expressly decided that such civil actions included suits involving equitable rights and remedies. These decisions have stood unreversed for thirty years, and we adhere to them without discussion, as expressing the law touching the right of the common pleas court to hear and adjudicate suits of the general class to which the receivership proceeding in that court belongs. The allegations of the original, as well as of the amended, petition, show that the real property of the Cape Railway lies partly in the city of Cape Girardeau. So that, upon the law and facts shown by the record in that case, that court had originally authority to entertain and decide a suit of that nature at the time it took possession of the property in litigation through the agency of Mr. Houck as its receiver. It hence had jurisdiction of the subject-matter of that proceeding, as has been held by this court in many decisions, of which we cite but a few. *Walker v. Likens* (1857) 24 Mo. 298; *State v. Weatherby* (1869) 45 Mo. 17; *Rosenheim v. Hurlstock* (1886) 90 Mo. 365; *Hope v. Blair* (1891) 105 Mo. 93.

2. It is, however, claimed in this connection that the common pleas court had no power to appoint its receiver, because the original petition invoking its authority in that behalf was so deficient as to state no cause of action, and that consequently the appointment must be treated as a nullity. It may be well to repeat what was said in a recent case in the first division, without dissent, that, "where enough facts are alleged to disclose that the case falls within a class of proceedings which the court is lawfully authorized to hear and decide, the question of the sufficiency of the showing made for the purpose of setting the court in motion is one of law for the determination of the court itself to which the showing is addressed whatsoever its rank." *Dowdy v. Wamble* (1892) 110 Mo. 284. In *State v. Tate*, (1892) 109 Mo. 270, it was unanimously held by the first division that the omission to state a cause of action was not even an irregularity in procedure justifying the setting aside of a judgment on motion after the lapse of the judgment term. If that proposition be correct, for a stronger reason would not such omission furnish ground to treat the action of a court on such a defective pleading as a nullity upon a collateral attack? In *State v. Southern R. Co.* (1899) 100 Mo. 61, it was remarked, in the discussion of the main point involved, that it would be manifestly improper to issue

a writ of prohibition against a court having jurisdiction of a cause upon an application alleging that it was about to pronounce judgment on a petition which did not state a cause of action, but which the trial court had held sufficient. In the case before us the common pleas court had lawful judicial power to appoint a receiver of the property in question upon a proper state of facts. If the original application for the exercise of that power was defective, even defective in substantial respects,—it was subject to amendment, which would relate back to the time when the pleading which it amended was filed. It was expressly so held by the first division in *Lilley v. Tobbein* (1890) 103 Mo. 477. The general rule has long been recognized in this state that proceedings which are defective or insufficient, but yet amendable, are not void merely because of such insufficiency. It was said in *Hardin v. Lee* (1873) 51 Mo. 241, that the fact that the court can make the amendment shows "that the proceedings are merely erroneous or irregular, and that the court had jurisdiction." That ruling has been repeatedly followed in this state. In one of the decisions applying it, we note that it is further added, in the argument of the court, that a judgment could not be declared void in a collateral proceeding because based upon a defective petition. *Burnett v. McCluey* (1887) 92 Mo. 230. The same idea was advanced again in *Dollarhide v. Parks* (1887) 92 Mo. 178. It cannot, we think, in view of these positive expressions of principles in former cases, be correctly held that, if the court of common pleas had lawful power to appoint a receiver of the property in question upon a proper showing of the facts, its act in making such appointment is necessarily void in this collateral assault upon it, because the showing on which that court acted was insufficient, in the estimation of some other court, to warrant the ruling which the former court saw fit to make upon that showing.

3. But it must further be remembered that the original petition for a receiver was amended in some particulars during the proceedings, and that Mr. Doyle, one of the defendants therein, interposed an answer in the nature of a cross-bill, uniting in the request for the receivership, and praying such action by the court in that matter as he claimed was equitable and proper, in the interest of the creditors secured by the mortgages in which he is trustee. Whatever opinion may be entertained of the correctness of the ruling of the court in originally appointing a receiver at the instance of the corporation itself, it is plain, we think, that the joinder of the trustee in that application, as indicated, gives the proceeding a far more certain and safe foundation for judicial action than the case at first possessed. The trustee certainly had the right, upon the facts submitted by the company, to ask the intervention of a court of equity for the foreclosure of the mortgages of which he was trustee, and for the appointment of a receiver in aid of that result. The action of the court in granting that request of the trustee and of the corporation severally is very clearly one which

the common pleas court had jurisdiction to take in the exercise of its general powers as a court of equity. This proposition is too self-evident to require argument. *Quincy, M. & P. R. Co. v. Humphreys* (1892) 145 U. S. 82; *Chicago & A. R. Co. v. Union Rolling Mill Co.* (1884) 109 U. S. 702, 27 L. ed. 1081.

4. It appears, then, from the record of the court, whose right to proceed is called in question, that it has jurisdiction of the subject-matter of the litigation. The next point for consideration is whether or not its right to deal with that subject-matter is affected by the proceedings which took place before Judge Wear, or in the circuit court of the neighboring county. The real issue sought to be submitted, as decisive of the application for a writ of prohibition, is, Which of these two receivers has the better title or right to possession of the railway line? The decision of that issue depends upon the views of law that may be adopted, upon several mooted points, by the authority which shall finally determine that issue, after a finding of the exact facts bearing thereon from the conflicting evidence concerning them. The main position taken by Mr. Merriam, as relator, now is that, by virtue of the proceedings before Judge Wear, Mr. Klotz became invested, as receiver, with a right of possession of the railway property now in custody of the receiver of the common pleas court, and that consequently the latter court has no jurisdiction to entertain or adjudicate the pending cause there. On the other side, defendants insist that the original appointment of Mr. Klotz as receiver was void for several reasons, one of which is because, as they allege, the appointment was made by Judge Wear beyond the territorial limits of Stoddard county, but that, if valid, it was afterwards vacated by the Stoddard circuit court. They also assert that the later appointment of the same receiver in July was void because of the then pending applications on file for a change of venue, based on an alleged disqualification of the judge to act in that proceeding. In reply, the relator urges that the jurisdiction to proceed with the foreclosure and incidental receivership belongs to the court in which the first formal steps were taken to that end, and that they were taken in the Stoddard circuit court. This last-mentioned fact the defendants deny, and also seek to avoid by the contention that the right to proceed belongs properly to the court which has subjected the property in question to its process by seizure. The case is further complicated by charges of fraud and conspiracy, as indicated in the report of the proceeding in this court for a mandamus, 23 S. W. Rep. 196. We are asked by relator to solve all these questions of law here and now, and incidentally to decide the questions of fact on which the former depend. If, upon doing so, we should conclude that the receivership of Mr. Klotz has priority of right over that of Mr. Houck, it is supposed that such a conclusion, founded on our view of facts, entirely outside the record of the court of common pleas, would have the legal effect to annihilate its power, as a court of equity, to entertain the application for a re-

celver upon which it has acted, and to render all the proceedings in that cause void from the beginning. Ordinarily, we would think that the mere statement of such a suggestion would sufficiently reveal the inherent weakness of the proposition. It is no new or unusual thing in jurisprudence that the same property is found so situated as to form the subject of litigation in several jurisdictions. Conflicts of rights depending upon the proceedings of different courts with respect to the same property are of frequent occurrence, as the reported cases show. *Brown*, Jur. § 95. In Missouri, by the express provisions of our Code, the fact that "there is another action pending between the same parties, for the same cause, in this state," is an objection to a petition which may be interposed by a demurrer if it appears from the petition itself. If it does not so appear, that defense must be made by answer. If it is not submitted to the court, either by a demurrer or answer, it is waived, and cannot be insisted upon thereafter as a defense. Rev. Stat. 1889, §§ 2043, 2047. The sections of our statute law just cited indicate, as plainly as language can, that jurisdiction of the subject-matter of a cause does not depend on whether or not another action is already pending between the same parties for the same property. They also indicate that the court in which the second action is brought for the same property is vested with authority to determine the validity of that objection to the proceeding, either upon demurrer, if the fact is conceded, or by trial of the issue as to such fact, if set up first by an answer.

In the case at bar, both proceedings, as they now stand, are, in substance, to foreclose mortgages. The receiverships are ancillary to that main purpose. Giving relator the benefit of the view he takes (though it is stoutly disputed by arguments founded on the terms of the three mortgages on the various parts of the railway property), namely, that the two proceedings are, in their general scope and purpose, identical (though we do not decide that point), it is nevertheless within the judicial power of each of the courts to determine whether or not a prior action of the same nature was pending when that before it was commenced, if the sections above cited from our Code of Procedure were not written in vain. Jurisdiction to hear and determine a controversy includes the power to hear and decide all questions of law or fact which bear upon that controversy, subject to the right of review (if any) provided by law, unless that jurisdiction is in some wise limited by the law creating or regulating it. The right of a court to entertain and adjudicate a subject of litigation lawfully committed to its judicial power cannot be made to depend upon the fact (outside of its record) whether or not some other court has entertained a similar proceeding touching the same subject. Its ruling, after due consideration of such a fact when submitted to it, may decisively affect the correctness of the court's action upon the subject involved, or infect it with reversible error; but it cannot take away its power to deal with the matter committed by the law to its considera-

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tion and decision. This proposition was directly decided in *State v. Withrow* (1891) 108 Mo. 1, with the concurrence of all the judges of the second division. That case is plainly decisive of this, and the principles on which it is founded have been repeatedly recognized and acted upon by many courts whose opinions are entitled to great consideration. *Joseph v. Henry* (1850) 1 Lowm. M. & P. 388; *Re Charkish* (1873) L. R. 8 Q. B. 197; *Broad v. Perkins* (1888) L. R. 21 Q. B. Div. 533; *Ex parte Fassett* (1892) 143 U. S. 479, 85 L. ed. 1087; followed in *Re Engles* (1893) 146 U. S. 357, 36 L. ed. 1004; *Morrison v. United States Dist. Ct.* 147 U. S. 14, 37 L. ed. 60. In our judgment, it is important to adhere to the principles above declared. The writ of prohibition has not been regulated by statute in this state. In determining when it shall issue, we are left to follow the principles and usages of the common law concerning it. The true function of the writ is to check the exhibition of judicial power beyond the lines marked out by law as the limits for its exercise. It may be used to prevent action by a court in excess of its legitimate authority in the course of a cause whose subject-matter lies within the general cognizance of the court, as well as to forbid assumption of authority over causes not committed by the law to its decision; but it cannot be applied to compel a judicial officer to substitute the opinion of some other court for his own upon such an issue as that involved in the case in the Cape Girardeau common pleas court, namely, whether or not another action is pending between the same parties for the same property in some other forum. Under our statutes already cited, the determination of such an issue belongs rightfully to the court in which that issue is raised in any action. Hence a ruling thereon would not be a proper subject for a prohibition; certainly not where, as here, the facts supposed to affect or defeat the right of the court to proceed are outside the record or judicial cognizance of the court and the latter has never been called upon to rule upon them. *State v. Judge of Third City Ct.* (La., 1892) 11 So. 935; *Hudson v. Judge of Super. Ct. of Detroit* (1879) 42 Mich. 239. If, whenever a question of priority of right to property depends on the priority in legal force and effect of process or orders of different co-ordinate courts of Missouri, this court is to take up the controversy, and settle it by a writ of prohibition, before the courts of first instance have passed upon it, this court would soon find itself called upon to decide a great number and variety of cases and issues which the trial courts are equally authorized to determine, and which their machinery gives them greater facilities to determine conveniently. We should certainly assume, in advance of the submission of any such issue or controversy to a trial court, that it will decide it fairly, impartially, and in obedience to the principles of law. The suggestion that the use of prohibition may be necessary to prevent a physical conflict between the parties or officers of these courts we regard as of little weight. The parties in possession of any property that forms the subject of liti-

gation are entitled to retain it until there is an adjudication of the right to possession, or until finally ordered by competent authority to surrender that possession. Any hardship there may be to one wrongfully kept from the possession of his own during the pendency of legal proceedings to assert his rights is one which is unavoidable under our system of jurisprudence, and cannot be made the basis for a departure from the usual and orderly mode of administering justice according to existing laws. *Porter v. Sabin*, (1893) 149 U. S. 473, 37 L. ed. 815. We

conclude that the writ of prohibition should be denied, and the preliminary rule upon defendants discharged. Hence we dissent from the judgment of the majority of the court granting the writ, and acting upon the present right to the possession of the property in the custody of the receiver of the common pleas court.

Grantt and Burgess, JJ., concur in this opinion.

Rehearing denied.

PENNSYLVANIA SUPREME COURT.

City of PHILADELPHIA, *Appt.*, v. MASONIC HOME OF PHILADELPHIA.

(160 Pa. 572.)

A home open only to free masons is not public so as to come within a constitutional provision exempting from taxation institutions of "purely public charity."

(*Williams and Green, JJ., dissent.*)

(April 2, 1894.)

APPPEAL by plaintiff from a judgment of the A Court of Common Pleas, No. 4, for Philadelphia County in favor of defendant in a proceeding brought to compel payment of certain taxes. *Reversed.*

Defendant's charter was as follows:—"Section 1. Be it enacted by the senate and house of representatives of the commonwealth of Pennsylvania, in general assembly met, and it is hereby enacted, by the authority of the same, that Robert A. Lamberton, Christian F. Knapp, Henry B. McKean, Michael Nisbet, John A. Wright, D. W. C. Carroll, Jeremiah L. Hutchinson, Samuel B. Dick, James M. Porter and James H. Hopkins, their associates and successors, be and they are hereby created a body corporate and politic, with perpetual succession, by the name and style of 'The Masonic Home of Pennsylvania,' and by that name are made capable in law and equity to sue and be sued, plead and be impleaded, contract and be contracted with, and to make, have, and use a common seal and the same to break, alter, renew, at pleasure, ordain by-laws, and shall have the right to take and hold by purchase, gift, or devise, real and personal estate, free from all taxation, for the purposes hereinafter named, and to sell, convey, or exchange the same at pleasure.

"Sec. 2. The object of said institution shall be to provide and sustain in the state of Pennsylvania one or more houses for destitute widows and orphans of deceased free masons of the state of Pennsylvania, and an infirmary

or infirmaries for the reception and care of sick and afflicted free masons in indigent circumstances, and all such as may be placed under its charge by its managers.

"Sec. 3. The membership of said institution shall consist of life members, active members and representatives of masonic bodies, under such regulations as the committee of management may prescribe—all of whom shall be free masons.

"Sec. 4. There shall be a meeting of the members of the institution called within three months after the passage of this act, for the purpose of electing members of the committee of management, prescribing its constitution and general rules and regulations for the government of the institution."

The by-laws, which are of material importance in this case, were as follows:

"OBJECT OF THE HOME.

"Section 1. The masonic home shall have for its object, to provide and maintain a home for indigent, afflicted, or aged free masons, and for the destitute widows and orphans of free masons in the state of Pennsylvania, and for such others as may be placed under its charge.

"CORPORATION.

"Sec. 2. This corporation shall be composed of individuals as representatives of such masonic bodies as are recognized by the grand lodge of free and accepted masons of Pennsylvania, and of such master masons as may become members thereof by complying with the by-laws.

"ADMISSION OF INMATES AND FEES.

"Sec. 41. Every nomination for admission into the home as an inmate shall be made in writing, at a stated meeting of the board of managers, setting forth the name, age (not less than fifty-five years), residence, social condition, and masonic membership of the nominee, with such other information as the board of managers may require.

"All nominations shall be recorded in a book kept for that purpose, in the order in which they are presented, and shall be referred by

NOTE.—The question what constitutes a charity which has been considered in various important cases in this series (see *Crerar v. Williams* (II), 21 L. R. A. 454, with cases and notes there referred to), 28 L. R. A.

is here presented in a new phase with respect to the character of a "purely public" charity within the meaning of those words in a constitutional provision for exemption of property from taxation.

the board of managers to the committee on admissions.

"Sec. 42. Inmates shall be admitted into the home after report of the committee on admissions; those under sixty years of age requiring a two thirds, and others a majority, vote of the board of managers.

"Sec. 43. Each representative shall be entitled to make as many nominations for admission into the home as inmates as he may deem advisable, at the request of the masonic body represented by him; but not more than one nominee of a representative shall be admitted as an inmate while other nominees are upon the list from bodies which have at the time no inmate, and whose admission is approved by the board of managers.

"Individual members may also make nominations, subject to the same restrictions as to inmates as hereinbefore stated.

"In the event of an inmate withdrawing from the home, for any cause whatever, within three months after admission, so much of the fee paid into the funds of this corporation as shall remain after deducting five dollars (\$5) per week for his board during his residence in the home, and, in addition, such other expenses as may be incurred in his behalf, shall be returned to the masonic body or individual member that paid the same.

"The preference for admission shall always be given in the following order, viz.:

"1. To such nominees as are members of masonic bodies represented in the corporation, and nominated at their instance.

"2. To such nominees as may be placed in nomination by a representative of one masonic body, where the nominee is a member of some other masonic body which is also represented.

"3. To master masons nominated by individual members.

"4. To master masons belonging to masonic bodies located within the commonwealth of Pennsylvania, but not represented in this corporation, who may have been nominated as aforesaid.

"5. To master masons of other jurisdictions upon such nomination.

"Sec. 44. There shall be paid into the funds of this corporation, as the admission fee of an inmate, the sum hereinafter named, according to the age of the brother so admitted as follows:

"If the applicant be fifty-five years of age, and not exceeding sixty years \$250.00

"If the applicant be sixty years of age, and not exceeding sixty-five years 200.00

"If the applicant be sixty-five years of age, and not exceeding seventy years 150.00

"If the applicant be over seventy years of age 100.00

"Sec. 45. Any master mason wishing to secure a home for himself in his declining years shall, upon becoming a member of this corporation and the payment of four hundred dollars (\$400) in addition to his membership fee, be at once nominated by a majority vote of the board of managers for admission into the home, in accordance with section 41 of these by-laws. He shall be exempt from the payment of annual dues, and upon reaching the age of sixty (60) years or upwards, shall

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have precedence, according to date of nomination, of all other master masons nominated by either representatives or by individual members, subject, however, to the restrictions of section 43 of these by-laws; provided, that any member of this corporation, becoming an inmate of the home, shall thereby forfeit and terminate his membership in the corporation.

"PERMANENT FUND.

"Sec. 46. The permanent fund shall consist of the fees for life membership and admission of inmates, and of all donations and bequests, when not otherwise designated by the donor or legatee and such other amounts as may be voted to the fund by the board of managers.

"All investments in the permanent fund shall be made under the supervision and direction of the committee on finance, who shall make a report of the investments in the fund annually, or whenever required, to the board of managers and the corporation.

"The interest from such investments shall be paid to the treasurer for the general uses of the corporation."

Further facts appear in the opinion.

Messrs. Isaac H. Shields, James Alcorn, and Charles F. Warwick, for appellant:

As the legislature could not go beyond the power conferred by the constitution, the Act of 1874 cannot be construed to extend the exemption from taxation to any associations or institutions other than institutions of purely public charity.

By the use of the phrase "public charity" the constitution recognizes a charity which is not public, and only exempts from taxation that charity which is wholly, entirely, and completely public.

The latest and broadest definition of a public charity is, "whatever is gratuitously done or given in relief of the public burdens, or for the advancement of the public good."

Episcopal Academy v. Philadelphia, 150 Pa. 565.

The public character of the charity, then, is determined not from the motives or sect of the donors or those in control, but from the donees or beneficiaries.

A purely public charity is one for the benefit of the public and not for the members of an order, sect, or denomination. It must be founded, endowed, and maintained by public or private charity.

A preference, as in *Episcopal Academy v. Philadelphia*, *supra*; *Burd Orphan Asylum v. Upper Darby School Dist.* 90 Pa. 85; *Donoghue's App.* 86 Pa. 306,—does not prevent the charity from being purely public, nor does the fact that the beneficiaries pay part of the expenses of the institution as in *Northampton County v. Lafayette College*, 128 Pa. 132; *Philadelphia v. Women's Christian Assn.* 125 Pa. 573.

In *Delaware County Inst. of Science v. Delaware County*, 94 Pa. 163, where a library was established for the use of the members only, it was held not to be a purely public charity.

So in *Miller's App.*, 10 W. N. C. 168, where the school was erected for the education of the children of catholic parents.

Section 2, article 9, of the Constitution, repealed all special exemption laws.

Allegheny County v. Gibson, 90 Pa. 397, 35 Am. Rep. 670; *Perkins v. Slack*, 86 Pa. 270; *Lehigh Iron Co. v. Lower Macungie Twp.* 81 Pa. 484.

Mr. Robert H. Hinckley, for appellee: The Act of May 14, 1874, Pamphlet Laws, 158, does not, by any of its terms, repeal the previous Statute of 1871.

A general affirmative statute will not repeal a previous particular statute upon the same subject, though the provisions of the former be different from those of the latter.

Bell v. Allegheny County, 149 Pa. 381, 30 W. N. C. 194.

The exemption contained in the Act of 1871, whereby the masonic home was incorporated, conferred a special privilege upon the home, and this privilege cannot be repealed by any general law without words of express repeal.

Williamsport v. Brown, 84 Pa. 438; *Sifred v. Com.* 104 Pa. 179.

The provisions of the Constitution of 1874 "did not execute themselves so as to repeal any existing laws, providing for the assessment and collection of taxes;" they merely impose restrictions upon the future legislation when it should be enacted.

Coatesville Gas Co. v. Chester County, 97 Pa. 476; *Erie County v. Erie*, 118 Pa. 367; *Allegheny County v. Gibson*, 90 Pa. 411, 35 Am. Rep. 670; *Evans v. Phillips*, 117 Pa. 387.

The true test, whether a charity is a purely public one within the meaning of the Act of 1874, is whether there is any gain or profit to any class of persons or corporation who can assert a right to be beneficiaries.

Burd Orphan Asylum v. Upper Darby School Dist. 90 Pa. 21.

As in that case a limit of the bounty of the asylum to those who were Episcopalians was not held to detract from its public character, so surely the fact that the benefits of the masonic home are limited to those who become masons could not be held to detract from its public character.

Philadelphia v. Women's Christian Asso. 125 Pa. 572.

What right has the city to say to the charitably disposed persons, "We will take the money you intended for the support of these poor helpless inmates, and apply it to the use of the city?"

Donohugh's App. 86 Pa. 313.

The case of *Episcopal Academy v. Philadelphia*, 150 Pa. 565 (1892), is one of a purely denominational school, supported by fees received from those who are educated.

In *Blenon's Estate*, Brightley (Pa.) 338, the testator left property "to the different institutions of charity and beneficence constituted and established at Philadelphia for the relief of the unfortunate and for those who live under the influence of infirmities and of every sort of privation, without any distinction of sect or religion."

It was held by the court that societies of a religious character, whose charities were exclusively confined to a particular sect, were not excluded from the benefits of the charitable bequest.

The founders of the masonic home founded 23 L. R. A.

a free, pure charity for the benefit of that indefinite class of the public who might become free masons. A man is as likely to become a free mason as he is to become a seaman, and yet a charity founded as a sailor's snug harbor for sailors only was sustained.

Atty Gen. v. Pearce, 2 Atk. 87.

So a charity to the poor of a particular township.

Lawrence County v. Leonard, 83 Pa. 206.

A trust to educate male, white orphans, or for the assistance and encouragement of young mechanics, or to procure food during the winter for poor housekeepers who are widows, or for the help of those placed in a hospital during the existence of yellow fever, or to pay premiums to ingenious men and women who make useful inventions, or for a hospital for the relief of the indigent blind, or for a trust to renew shade trees, or for a trust for the poor of the northern liberties, or for a trust for poor widows as are not assisted by any public charity, or a trust to pay money to soup societies, or a trust for the benefit of widows whose husbands have died within the limits of Southwark, and to no other description of widows, is a valid public charity.

Philadelphia v. Fox, 64 Pa. 172.

Dean, J., delivered the opinion of the court:

There is nothing of doubt in this case except the question as to whether the appellee is an "institution of purely public charity," within the meaning of section 1, article 9, of the Constitution of 1874. If it be not, nothing in its charter or the statutes can avail to exempt it from liability to taxation. The contention turns on the constitutional meaning of the words "purely public charity." "Words in a constitution, that do not of themselves denote that they are used in a technical sense, are to have their plain, proper, natural, and obvious meaning." *Monongahela Nav. Co. v. Coons*, 6 Watts & S. 114. The legal definition of the word "charity" has been the subject of much discussion in the courts, especially in those of England, but its meaning here, discarding all technical sense, is "a gift to promote the welfare of others." The appellee clearly is a charity. It provides for and maintains in the "Masonic Home" indigent, afflicted, and aged free masons. This, too, from voluntary contributions, without charge to the beneficiaries, and with no profit either to the corporation or to its officers. Not one of the corporate officers receives a cent of compensation for administering its affairs. Such unselfishness excites the admiration and approval of all friends of humanity. Gen. Wagner, president of the home, testifies: The number of inmates at present is thirty. Their average age is seventy-two years. All are decrepit. If they could support themselves, they would not be admitted. The money to support them is contributed by different masonic lodges, individuals, masons, men and women. The receipts are always less than the expenses, and a deficit has to be made up at the end of each year. No one is benefitted except the inmates. They are fed, clothed, and lodged during life and

buried at death, at the expense of the home." Of course if this be not purely charity, nothing is. But is it a public charity? The word "public" relates to or affects the whole people of a nation or state. Gen. Wagner further testifies: "The home is open only to those who are masons. A man, to be admitted, must be a mason." When the eligibility of those admitted is thus determined, it seems to us the institution is withdrawn from public, and put in the class of private, charities. A charity may restrict its admissions to a class of humanity, and still be public. It may be for the blind, the mute, those suffering under special diseases; for the aged, for infants, for women, for men, for different callings or trades by which humanity earns its bread; and, as long as the classification is determined by some distinction which involuntarily affects or may affect any of the whole people, although only a small number may be directly benefited, it is public. But when the right to admission depends on the fact of voluntary association with some particular society, then a distinction is made which concerns not the public at large. The public is interested in the relief of its members, because they are men, women, and children, not because they are masons. A home without charge, exclusively for Presbyterians, Episcopalians, Catholics, or Methodists, would not be a public charity. But then to exclude every other idea of public, as distinguished from private, the word "purely" is prefixed by the constitution. This is to intensify the word "public," not "charity." It must be purely public; that is, there must be no admixture of any qualification for admission, heterogeneous, and not solely relating to the public. That the appellee is wholly without profit or gain only shows that it is purely a charity, and not that it is a purely public charity. Nor does the argument that to the extent it benefits masons it necessarily relieves the public burden, affect the question. There is no public burden for the relief of aged and indigent masons. There is the public burden of caring for and relieving aged and indigent men, whether they be masons or anti-masons; but age and indigence concern the public no further than the fact of them; it makes no inquiry into the social relations of the subjects of them. *Burd Orphan Asylum v. Upper Darby School Dist.*, 90 Pa. 21, is cited as sustaining a different view. The test there, as to whether the defendant was a purely public charity, was whether there was any gain or profit to any class of persons or corporations who could assert a right to be beneficiaries. As there was not, and as the administrators of the charity could, in their discretion, select those who should be the recipients of the benefits, giving only a preference, the court held it to be a purely public charity. While concurring in the judgment in that case, because the facts showed it was administered as a purely public charity, I do not concur in the reason given for distinguishing a quasi public from a purely public charity. I would put the distinction on firmer, as well as on what seems to me more clearly defined, ground: Is any mem-

ber of humanity—that greater public of whom the commonwealth is constructively the parent or trustee—excluded because he has not a particular relation to some society, church, or other organization, which relation is dependent on his wholly voluntary act? If so, if he be excluded in fact, because he is not a Presbyterian, free mason, or a member of some one of the innumerable religious, social, or beneficial organizations of the commonwealth, then, however pure may be the charity, however commendable its purpose, it is not "purely public," and its property must, under the constitution, be taxed; not because this court says so, but because the people have said so in their fundamental law. Here, while the charter and by-laws of the institution do not show that it is not "purely public," the undisputed facts as to the administration of the charity show that none were admitted except free masons; of course excluding all other aged and indigent men, because they had not chosen to become members of a particular society. This made admission depend on an artificial badge of distinction, and not on one incident to humanity, and therefore it is not "purely public." If this be purely public, then what is not purely public? This is not a question to be decided on sentiment. If it were, our inclinations would prompt to a different conclusion. But there is not much sentiment in the constitution. It is a barrier erected by the whole people against encroachments on the rights of the people as a whole. They have forbidden an annual appropriation of their money in a sum equal to the amount of taxes here imposed, for the benefit of a favored few. The duty of a court, when called upon to decide such a question, is so plain, that "he who runs may read." As to the argument that the Act of 1871 exempted the home from taxation, the Act of 1874, when read in connection with the Constitution of 1874, repealed all such exemptions enacted after the constitutional amendment of 1857. It is so decided in *Wagner Free Inst. v. Philadelphia*, 182 Pa. 612, and *Philadelphia v. Pennsylvania Hospital*, 184 Pa. 171.

The judgment is reversed at costs of appellee, and a new trial is awarded.

Williams, J., dissenting:

This appeal depends on a definition. Its decision will affect many of the noblest charities in the state. The words requiring definition are the words "purely public," as used in section 1, art. 9, of the Constitution of Pennsylvania. The paragraph in which the words occur is as follows: "But the general assembly may, by general laws, exempt from taxation public property used for public purposes, actual places of religious worship, places of burial not used or held for private or corporate profit, and institutions of purely public charity." A majority of this court holds that the defendant, the masonic home, is not an institution of purely public charity, and for that reason is subject to taxation like all other property held by private persons or organizations for private purposes. The correctness of this decision

depends on the result of two preliminary inquiries: First. What is the meaning of the words "purely public," as used in the constitution? Second. What is the character of the masonic home, and its work? In reply to the first of these questions it should be noticed that the legislature has undertaken an interpretation of the constitutional provision, and of these particular words, by a law passed at the same session at which the adoption of the constitution was formally declared. The law was passed for the express purpose of giving effect to the constitutional provision authorizing the exemption of certain property from taxation, and to guide the taxing officers of the state in determining what property was entitled to the exemption authorized by the constitution. This purpose made it necessary to consider and determine the exact extent of the limits within which the exercise of legislative power was permissible under section 1, article 9; and to define accurately each class of property to which the privilege of exemption was extended by it. Our present concern is with the fourth class, viz.: "Institutions of purely public charity." The Act of 1874 interpreted these words, and enumerated the institutions embraced by them, so as to include "all hospitals, universities, colleges, seminaries, academies, and institutions of learning, benevolence or charity, . . . founded, endowed, and maintained by public or private charity." This definition is broad enough to include the masonic home, and all similar institutions of charity; and, unless the constitutionality of the act can be successfully assailed, the judgment of the court below must be affirmed. It should be noticed, in the next place, that this court has adopted and followed the legislative definition in several cases in which the question was fairly raised and squarely decided. The first of these was *Burd Orphan Asylum v. Upper Darby School Dist.*, 90 Pa. 21. The Burd Asylum was founded and endowed under the will of Mrs. Burd, "to establish an asylum for poor white female orphans." But not all poor white female orphans were entitled to admission. They were required to be of legitimate birth, not less than four nor more than eight years of age, and baptized in the Protestant Episcopal Church; preference being given to such orphans in the city of Philadelphia; after them, to such orphans in the state of Pennsylvania. If both city and state failed to fill the asylum with those who met all the requirements, then poor white female orphans within the required age might be admitted without regard to the place of their birth or the fact of their baptism. This was not a public asylum in the sense of being open to the general public. It was a denominational institution, under denominational control, open, in the first instance, to children baptized in the churches of the denomination, and, if enough such could be found, then to no one else. We held that such an institution was a charity. As it was administered in the interest of the helpless in the city and the state, it was a public charity; as there was no element of private or corporate gain in its organization

or management, it was a purely—that is, wholly—public charity. It was within the letter of the Act of 1874, and within the spirit or intention of the constitutional provision. In *Mrs Ins. Patrol of Philadelphia v. Boyd*, 120 Pa. 624, 1 L. R. A. 417, we held that an organization whose purpose was to save life and property endangered by fires, without charge to the persons or to the owners of the property rescued by the efforts of the members and employees of the organization, was a charity. It was supported by contributions made by insurance companies and others, and rendered its services gratuitously whenever and wherever a fire occurred in the city. It was, therefore, a public charity; and, as there was no profit or gain to its projectors or managers contemplated, and no return received from those benefited by its labors, it was wholly—that is, purely—a public charity. The same doctrine was held in *Philadelphia v. Women's Christian Assn.* 125 Pa. 581; in *Northampton County v. Lafayette College*, 128 Pa. 182; and *Episcopal Academy v. Philadelphia*, 150 Pa. 565. In each of these cases the Act of 1874 was treated as a correct exposition of the constitutional provision. Other questions were raised and considered, but in no one of these cases has this court given expression to the slightest doubt about the constitutionality of the Act of 1874, or attempted to give any other definition of the words "purely public charity" than that given by the legislature in that act. The same definition may be found in substance, in *Donohugh v. Library Co. of Philadelphia*, 86 Pa. 806, in which we said that a purely public charity "is not necessarily one solely controlled and administered by the state, but the phrase extends to and includes private institutions for purposes of purely public charity, and not administered for private gain." We defined the word "purely" in the same manner in that case as in the latter cases above referred to, as meaning "completely," "entirely." The institution must not be administered for private gain, but completely, entirely, purely, in the interest of the charity. Upon this distinction the property of the Delaware County Institute was held liable to taxation. *Delaware County Inst. of Science v. Delaware County*, 94 Pa. 163. The advantages of that institute were confined to its members, and it was for that reason a private charity, if it could be regarded as a charity at all. The benefits came back to the members, who were necessarily the contributors, and no one else shared in them. It was not intended to serve the public, or to relieve in the slightest degree the public burdens, but to minister to the tastes and the intellectual improvement of those whose money purchased the books and provided for their care. A provision for one's self, or for those for whom he is legally bound to provide, is private and personal in its object. It has no public purpose or work. So a hospital or school designed to secure to a town or a region better medical attention or better education than would otherwise be within the reach of such town or region, may be a charity in an important sense, but if it is conducted with a view to

private or corporate gain it is a private charity. If it is conducted and maintained by the gifts of individuals or the public, for the benefit of its inmates, it is a public charity; and, being free from the element of private or corporate gain, it is a purely public charity, within the meaning and the letter of the Act of 1874, and is protected from taxation by the list of decided cases already cited.

But let us suppose that the legislative definition of a purely public charity had not been made, and the decisions cited had not been rendered, and the question was now to be considered as one of first impression, how, in such case, ought it to be determined? The subject before the framers of the constitution was taxation. They declared this should be uniform, and levied under general laws, but some property ought not to bear taxation, and so exemption from the public burden came to be considered. This also must be regulated by general law, and not left to the caprice of favoritism or prejudice of the lawmakers. Where may the legislature draw the line that shall separate the taxable from the nontaxable property of the state? This question was answered by the adoption of the well-understood distinction between public and private uses. The words employed were "public property used for public purposes,"—that is, property the title to which is in the public, and which is actually used for some public purpose; "actual places of religious worship," no matter who may own them or worship in them, for the support of public worship tends to the public improvement; "places of burial, not used or held for private or corporate profit," for the gift of land to the public for purposes of burial is a gift to a public use; and, finally, "institutions of purely public charity," or, in other words, institutions that are already ministering to the public, and so ought not to pay taxes, because public in the ends they serve, and without any element of private gain in their organization or management. This is the plain, obvious meaning of the consecutive sentences devoted to the subject of exemption from taxation. Moreover, the reason for any exemption should be considered. Why ought any property to be exempt? Taxes are levied and collected to provide the public purse with money for the support of public institutions conducted by it, and to defray public expenses, in the preservation of order, the administration of justice, and the support of public schools. A woman like Mrs. Burd, or a man like Stephen Girard or Isaiah Williamson, devotes a large fortune to the founding and endowment of an institution intended to relieve the public burden and advance the public good, by taking up some part of its work, and doing it with more thoroughness and fidelity than the public could do it through its officers. The property of such an institution is not simply contributing, like taxable property in general, to the public good, but is devoted absolutely and irrevocably to it. The title may remain in trustees, but it is, in effect, dedicated wholly to public uses, with no element of private gain whatever. To levy taxes on property

so given to a charitable use is unjust towards the benevolent giver, and is coldly cruel to the beneficiaries. This will be conceded as to the Burd orphan asylum and Girard college. To deny it, would be to shock the public sense of justice. A majority of this court, however, deny exemption to the masonic home, and the reasoning on which that denial rests would logically lead to a denial of it to all social, denominational, or trade organizations providing for the education, support, medical treatment, and burial of its members, their widows, and orphans. What is the masonic home? It is a corporation, whose object is set out in its charter, its constitution, and its by-laws. In the constitution it is stated thus: "The object of said institution shall be to provide and sustain in the state of Pennsylvania one or more houses for destitute widows and orphans of deceased free masons of the state, and an infirmary or infirmaries for the reception and care of sick and afflicted free masons in indigent circumstances, and all such as may be placed under its charge by its managers." In the by-laws it is stated in these words: "The masonic home shall have for its object to provide and maintain a home for indigent, afflicted, or aged free masons, and for the destitute widows and orphans of free masons, in the state of Pennsylvania, and for such others as may be placed under its charge."

It is conceded by my brethren that this is a charitable object, and that the home is a charity. The point taken is that it is a private, and not a public, charity. It was founded and endowed, as the evidence clearly shows, and it is maintained, by voluntary gifts. Out of the contributions made to it the grounds and buildings have been paid for, and the maintenance of its inmates provided. It is supporting, nursing, and caring for thirty or more aged men, who would otherwise be dependent upon the almshouse or other forms of charity supported by taxation. No profit is possible to any person, corporation, or society. The entire plant, and the stream of voluntary gifts on which it is dependent, are devoted wholly to the charitable work described in the constitution and by-laws of the home. The contributors get nothing for their money but the approval of their consciences, and the knowledge that they are increasing the happiness of the aged, indigent, and afflicted. I see nothing private about such a charity. It is not limited in its work to the donors or their children. It brings no pecuniary benefit or return. It is done in relief of public taxation, and in the interest of humanity, and that brotherly love that becomes the children of a common father. Preference is given to members of the masonic fraternity, their widows and orphans, but it is also open to all persons, regardless of their relation to the masonic body, who may apply for admission, and be found by the managers to be suitable persons "to be placed under its charge." Its doors are as wide as those of the Episcopal academy, or the Burd orphan asylum, or the Girard college. The requisites to admission are fewer and simpler. They are, first,

masonic connection, and helplessness; next, helplessness, and suitability for admission to an institution conducted in the manner adopted by the managers for the home. The qualifications in both instances are to be judged of by the managers. So in any almshouse or hospital or asylum, the fitness of the applicant for admission must be determined by the proper officer before the doors will open to him or her. But it will perhaps be said that the purpose that moved the contributors was to provide for masonic brethren and their families, and that this ought to subject their gifts and their noble charity to taxation. Then every denominational hospital, school, or asylum should be taxed for the same reason. All contribute alike to the public good; all alike relieve the public burden and the taxpaying property of the commonwealth; but all give, to some extent, preference to a particular class of the public, and then open their doors to those outside the class who are within the general purpose of the charity. The women's christian association has for its beneficiaries young unmarried women. The snug harbor for seamen provides for sailors. The bricklayers' union for a limited subdivision of house builders. The homes for mechanics, apprentices, newboys, sewing women, actors, disabled clergymen, and the like, all limit admission to the class of persons described in the names they have adopted. Indeed, in all charitable institutions, whether founded and maintained by private beneficences or by public taxes, some principle of selection prevails. The county poorhouse is for the care of those whose legal settlement is within certain geographical lines, and the wretch who cannot show his title to admission on the map must starve on the outside. A member of the great public may, like Lazarus, subsist on crumbs, or die for want of them at the gateway of a "public charity," if he belongs to another "poor district." Such a thing as a charitable institution that is open absolutely to the general public without limitation or restriction is not to be found in our state or country. Sailors and soldiers are cared for by the public in separate homes and separate hospitals. The state cares for injured miners in hospitals devoted to them exclusively. The deaf are in one institution, the dumb in another, the blind in a third. Hospitals are provided for consumptives, for persons afflicted with contagious or infectious diseases, for invalids whose diseases are of a nervous origin, and so on. The feeble-minded are gathered in one place, those crippled or deformed in body in another. The foundling has institutions to which it is admitted, and from which others are excluded. Homes for aged persons, for aged couples, for fallen women, are open only to those for whom the charity was founded. Then, too, there are homes for widows, to admission to which a previous marriage and the death of a lawful husband are the necessary requisites; schools for soldiers' orphans, from which all other children are excluded; homes for decayed merchants, for superannuated and disabled clergymen, for disabled and aged firemen, and a long

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list of similar charities founded for a class of beneficiaries selected by reference to their trade, occupation, social position, denominational affiliation, age, color, disease, or place of residence. These are all engaged in ministering to the public needs. They all do some part of the work, and bear some part of the burden, that would otherwise fall upon the public. They are all public charities, and, when free from any private or corporate gain, are purely public charities. The institution now made subject to taxation by the decision just rendered is one of the many charities, doing the work of the public without the aid of public money, and doing it more tenderly and more thoroughly than it could be done in charitable institutions supported by taxation. Such institutions not only provide food and clothing and necessary medical attention to their inmates, but they go further, they seek to assuage the sorrows, and cheer the last days of those to whom they minister, and surround them with the comforts of a well-appointed home. For this added liberality and care they are declared to be private charities, and compelled to take part of the gifts of the benevolent from those they were intended to benefit, and use it to pay taxes upon property actually dedicated to the public use. The position of the city of Philadelphia in levying taxes upon such charities is ungracious. It says, in effect, to them: "It is true, your property represents the unselfish gifts of the benevolent; it is true that it is devoted to the relief of suffering, and the care of persons who must otherwise be chargeable to us; it is true that your work is for the public good, and in relief of taxpayers,—but you must do what we do not; you must ask no questions, and take all who come. If you do not, then charity is a luxury which we shall tax you for. You must convert your home into a mere public almshouse, or else pay roundly for the privilege of carrying part of the public burden." The judgment of this court seems to be that the position of the city is correct, and that, notwithstanding the fact that a man or a society devotes a fortune to the care of the helpless and the relief of the taxpayers, the property occupied for the purposes of the charity so founded and maintained must be treated as a business investment, and compelled to pay taxes, though the money used for that purpose is taken out of the mouths and off the bodies of the inmates. I dissent from the judgment and from the reasons on which it is rested. In my opinion, nothing marks the advancement of the age in which we live so much as the growth of organized charity, and the increased care for the unfortunate and the helpless. This growth shows itself in the character of the hospitals, reformatories, and asylums supported by the public funds. It is seen in a still more striking manner in the number and variety of richly endowed charitable institutions that owe their existence and their power for good to the munificence of individuals. So long as sickness and poverty and misfortune are in the world, so long this field for private generosity will offer room for the labors and the fortunes of

the benevolent. The better the field is occupied, the better it will be for the public at large, and for the individuals who help to make up the indefinite body we call the public. Now and then some piece of property used for charitable purposes may cease to pay taxes, but for every dollar so withheld from the public treasury many dollars will be saved to it by the relief of the public burdens by means of the charity so established.

But if we lift our eyes from the tax list, and consider the work done by these charities, of which there are several hundreds in this city alone, we shall see that the public gain from their labors and expenditures is incalculable. There is probably no city on either side of the ocean so justly celebrated for the multitude of its charitable institutions as Philadelphia. A distinguished citizen, who is himself actively identified with several of them, places the total number at about 600. Some of these are supported by public funds, but most of them are monuments to the enlightened liberality of private citizens who have given their money with a freedom and discrimination that are without any parallel, at least in this country. It would be difficult to name a form of suffering that has not been provided for by some generous man or woman whose attention has in some manner been drawn to that particular field for charity. The sums thus dedicated to the public service make an enormous

aggregate, and the institutions supported by them embellish the city, and honor it. The masonic home is one of these. It now enjoys the undesirable distinction of being the first admitted charity which has no trace of private or corporate gain about its organization or management to be condemned by this court to the payment of taxes as the price of being allowed to go on with its unselfish work of charity. It carries part of the public burden. It lifts what it carries off the shoulders of the taxpayers. It does this with a stream of generous contributions from the pockets of private citizens. But it is now judicially determined that it must take the money contributed for the care of the sick, the infirm, the aged, the afflicted, and use a part of it to pay taxes on the buildings and grounds in which its work is carried on, and in which the homeless and helpless are sheltered and fed. I dissent wholly from the proposition that such charities are private. They are purely public. They are within the Act of 1874, as is admitted. They are within our own cases beyond any doubt. They are within the intent and meaning of the constitution, and are, in my opinion, clearly entitled to exemption from taxation. I would affirm the judgment of the court below.

Green, J., concurs in the foregoing opinion.

INDIANA SUPREME COURT.

Phineas PARKER, Admr., etc., of William A. Parker, Deceased, Appt.,
v.

PENNSYLVANIA CO.

(.....Ind.....)

- 1. The act of one who, unacquainted with the plan and uses of an archway covering railway tracks leading into a manufacturing establishment, attempts to pass through it without license, notwithstanding obvious dangers from the narrowness of the arch and the obstructed view of the track, will prevent recovery from the railroad company for mere negligence in propelling into the archway at a speed prohibited by the city ordinance a car, by which he is killed.**
- 2. Willfulness is not shown by mere failure to provide for the protection of a possible trespasser in an archway covering railway tracks leading into a manufacturing establishment into which a car is propelled at a negligent speed so as to render the railway company liable for his death notwithstanding his contributory negligence.**

(June 6, 1893.)

APPPEAL by plaintiff from a judgment of the Circuit Court for Bartholomew County

in favor of defendant in an action brought to recover damages for the death of plaintiff's intestate alleged to have been caused by the negligence or willful wrong of defendant. *Affirmed.*

The facts are stated in the opinion.

Messrs. J. F. Cox and W. L. Cox, for appellant:

The only way to avoid the sufficiency of this complaint, is to hold that before appellee could be guilty of a willful act it must have seen deceased and intended to inflict the identical injury.

Where the negligence of defendant is so gross as to imply a disregard of consequences, or a willingness to inflict injury, the plaintiff may recover though he be a trespasser, or did not use ordinary care to avoid the injury.

Lafayette & I. R. Co. v. Adams, 26 Ind. 76; *Indianapolis, P. & O. R. Co. v. Petty*, 80 Ind. 261; *Carter v. Louisville, N. A. & O. R. Co.* 98 Ind. 552, 49 Am. Rep. 780; *Palmer v. Chicago, St. L. & P. R. Co.* 112 Ind. 250; *Brannan v. Kokomo, G. & J. Gravel Road Co.* 115 Ind. 115; *Penso v. McCormick*, 9 L. R. A. 813, 125 Ind. 116; *Cooley, Torts*, 674; 1 Hale, P. C. Am. ed. 475.

Appellee used the archway in loading cars with cerealine to be shipped over its road, deceased used it as others did, in passing through

NOTE.—The above case is valuable for its distinction between mere negligence and such willfulness as will preclude a defense of contributory negligence. See in this connection the *note* to *Robinson v. Oregon Short Line & U. N. R. Co.* (Utah) 13 L. R. A. 765.

negligence. See in this connection the *note* to *Robinson v. Oregon Short Line & U. N. R. Co.* (Utah) 13 L. R. A. 765.

the building. Where persons are given license to pass through a building,—that is are permitted to do so, there being a footway through, opened to the public,—a person is not a trespasser under such circumstances, not such a trespasser as the law imputes to him negligence.

Whart. Neg. § 349.

A railroad company is not justified in maintaining a footway through an archway that has the appearance of safety, and then recklessly rolling a car into such archway, giving those therein no chance to escape death. The deceased being in the archway under the circumstances did not contribute to his injury.

Groves v. Thomas, 95 Ind. 361, 48 Am. Rep. 727.

The archway assumed the appearance of safety, nothing to warn him of pending danger. Appellant's decedent thought, from the appearance, that if cars were rolled into the archway he could step to one side and be safe. Appellee knew if he was in there he could not escape as the car would fill the archway from wall to wall. So the knowledge of danger was not as well understood by the one as the other. The law does not, under the circumstances, enjoin the same degree of care upon the injured party as upon the aggressor.

Ohio & M. R. Co. v. Selby, 47 Ind. 471, 17 Am. Rep. 719.

In a complaint for willful injury, it is not necessary to show that the plaintiff was without contributory fault or that an animal so injured was rightfully on the track.

Chicago, St. L. & P. R. Co. v. Nash, 1 Ind. App. 297.

Mr. S. Stansifer, for appellee:

The spirit, meaning, and purpose of the ordinances are the protection of persons on public crossing and streets occupied by railroads, places where the public have a right to be and are expected to be.

Patterson, Railway Accident Law, 160; *Lockwood v. Chicago, N. W. R. Co.* 55 Wis. 50, 6 Am. & Eng. R. R. Cas. 151; *Baltimore & O. R. Co. v. State*, 62 Md. 479, 19 Am. & Eng. R. R. Cas. 88; *Randall v. Baltimore & O. R. Co.* 109 U. S. 478, 27 L. ed. 1008; *Rosenberger v. Grand Trunk R. Co.* 8 Ont. App. Rep. 482; *Clark v. Missouri Pac. R. Co.* 35 Kan. 850; *Bell v. Hannibal & St. J. R. Co.* 72 Mo. 50; *Hodges v. St. Louis, K. C. & N. R. Co.* 71 Mo. 50; *East Tennessee, V. & G. R. Co. v. Feathers*, 10 Lea, 103; *St. Louis & S. F. R. Co. v. Payne*, 29 Kan. 166; *Harty v. Central R. Co. of New Jersey*, 42 N. Y. 468; *Cordell v. New York Cent. & H. R. R. Co.* 64 N. Y. 535; *Byrns v. New York Cent. & H. R. R. Co.* 94 N. Y. 12; *O'Donnell v. Providence & W. R. Co.* 6 R. I. 211; *Alabama G. S. R. Co. v. Hawk*, 72 Ala. 112, 47 Am. Rep. 403.

By what right or authority was the deceased in the archway? There was the narrow archway with the railroad track through it. Even if in the open country he would have been held to knowledge that the track was a place of imminent peril, much more so situated as it was—a death trap. From all shown, the decedent was there without right, a trespasser, and, therefore the complaint is bad, regardless of the averment that he was free from fault.

Louisville, N. A. & O. R. Co. v. Ader, 110 28 L. R. A.

Ind. 876; *Belt R. & Stock yard Co. v. Mann*, 107 Ind. 89; *Louisville, N. A. & O. R. Co. v. Bryan*, Id. 51; *Louisville, N. A. & O. R. Co. v. Schmidt*, 106 Ind. 78; *Chicago & E. I. R. Co. v. Hedges*, 105 Ind. 393; *Terre Haute & I. R. Co. v. Graham*, 95 Ind. 286, 48 Am. Rep. 719; *Indianapolis & C. R. Co. v. McClaren*, 63 Ind. 588; *Palmer v. Chicago, St. L. & P. R. Co.* 112 Ind. 250; *Ioens v. Cincinnati, W. & M. R. Co.* 103 Ind. 27; *Evansville & T. H. R. Co. v. Griffin*, 100 Ind. 221, 50 Am. Rep. 788; *Ohio & M. R. Co. v. Walker*, 118 Ind. 196.

To constitute a license it must appear, either expressly or by clear implication, that the owner of the track authorized them to use it.

Palmer v. Chicago, St. L. & P. R. Co. 112 Ind. 261.

As a rule of pleading, there must be an averment that the deceased was licensed to be where he was. The footway and habit could but be links in the chain of evidence to prove a license. Even if licensed, the archway was none the less dangerous, and it was negligence to go there without some showing of legitimate excuse for so doing.

Evansville & T. H. R. Co. v. Griffin, *supra*. See strong case of *Kelley v. Hannibal & St. J. R. Co.* 75 Mo. 188, 13 Am. & Eng. R. R. Cas. 638.

The violation of the ordinances belongs to the domain of negligence.

Sherfey v. Evansville & T. H. R. Co. 121 Ind. 427.

The second paragraph to the complaint fails to show willfulness.

Louisville, N. A. & O. R. Co. v. Ader, *Belt R. & Stock-Yard Co. v. Mann*, *Louisville, N. A. & O. R. Co. v. Bryan*, *Louisville, N. A. & O. R. Co. v. Schmidt*, and *Chicago & E. I. R. Co. v. Hedges*, *supra*; *Pennsylvania Co. v. Sinclair*, 63 Ind. 801, 30 Am. Rep. 135; *Terre Haute & I. R. Co. v. Graham*, *Ioens v. Cincinnati, W. & M. R. Co.* and *Sherfey v. Evansville & T. H. R. Co.* *supra*.

Hackney, J., delivered the opinion of the court:

The appellant sued the appellee for damages in causing the death of William A. Parker. The complaint was in four paragraphs, to all of which the circuit court sustained demurrers, and this ruling is here presented for review. The theory of the first and third paragraphs is that the death was negligently produced, while the second and fourth paragraphs proceed upon the theory of willfulness in the acts complained of. The controlling facts alleged in any one of the paragraphs are that in the city of Columbus the appellee maintains a railway switch running east and west, and crossing the company's main line south of, and near to, the station building and platform; that opposite the station is located the cerealine mill, on the west side of said main track; that in said mill was an archway 250 feet long, and into which said switch was extended and maintained for the purpose of placing cars within said archway for loading from said mill of the product thereof; that the archway was so narrow that a box car almost filled it from wall to wall; that on the north side of said archway was a walk or footway four feet and

two inches wide, used by persons passing through the building; that in the immediate vicinity of said crossing were usually large numbers of people; that said William A. Parker was unacquainted with said building and its surroundings when he walked into said archway upon said footway to a point near the center of the building, and was killed. It is alleged that the appellee then knew that persons were in the habit of passing through said archway, and that to run a car through said archway at great speed would endanger the lives of those who might be therein; that there was then an ordinance of said city limiting the speed of cars to four miles per hour, and requiring that some person should be caused to proceed in advance of any car moved backwards within said city, for the purpose of keeping the track clear of pedestrians; that in disregard of the requirements of said ordinance, and of the situation, with its dangers as described, the appellee's servants caused an engine to push a box car over said switch and into said archway at a speed of twelve miles per hour, unaccompanied by any person, and without the knowledge of, or warning to, said decedent; that said car so running ran upon and killed the decedent there, there then being no means of escape for him. The first and third paragraphs allege that the decedent was free from negligence, and the second and fourth paragraphs omit allegations of the absence of contributory negligence, and allege that the acts complained of were done willfully. There is also an effort to distinguish the charge of negligence from that of willfulness by alleging that there was a curve in the switch which prevented the decedent from seeing the approaching car, and that from the appearance of the archway he believed in good faith that he could pass through in safety.

It is conceded by appellant's learned counsel that the specific facts alleged control in the construction of the complaint, and that the detached phrases, epithets, and conclusions cannot prevail against the facts so alleged. It is further conceded that the failure to observe the ordinance does not constitute willfulness, and it is so held in *Sherfey v. Evansville & T. H. R. Co.*, 121 Ind. 427. And it is conceded that the presence of contributory negligence on the part of the decedent would defeat a recovery on the ground of negligence, and that, if he was a trespasser such contributory negligence existed. Considering the right of recovery as for negligence, we find the complaint insufficient, in that it not only fails to allege a license to the decedent to use the archway, but it appears clearly from the facts alleged that said archway was a place of great danger for one to go into. It was narrow, not of sufficient width to admit a box car and furnish room for retreating. Through it ran a railway switch, and said switch so curved as to prevent a view of a car approaching the archway. The decedent was a stranger as to the conditions then existing in and about said archway, including its uses by the appellee. It is not alleged that it was a public thoroughfare, and the facts alleged would seem

to imply that it was not. In venturing into the archway he was confronted with all of the elements of danger that the situation afforded. He was in duty bound to observe the dangers thus surrounding him. While we find it unnecessary to say that the facts show a rash assumption of the dangers incident to the situation, we do feel that it is beyond serious doubt that he was a trespasser upon the appellee's track when he lost his life. "It is not enough that persons do occasionally use the track, for to constitute a license it must appear, either expressly or by clear implication, that the owner of the track authorized them to use it." *Palmer v. Chicago, St. L. & P. R. Co.* 112 Ind. 250. Here it does not appear that the decedent knew of the use by others of the archway in passing through; on the contrary, it is a necessary inference from the allegation that he was unacquainted with the building and its surroundings; that he did not rely on the use of it by others as a license to use it himself. With this conclusion, the first and third paragraphs were insufficient, and the demurrer was correctly sustained to them. Some of the cases supporting this conclusion are: *Chicago & B. I. R. Co. v. Hedges*, 105 Ind. 898; *Louisville, N. A. & C. R. Co. v. Schmidt*, 106 Ind. 78; *Louisville, N. A. & C. R. Co. v. Bryan*, 107 Ind. 51; *Belt R. & Stock Yard Co. v. Mann*, Id. 89; *Louisville, N. A. & C. R. Co. v. Ader*, 110 Ind. 876; *Palmer v. Chicago, St. L. & P. R. Co. supra*.

Considering the right of recovery as for willfully causing the death of the plaintiff's decedent, it is proper to observe the absence of an allegation that appellee's operatives knew of the presence of Parker. That one may be held liable for the consequences of a willful act without an actual knowledge of the presence of the object acted upon is urged, and may be conceded, but this liability is never held where the act or the omission is one from which the injury could not reasonably have been anticipated as the natural and probable consequence of such act or omission. *Louisville, N. A. & C. R. Co. v. Bryan, supra*. In this case the rule was correctly stated by the late Judge Mitchell as follows: "Where one person negligently comes into a situation of peril, before another can be held liable for an injury to him, it must appear that the latter had knowledge of his situation in time to have prevented the injury; or it must appear that the injurious act or omission was by design, and was such, considering the time and place, as that its nature and probable consequences would be to produce serious hurt to some one. To constitute a willful injury, the act which produced it must have been intentional, or must have been done under such circumstances as evinced a reckless disregard for the safety of others, and a willingness to inflict the injury complained of. It involves conduct which is quasi criminal. *Louisville & P. Canal Co. v. Murphy*, 9 Bush, 522; *Louisville & N. R. Co. v. Filbern*, 6 Bush, 574, 99 Am. Dec. 690; *Peoria Bridge Assn. v. Loomis*, 20 Ill. 235, 71 Am. Dec. 263."

While it is admitted that the act complained of is negligence, it is earnestly and

ably contended that, under the circumstances, considering the time, the place, and the habit of persons to pass through the archway, the act evinced a reckless disregard for the safety of others. It is not alleged that the appellee did not possess the right to use the switch at the time and place and under the circumstances then existing. The exact point at issue is in the excessive speed of the car through the archway, a place of danger, without affirmative action for the protection of a possible trespasser. While conceding expressly that the same act upon an open switch would have been but negligence, it is argued that the archway gave to one therein no means of escape, and that a different rule should obtain,—a rule whereby such negligence becomes an aggressive wrong. In the decision from which we have quoted the place of injury was a street crossing in a populous city, a place where the injured party was not a trespasser, but had a perfect right to go, and where the company was required to anticipate his presence. The crossing was alleged to be "extra dangerous by the track being hidden from view for some distance by intervening buildings." It was there held that the facts were "in no wise different from those involved in the ordinary case where a locomotive is run over a highway at a high rate of speed, without giving the statutory signals." These are merely acts of nonfeasance, not of aggressive wrong. The consequences of undenied contributory negligence cannot be avoided in such a case by the fact that the track was "hidden from view for some distance by intervening buildings." Willfulness does not consist in negligence; on the contrary, as illustrated by the cases of *Bryan* and of *Mann*, heretofore cited, the two terms are incompatible. Negligence arises from inattention, thoughtlessness, or heedlessness, while willfulness cannot exist without purpose or design. No purpose or design can be said to exist where the injurious act results from negligence, and negligence cannot be of such a degree as to become willfulness. Indeed, this court has

so often denied the claim which attempts to distinguish between degrees of negligence, that authority or further statement in denial should not be deemed necessary. The railroad company owes to the trespasser no protection against negligence. It does owe him the duty of all reasonable effort to avoid injuring him when his presence and his own inability to avoid injury are known to it; but does it owe such duty when his presence is not known? It would seem that a negative answer is all that the inquiry is susceptible of. The circumstances should be such as to charge the operatives with knowledge, actual or imputed, of the presence of the trespasser, and of his inability to avoid injury, before any duty of the company arises to require of it affirmative acts or effort to avoid injuring him. By imputed knowledge in such case we mean such as should be implied from the conduct of the party or others within the actual sight or hearing of such operatives. It is upon such knowledge that wantonness is held the equivalent of willfulness. To require more would be to deny to railway companies the free use of their lines, and would require of them superhuman vigilance against inflicting injury upon the trespassing tramp who lurks about the yards to steal a ride, or loiters in some dark tunnel, or upon a respected citizen whose curiosity may lead him in such an archway as that of the cerealine mill. To require the companies to presume the presence of trespassers in places of danger, and to use all possible care to avoid injuring them, would destroy the line dividing negligence from willfulness in such cases, or would give no discouragement to trespassers, and would place in the same right the trespasser and those using the railway by a license or by public authority. We have no doubt that the facts as pleaded in the second and fourth paragraphs of the complaint state but causes for negligence, which causes are insufficient, for the reasons and upon the authorities upon which we hold the first and third paragraphs insufficient.

The judgment of the Circuit Court is affirmed.

ILLINOIS SUPREME COURT.

Michael C. HAYES, *Appt.*,

v.

William D. O'BRIEN *et al.*

(.....Ill.....)

1. A suit to set aside a deed and specifically enforce a contract for land involves a freshhold, within the jurisdiction of the Illinois supreme court.
2. A suit to compel the execution or cancellation of deeds to land may be within the jurisdiction of a court outside of the county in which the land lies, if it has jurisdiction of the person of the defendant.

NOTE.—The question of mutuality in a contract which is presented in an interesting manner in the above case is decided in harmony with the conclusions of the note on options with the case of *Lits v. Gosling* (Ky.) 21 L. R. A. 127.

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3. The provision in the Illinois Chancery Act, § 3, that bills for injunction to stay proceedings at law shall be brought in the county in which the proceedings at law are had, does not prevent a court in another county from staying such proceedings at law as auxiliary or incidental relief in a suit to compel specific performance of a contract for the sale of land.
4. The privilege of purchasing given a lessee, in case the lessor makes a sale of the premises, is not invalid on the ground that it is wanting in mutuality, since this privilege is part of the consideration for accepting the lease.
5. A description of land as the portion of a specified farm east of the right of way of a certain railroad, which runs in a northerly and southerly direction, is sufficient to identify the land, where the range, township, and section on which the land is situated are given.

6. An agreement in a lease that the lessee shall have the privilege of purchasing the premises upon such terms and at the same price per acre as any other person or purchaser may have offered, although it does not bind the lessor to make any sale, is valid and binding in favor of the lessee, if the lessor decides to sell, and is not incomplete or indefinite.

(Craig, J., dissents.)

(March 31, 1894.)

APPEAL by plaintiff from a judgment of the Superior Court for Cook County in favor of defendants in a proceeding brought to compel specific performance of an alleged contract to sell real estate. *Reversed.*

Statement by Shope, J.:

This was a bill in chancery filed by Michael C. Hayes against William D. O'Brien and Fayette Thompson in the superior court of Cook county to enforce the specific performance of a contract for the conveyance of land situated in Lake county, and, as auxiliary to this relief, to enjoin O'Brien from the prosecution of a forcible entry and detainer proceeding brought by O'Brien against the tenant of Hayes before a justice of the peace of Lake county. O'Brien filed a general and special demurrer to the bill. Thompson entered a special appearance, and moved to dismiss the bill for want of jurisdiction. The motion and demurrer were heard together, which were sustained by the court, and the bill dismissed. From this decree, Hayes prosecutes this appeal.

So much of the contract sought to be enforced, material to an understanding of the opinion, is as follows: "This indenture, made and entered into this eighth day of April, A. D. 1889, by and between Fayette Thompson, of Waukegan, Lake county, state of Illinois, party of the first part, and Michael C. Hayes, of Chicago, Cook county, state of Illinois, party of the second part, witnesseth, that the said party of the first part, for and in consideration of the covenants and agreements hereinafter mentioned, to be kept and performed by said party of the second part, his assigns, executors, or administrators, has demised and leased unto the party of the second part, the following described land, to wit: Situate in the county of Lake and the state of Illinois, and being a part of the south half of section thirty-four (34) and thirty-five (35) in township forty-six (46) north, of range twelve (12) east of the third principal meridian, more familiarly known as the 'Old Merchant Farm.' Said land is divided into unequal portions by the right of way of the Chicago & Northwestern Railway Company through said land in a northerly and southerly direction. All of that portion east of said right of way, only, is leased to said party of second part. To have and to hold the same to the party of the second part from the eighth day of April, A. D. 1889, to the eighth day of April, A. D. 1899. Said party of the first part hereby reserves the right or privilege of selling that portion of said land at any time from and

after this date; but no such sale of said land shall be made by said first party without first having given said second party the privilege of purchasing said land upon such terms, and at the same price per acre, as any other person or purchaser might have offered therefor." Then follow covenants to pay rent at the rate of one dollar per carload of gravel removed, etc., and that not less than 250 cars per year shall be taken, etc. The bill alleges that in the month of September, 1889, Thompson, without any notice to complainant, and without giving him the privilege of buying, as he covenanted to do, sold and conveyed the land to O'Brien, who, it is alleged, purchased with full notice of complainant's rights. The bill charges fraud and collusion between O'Brien and Thompson to deprive complainant of the benefits of his lease, and his right to purchase, alleges acts of O'Brien and others interfering with complainant in the use and enjoyment of the premises, etc., and seeks to enjoin the same.

Messrs. K. R. Smoot, C. B. Eyer, and Monk & Elliott, for appellant:

The rule requiring mutuality does not apply where the optional agreement is made upon proper consideration or forms part of a lease or other contract between parties that may be true consideration for it.

Estes v. Furlong, 59 Ill. 298; *Haworth v. Warren*, 18 N. J. Eq. 124, 90 Am. Dec. 613; *Hall v. Center*, 40 Cal. 63; *Kerr v. Day*, 14 Pa. 112, 58 Am. Dec. 526; *Corson v. Mulvany*, 49 Pa. 88, 88 Am. Dec. 485; *Rogers v. Saunders*, 16 Me. 92, 33 Am. Dec. 635; *Justice v. Lang*, 42 N. Y. 524, 1 Am. Rep. 576; *Evans v. Gordon*, 49 N. H. 444; *Esmay v. Gorton*, 18 Ill. 488; *Farwell v. Louther*, Id. 252.

The agreement describes the land as being part of the government subdivisions designated "more familiarly known as the Old Merchant Farm." It is then stated that this is divided into two unequal portions by the right of way of the Chicago & Northwestern Railway Company through said land in a northerly and southerly direction. The priority of right to purchase also relates to that portion of said land. This description is sufficiently descriptive and if it were not, the possession taken by complainant under the contract locates the land and removes all objection on the score of uncertainty.

White v. Hermann, 51 Ill. 248, 99 Am. Dec. 543; *Hurley v. Brown*, 98 Mass. 545, 96 Am. Dec. 671; *Scanlan v. Geddes*, 112 Mass. 16; *Spanglar v. Danforth*, 65 Ill. 152; *Mead v. Parker*, 115 Mass. 418, 20 Am. Rep. 110; *Purinton v. Northern Illinois R. Co.* 46 Ill. 297; *Ottumwa, C. F. & St. P. R. Co. v. Williams*, 71 Iowa, 164.

The contract provides a way in which the price and terms are to be ascertained. It binds Thompson in accepting a proposition from a stranger to insert in it a condition that it is subject to an offer of the property, at the same price and on the same terms to appellant. The acceptance of an offer in violation of this duty is no less effectual in fixing the terms and price upon which appellant is entitled to a conveyance than if such duty had been complied

with, the sale being to a purchaser with notice of his pre-emptive right.

Estes v. Furlong, *supra*; *Homfray v. Fothergill*, L. R. 1 Eq. 567; *Race v. Groves*, 43 N. J. Eq. 284; *Lovering v. Fogg*, 18 Pick. 540; *Orby v. Trigg*, 9 Mod. 2; Coote, Mortg. p. 20; Bythewood, Conv. p. 683; 1 Powell, Mortg. 125; Fisher, Mortg. p. 280; Pom. Eq. Jur. § 1193; Story, Eq. Jur. 12th ed. § 1019, note 2; 1 Bell, Conv. pp. 423, 424; High, Inj. §§ 1184, 1185, 1164, 1165, and cases there cited.

Affirmative equitable relief being necessary in order to a complete determination of the issues, the court will take control of the whole controversy and enjoin the action at law.

Pom. Eq. Jur. §§ 1362, 1363; *McDowell v. McDowell*, 114 Ill. 256; *Baker v. Rockabrand*, 118 Ill. 865; *Henwood v. Jarvis*, 27 N. J. Eq. 247.

Regarded either as a suit to annul a conveyance to O'Brien or compel a conveyance from him, the suit is transitory and not local, and jurisdiction is conferred by reason of the diverse residence of the parties.

Mitchell v. Bunch, 2 Paige, 606, 2 L. ed. 1049, 22 Am. Dec. 669; *Hickey v. Stewart*, 44 U. S. 8 How. 750, 11 L. ed. 814; *Hart v. Sansom*, 110 U. S. 151, 28 L. ed. 101; *De Klyn v. Watkins*, 3 Sandf. Ch. 185, 7 L. ed. 818; *Enos v. Hunter*, 9 Ill. 211; *Cooley v. Scarlett*, 38 Ill. 316, 87 Am. Dec. 298; *Johnson v. Gibson*, 116 Ill. 294; *Baker v. Rockabrand*, *supra*.

Having acquired jurisdiction for other purposes, the court, to administer complete relief, could enjoin proceedings at law pending in another county.

Lester v. Stevens, 29 Ill. 155; *Baker v. Rockabrand*, *supra*; *Winston v. Midlothian Coal Min. Co.* 20 Gratt. 686; *Muller v. Buily*, 21 Gratt. 521.

If the statute applies, Hayes was entitled to a written offer of the land from Thompson before selling to another. In case of sale without such written offer the pre-emptive right remained unimpaired, and the court should direct an inquiry before the master to ascertain the price and terms of sale, and decree a conveyance to Hayes on making payment in accordance therewith.

Birmingham Canal Coal Co. v. Cartwright, L. R. 11 Ch. Div. 424.

The statute of frauds does not apply.

An oral offer to Hayes would bind Thompson. The offer contemplated does not constitute part of the contract, but is something to be done in execution of it, proof of which might be made by parol.

Estes v. Furlong, 59 Ill. 298, and cases there cited; *Norton v. Gale*, 95 Ill. 533, 35 Am. Rep. 173, and cases cited.

The contract is taken out of the statute of frauds by the possession of Hayes and his improvements thereunder.

Morrison v. Herrick, 130 Ill. 631.

The contract is sufficiently certain, definite, and complete in its terms to be enforceable in equity.

Homfray v. Fothergill, *Race v. Groves*, *Orby v. Trigg*, and *Lovering v. Fogg*, *supra*; *Re Houghton*, 11 Ir. Ch. Rep. 136; Coote, Mortg. p. 203; Bythewood, Conv. p. 683; Pom. Eq. Jur. § 1193; Fisher, Mortg. p. 286; 23 L. R. A.

Story, Eq. Jur. 12th ed. § 1019, note 2; 1 Bell, Conv. pp. 423, 424.

Messrs. Whitney & Upton for appellee Thompson.

Messrs. S. M. Meek and O. R. Trowbridge for appellee O'Brien.

Shope, J., delivered the opinion of the court:

Appellees have entered a motion to dismiss the appeal for want of jurisdiction in this court. The contention is that a freehold is not involved. The complainant, by his bill, seeks to have the deed made by Thompson to O'Brien set aside, and to specifically enforce his contract with Thompson, by compelling the defendants to convey the land described in the contract to him. We are of opinion that a freehold is involved. A decision in favor of either party would determine their right to the land, as between themselves. If adverse to the complainant, O'Brien would retain the title under his deed; if in his favor, the title of O'Brien would be divested. The motion is overruled.

The first point raised by the demurrer and motion to dismiss in the lower court is that the court had no jurisdiction; the land in respect of which specific performance was sought, lying in Lake county, and the bill having been filed in Cook. It is conceded that the court acquired jurisdiction of the person of the defendants. We need not enter upon any discussion of this question, for the reason that it has been repeatedly held in this state that jurisdiction of the person invests the court with power to proceed to final decree in all that class of cases where it is sought to compel the execution or cancellation of deeds to land. Where the relief sought does not require the court to deal directly with the estate itself, the proceeding does not affect real estate, within the meaning of the third section of the chancery act; and the court, having the parties in interest all before it, may proceed, although the land to which the controversy relates may lie without the jurisdiction of the court. As said in *Johnson v. Gibson*, 116 Ill. 294, "the decree in such cases settles the rights of the parties before the court with respect to some contract, conveyance, or fraudulent conduct, and, by attachment or other coercive means compels the offending party to comply with the requirements of the decree." *Enos v. Hunter*, 9 Ill. 211; *Cooley v. Scarlett*, 38 Ill. 316, 87 Am. Dec. 298; *Baker v. Rockabrand*, 118 Ill. 865; *Mannis v. Watts*, 10 U. S. 6 Cranch, 148, 3 L. ed. 181; *De Klyn v. Watkins*, 3 Sandf. Ch. 185, 7 L. ed. 818; *Mitchell v. Bunch*, 2 Paige, 615, 2 L. ed. 1054, 23 Am. Dec. 669; *Hart v. Sansom*, 110 U. S. 151, 28 L. ed. 101.

It is also objected that the court was without jurisdiction to restrain the proceeding at law pending in Lake county. Section 8 of the Chancery Act provides: "Bills for injunction to stay proceedings at law, shall be brought in the county in which the proceedings at law are had." Unquestionably, if this was a bill to enjoin proceedings at law, simply, it could be brought only in Lake

county. But such is not the primary object of the bill, that being to compel specific performance of the contract for the sale and conveyance of the land. It is apparent that, it having been alleged in the bill that Thompson had conveyed the land to O'Brien, complete relief could not have been afforded without making O'Brien a party defendant. He being a necessary party to the bill, therefore, and residing in Cook county, the bill might properly be brought in that county (Rev. Stat. chap. 22, § 3). and the other defendants brought in by summons in that proceeding. The court, having jurisdiction of the main purposes of the bill, would have the right to grant such auxiliary or incidental relief as would be necessary to make the relief sought complete. *Lester v. Stevens*, 29 Ill. 155; *Baker v. Rockabrand*, *supra*; *Winston v. Midlothian Coal Min. Co.* 20 Gratt. 686; *Muller v. Bayly*, 21 Gratt. 521.

The principal contention is that specific performance of the alleged agreement cannot be decreed—First, because it is wanting in mutuality; second, because there is an insufficient description of the premises alleged to have been sold; third, that the contract is so uncertain, indefinite, and incomplete as to be incapable of enforcement.

1. The doctrine of the earlier English and American cases, in which it was held that the want of mutuality of obligation and remedy would render the contract incapable of specific enforcement, has by the more modern cases been so modified that optional agreements to convey, without any corresponding obligation or covenant to purchase, will now be specifically enforced in equity, if made upon sufficient and valuable consideration; and so, where the agreement to convey is a part of a lease or other contract between the parties, for which the agreement to convey forms the true consideration, the want of mutuality will not avoid the contract. *Estes v. Furlong*, 59 Ill. 298; *Hawralty v. Warren*, 18 N. J. Eq. 124, 90 Am. Dec. 618; *Hall v. Center*, 40 Cal. 68; *Maughlin v. Perry*, 35 Md. 352; *Backhouse v. Mohun*, 3 Swanst. 434; *Olson v. Bailey*, 14 Johns. 484; *Willard v. Taylor*, 75 U. S. 8 Wall. 557, 19 L. ed. 501, and cases cited. In *Willard v. Taylor*, *supra*, it was covenanted in the lease executed between parties that the lessee should, at any time before the expiration of the lease, have the right to purchase the leased premises at a fixed price; and it was said: "The covenant in the lease giving the right or option to purchase the premises was in the nature of a continuing offer to sell. It was a proposition extending through the period of ten years, and, being under seal, must be regarded as made upon a sufficient consideration, and therefore one from which the defendant was not at liberty to recede." When the contract is unilateral, as in the case of an option to purchase, the court will, as said in *Estes v. Furlong*, *supra*, exercise its discretion with great care, and scan the conduct of the party claiming the benefit of such a contract; "but an agreement of this character cannot be regarded as invalid, or as one which will not be enforced in equity." In *Hawralty v. Warren*, *supra*, it is said: "In

taking a lease, a tenant may be willing to pay a high rent for a number of years, provided the landlord will give him an optional right to purchase at a fixed price; and it is not to be presumed, that the landlord would agree to such a concession unless he had a consideration in the lease. Any sufficient consideration would make such unilateral contract binding in equity." We need not further review the authorities. The contract here is under seal, and imports consideration; but, if it were not, it is manifest that the privilege of becoming a purchaser of the premises formed at least a part of the inducement and consideration for the acceptance of the lease by the lessee. There is practical uniformity in the authorities that where the contract is otherwise valid, is fairly entered into, and is upon sufficient consideration, equity will enforce it, where there has been an acceptance of its terms by the vendee in apt time. Such a contract is a continuing obligation on the part of the lessor, running with the lease, which the lessee may accept, at his option, within the time limited. It is alleged in the bill that the sale was made by Thompson to O'Brien without notice to the lessee, and that immediately upon learning the same the lessee offered, and was and still is ready and willing, and offers by his bill, to take the land at the price at which it was sold, and that he demanded of Thompson and O'Brien conveyance of the land according to the agreement. This was all he could, or was required to, do. *Estes v. Furlong* and other cases *supra*.

2. The second contention arises, as we regard it, from a misapprehension. The land is described in the lease as a tract of land in Lake county, Ill., and "being a part of the south half of sections thirty-four (34) and thirty-five (35) in township forty-six (46) north, of range twelve (12) east of the third principle meridian, more familiarly known as the 'Merchant Farm.'" The land is then described as divided into two unequal portions by the right of way of the Chicago & Northwestern Railroad Company through said land in a northerly and southerly direction, and the description concludes: "All of that portion east of said right of way, only, is leased to said party of second part." The land contracted to be sold and conveyed in the land leased. The description given is clearly sufficient to admit evidence aliunde the lease to identify the land. *White v. Hermann*, 51 Ill. 243, 99 Am. Dec. 543; *Bowen v. Prout*, 52 Ill. 354; *Bybee v. Hageman*, 66 Ill. 519; *Billings v. Kankakee Coal Co.* 67 Ill. 489. A deed or other written contract is not void for uncertainty in the description of the land sold or conveyed if, from the words employed, the description can be made certain by extrinsic evidence of facts, physical conditions, measurements, or monuments referred to in the deed. 1 Devlin, Deeds, § 1012; *Smith v. Crawford*, 81 Ill. 296; *Rockefeller v. Arlington*, 91 Ill. 375; *Choteau v. Jones*, 11 Ill. 300, 50 Am. Dec. 460; *Lyman v. Geinney*, 114 Ill. 395, 55 Am. Rep. 871. And thus a defective description of land may be aided by the conduct of the parties, such as that the vendor put the pur-

chaser in possession of the premises intended to be conveyed. *Purinton v. Northern Illinois R. Co.* 46 Ill. 297; *Ottumwa, C. P. & St. P. R. Co. v. McWilliams*, 71 Iowa, 164.

3. The more difficult question arises upon the objection that the contract is indefinite, uncertain, and incomplete in its terms. After providing that the leasehold estate shall continue for ten years, it is stipulated: "Said party of the first part hereby reserves the right or privilege of selling that portion of said land at any time from and after this date; but no such sale of said land shall be made by said first party without first having given said second party the privilege of purchasing said land upon such terms, and at the same price per acre, as any other person or purchaser might have offered therefor." It is clear the latter part of this clause in the lease was inserted for the benefit of the lessee, and was intended to secure some right which he might otherwise not have had. It is urged that the contract is void, as a contract of sale, for the reason that there is no price fixed at which the sale should be made; and it is said, if it is enforced, the court must interpolate that term into the contract. This, it is at once conceded, the courts may not do. Their duty is to enforce contracts as made by the parties. In the construction of contracts, the intention of the parties—to be ascertained from the words employed, the connection in which they are used, and the subject-matter in reference to which the parties are contracting—must control; and courts are powerless to interpolate terms and conditions into the contract, to which the minds of the parties have not given assent. Courts will, however, look to the entire instrument, and, if possible, give such construction that each clause shall have some effect, and perform some office (2 Parsons, Cont. 7th ed. 633), and for this purpose will, as far as practicable, view the contract from the position of the parties at the time it was made, in order to understand their language, in the sense in which it was used. *Wilson v. Roots*, 119 Ill. 384; *Wood v. Clark*, 121 Ill. 362. And such construction will be adopted, if it can consistently and reasonably be done, as will render the whole contract operative. *Field v. Leiter*, 118 Ill. 21; *Holmes v. Bemis*, 124 Ill. 453; *Bishop*, Cont. 391-398. The lessor reserved the right to sell the land at any time, but covenanted that no sale of the land should be made by him without first having given the lessee the privilege of purchasing. Thus far there is no uncertainty. It will be seen that the lessee was given the right to purchase the land "upon such terms, and at the same price per acre, as any other person or purchaser might have offered therefor." This language is plain and unambiguous, and admits of no construction other than that the terms and price per acre at which the lessee might purchase was the same as offered by any other person or purchaser, and which the lessor was willing to accept. It is true, as said by counsel, the lessor was not bound to sell at all, nor was he bound to take any price offered. But he covenanted that before he would sell to any other person than the lessee, at any price, the lessee might exercise his

option to take the land at the price offered; that is, the lessee might purchase upon the terms and at the price the lessor was offered by another, which he decided to accept. As already seen, the fact that, by the contract, the lessor was not bound to sell, would not render the contract invalid. By the contract of the parties, the lessee had acquired an estate for years in the land; and as parcel of the transaction, and entering into its consideration for the execution and acceptance of the contract, he acquired the right to purchase the leased premises, if his landlord determined to sell. It may well be that the landlord was then unwilling to sell at any price, and that the tenant was willing to accept a lease under him, but wholly unwilling to accept a lease for a term of years, and run the hazard of a sale to one whose interests might be inimical to his own. Indeed, the bill alleges that O'Brien was engaged in the same business as the lessee, and for which the latter was using the demised premises, and charges that the purchase by O'Brien was made for the purpose of harassing the lessee, and destroying his business, and that Thompson, colluding with O'Brien in that unlawful purpose, made the sale without notice to the lessee. It is argued by counsel for appellee O'Brien that reservation of the right of the lessor to sell may be construed as intending that the leasehold should terminate upon a sale of the premises; and it would seem this construction was put upon the contract both by Thompson and O'Brien. That question does not arise in this case, and it is unnecessary to determine it. If, however, that construction can be placed upon the contract, it at once becomes apparent that the right of purchase by the lessee was an important part of the consideration for his acceptance of the lease. It is clear the lessor was not bound to sell, but having determined to do so, at a price and upon terms satisfactory to himself, offered by some other person or purchaser, he covenanted that he would not sell to such other person or purchaser without first giving to the lessee the right to exercise his option to purchase the land upon the same terms; and it cannot be presumed that the tenant would have taken the lease without his covenant, or that the landlord would have granted the concession without each understanding that it entered into, and formed a part of, the consideration moving between them.

We know of no principle of equity that is violated by such a contract, nor are we referred to any case holding that a contract of this character may not be enforced in equity. The contract is that the lessee shall have a right to purchase at a price satisfactory to the lessor: and when fairly entered into, upon a valuable consideration, if the terms upon which the sale is to be made are fixed in the contract, or the parties have, by the contract, provided the means for their ascertainment, no reason is perceived why a court of equity may not compel its performance. The authorities are agreed that the contract must be complete; that is, must contain the terms, by the acceptance of which the grantee will become entitled to a conveyance. In

most of the reported cases there has been an offer to sell, or an option to purchase, at a fixed price named in the written contract. But this is not necessary where the written instrument fixes a definite mode of its ascertainment. Thus, in *Fogg v. Price*, 145 Mass. 518 (being the principal case relied upon by appellees), the covenant was, "If the premises are for sale at any time, the lessee shall have the refusal of them." The court says: "This is simply an agreement to give the lessee the first chance to make a contract, — an agreement to sell if the parties can agree, and not otherwise. It neither fixes the price, nor provides a way in which it can be fixed." And it is manifest, as said by that court, that, to justify specific performance at the suit of the lessee, "a term would have to be added which is not in the contract." And the court, in that case, further says, "The contract certainly does not contemplate a sale to somebody else, as a mode of ascertaining the price at which the lessor will sell to the lessee;" citing *Bromley v. Jefferies*, 2 Vern. 415. In *Bromley v. Jefferies*, *supra*, on the marriage of the plaintiff with the daughter of Sir Rowland Berkley, the latter covenanted that if the plaintiff survived him, and had issue of the marriage, plaintiff "should have, Catheridge £1,500 less than any other purchaser would give for the same." Other disposition was made of the estate by will, the testator bequeathing £1,500 to plaintiff and wife. The court refused specific performance of the covenant "because, if the estate was not to be sold, but the plaintiff was to have it, it was not practicable to know what a purchaser would give for it." The clear intimation of both of these cases is that, had there been a mode of ascertainment provided for, the holdings would have been otherwise. According to the doctrine of some of the later cases, the difficulty found by the court in the *Bromley Case* would have been overcome; but it is sufficient, for the purposes of this case, that the refusal was placed upon the ground of the impracticability of ascertaining the price at which the plaintiff was to have the land. Practically, these are the only cases cited that are thought to be decisive against the right to enforce the contract. The other case cited (*Buckmaster v. Thompson*, 36 N. Y. 558) does not involve the question here being considered. On the contrary, where the contract was that there should be a fair valuation of the property, this court, in *Estes v. Furlong*, *supra*, said, "This implied a reasonable estimate to be made by the parties, or, if they could not agree, to be determined by the court upon proof;" and it was held that upon bill filed for specific performance, where vendor had refused to yield to an appraisement by other persons, but arbitrarily fixed the price at a gross sum, the court must determine the value upon proof, and enforce performance accordingly; citing *Parkhurst v. Van Cortlandt*, 14 Johns. 15, 7 Am. Dec. 437. So, in *Milnes v. Gery*, 14 Ves. Jr. 401, it was held that an agreement to sell at a fair valuation may be enforced, and that, if no means are pointed out in the contract to ascertain the value, the court may resort to any means adapted to the purpose. In *Fry* on

Specific Performance of Contracts, after stating (sec. 214) that "it is evident that the price is an essential ingredient in the contract, and that where this is neither ascertained, nor rendered ascertainable, the contract is void for incompleteness and incapable of enforcement," the author says (sec. 216): "It is not, however, necessary that the contract should determine the price in the first place. It may appoint a way by which it is to be thereafter determined, in which case the contract is perfected only when the price has been so determined." The principle governing is: When the contract appoints the mode of determining the price, and the price is determined according to that mode, the contract becomes perfect and complete in all respects, as if it had been originally fixed in the writing. *Norton v. Gale*, 95 Ill. 538, 35 Am. Rep. 173.

The case of *Homfray v. Fothergill*, L. R. 1 Eq. 567, is an instructive case on this point. The agreement there was that no partner should sell his shares without first offering them or it to the other partners, collectively, after notice. If they refused to buy, the shares were to be offered to the partners desirous of collectively purchasing. If no two desired to purchase jointly, then to the partners individually, after which he might sell them to a stranger. The only limitation as to the price upon the sale to strangers was in the condition providing that he or she should sell the same, fairly, for £500 per share, at least, more than the price at which he or she offered the same to his or her partners collectively or individually. One of the partners offered his shares to the three remaining partners. One of the three refused to join with the other two, so there could be no collective purchase. A bill was filed by the two who were willing to purchase, and the court held that the offer to the partners inured to the benefit of the two who were willing to purchase, and decreed specific performance accordingly. There, it is apparent, the price was in the discretion of the seller, subject only to the limitation that he would not sell to a stranger for less than £500 per share more than he had offered to sell them for to his partners, collectively or individually. By the contract the price was to be fixed by the offer of the seller, and thereupon the right of the remaining partners to purchase became complete. See also, *Re Houghton*, 11 Ir. Ch. Rep. 136; *Loering v. Fogg*, 18 Pick. 540; *De Ruitte v. Muldrow*, 16 Cal. 518; *Cooper v. Pena*, 21 Cal. 408; *Race v. Groves*, 48 N. J. Eq. 284.

Here the parties, by their contract, prescribed a mode by which the price at which the lessee was to purchase was definitely ascertainable. If the lessor received an offer for the land which he was willing to accept, that became the price at which the lessee might purchase, and, if the lessee accepted it, at which the lessor was bound to convey. It follows that the court below erred in sustaining the demurrer and dismissing the bill. The decree will be reversed, and the cause remanded for further proceedings. *Reversed and remanded.*

Craig, J., dissents.

MISSOURI SUPREME COURT (Div. 2.).

Harry K. FORD, *Resp't.*,
v.

UNITY CHURCH SOCIETY OF ST. JOSEPH, *Appt.*

(.....Mo.....)

1. The word "divided" in a deed of "one divided fourth" of certain property will not be rejected so as to make a deed of an undivided fourth, where the result would be to ignore the intention of the grantor by passing an after-acquired title.
2. A deed may pass a subsequently acquired title by virtue of Rev. Stat. 1885, p. 355, § 3, where it appears to convey the fee simple absolute, although it is on consideration of love and affection alone.
3. A recorded deed made by one who has then no title to the land is not within the chain of title so as to be constructive notice to a subsequent purchaser to whom the same grantor conveys after obtaining title by a recorded deed.
4. A statutory provision that subsequently acquired title of a grantor in a deed purporting to convey a fee simple absolute shall immediately pass to the grantee, and "that such conveyance shall be valid, as if such legal authority had been in the grantor at the time of the conveyance," is not effectual to defeat a bona fide purchase by a subsequent grantee from the same grantor in reliance on the records, which

do not show any conveyance by the grantor after acquiring title to the property.

(February 27, 1894.)

A PPEAL by defendant from a judgment of the Circuit Court for Buchanan County in favor of plaintiff in an action brought to recover possession of certain real estate. *Reversed.*

Statement by Grant, P. J.:

This is an action of ejectment for the recovery of the south eight feet of lot 6, all of lot 7, and the north two feet of lot 8, all in block 28 in Smith's addition to the city of St. Joseph. The answer admitted possession, and denied each and every other allegation in plaintiff's petition. The case was tried to a jury, and resulted in a verdict and judgment for the plaintiff. At the trial plaintiff introduced a patent from the United States to Fred W. Smith, a plat of Smith's addition to the city of St. Joseph, and a deed from Smith to James Cargill for lots 3, 4, 5, 6, 7, and 8, all in block 28 of said addition, of which the land sued for is a part. James Cargill, who is the common source of title, died in 1858, leaving a widow, Nancy G. Cargill (sometimes called Agnes G. Cargill), and four children,—George W. Cargill, John C. Cargill, Agnes Owen, and Abby N. Ford. James Cargill left a will, which was duly

NOTE.—Conveyance recorded before grantor obtained title, as notice.

The subject of this note involves the application of two opposing principles of law, and the effect so far as the courts have declared it which is to be given to each.

Thus the question whether a deed with covenants of title given before the grantor acquires title and placed on record is to prevail over a deed given after the title is acquired to a purchaser in good faith for value and without notice of the previous deed was raised in *Salisbury Sav. Soc. v. Cutting*, 50 Conn. 113, but the decision was made upon other grounds the court saying on this point that the question was one of very serious difficulty inasmuch as in sustaining the later deed it would be necessary to deny the application of the settled principles of estoppel, and in sustaining the prior deed it would be necessary to violate the entire spirit of the registry system.

But few of the cases have discussed the relative extent to which each doctrine should be carried and applied, the great majority of them having been decided upon principles applicable to the one side of the question ignoring those applicable to the other side entirely.

In this note it is not attempted to incorporate all the cases relative either to the law of estoppel or to the law of notice from registration. The intent has been to include such cases and such principles only as relate to or are connected with questions arising out of conveyances made before the person conveying has acquired title. Many have been included, however, which do not relate to notice from registration, with a view to show as near as possible the border line between the opposing doctrines of estoppel and notice from registration.

The doctrine of estoppel.

The doctrine of estoppel as applied to the note is,
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that, where lands are conveyed with covenants of warranty or quiet enjoyment by one who afterwards acquires title thereto, the after-acquired title inures to the benefit of the grantee and the grantor is estopped to claim that he had no title at the time of making the conveyance. *Middlebury College v. Cheney*, 1 Vt. 386; *Ward v. Willard*, 13 N. H. 389; *Foss v. Strachn*, 42 N. H. 40; *McCusker v. McKvey*, 9 R. I. 523, 11 Am. Rep. 295, overruling contrary dictum in *Gardner v. Greene*, 5 R. I. 104; *Jackson v. Matsdorf*, 11 Johns. 91, 6 Am. Dec. 355; *House v. McCormick*, 57 N. Y. 310; *White v. Patten*, 24 Pick. 324; *Knight v. Thayer*, 125 Mass. 25; *Somes v. Skinner*, 3 Pick. 62; *Trull v. Bigelow*, 16 Mass. 418, 8 Am. Dec. 144; *Green v. Clark*, 81 Cal. 591; *Bogy v. Shoab*, 13 Mo. 365; *Reese v. Smith*, 12 Mo. 344; *Gochenour v. Mowry*, 33 Ill. 331; *Jones v. King*, 25 Ill. 388; *Willis v. Watson*, 5 Ill. 64; *Rigg v. Cook*, 9 Ill. 336, 46 Am. Dec. 462; *Root v. Crock*, 7 Pa. 378; *Brown v. McCormick*, 6 Watts, 60, 31 Am. Dec. 450; *Pike v. Galvin*, 29 Me. 183; *Baxter v. Bradbury*, 20 Me. 260, 37 Am. Dec. 49; *Lawry v. Williams*, 13 Me. 281; *Gregory v. Peoples*, 80 Va. 355; *Raines v. Walker*, 77 Va. 2; *Burnetts v. Kieran*, 24 Gratt. 42; *Goodson v. Beacham*, 24 Ga. 150; *Irvine v. Irvine*, 76 U. S. 9 Wall. 617, 19 L. ed. 800; *Ryan v. United States*, 136 U. S. 68, 24 L. ed. 447.

Thus when A sells land to B and afterwards sells it to C with warranty, and subsequently B reconveys it, the title thus reconveyed will inure to the benefit of C. *Kimball v. Blaisdell*, 5 N. H. 553, 22 Am. Dec. 476.

And where D made a deed to B of premises belonging to A which was duly recorded, and A afterwards conveyed to F whose deed was duly recorded and just previous to that conveyance F had conveyed the lands to D by deed which was not recorded until nearly ten years afterward, and in the meantime F again conveyed premises to C who duly recorded his deed, it was held that the title which inured to B's benefit by reason of the war-

admitted to probate in the probate court of Buchanan county, by the second clause of which he gave all his real and personal estate to his wife for life, or until she should marry again. Mrs. Cargill, who survived her husband, lived until 1877, when she died without having married again. By the third clause of James Cargill's will he gave, at the death of his wife, his home place, describing it, to his son George Cargill, whom he appointed as his executor. By the fourth clause of his will it was provided that, at the death of his wife, his executor should take charge of all his property, real, personal, and mixed, and, after setting aside said home place to his son George, he should select three disinterested persons to divide all the remainder into four equal parts, and to each of his four children he devised and bequeathed one of these parts thus to be divided. In 1879, after the death of Mrs. Cargill, the executor selected three persons, who made division of the lands of which James Cargill died seised into four parts, and assigned one of these parts to each of the children named in the will, or to their assigns. The report of these commissioners is too long to be inserted in this statement. The lots sued for appear in that part which was assigned to John Cargill

and his assign, the Real-Estate Loan Company, through which defendant's claim of title runs, being named the assignee of this particular portion. Prior to this division, and prior to the death of his mother,—even as early as 1860,—John C. Cargill, in conjunction with his wife, Sarah L. Cargill, conveyed by deed of trust his interest in all the real estate which his father owned at his death to Joseph C. Hull, trustee, to secure the payment of certain debts in said deed of trust described. Having made default, the trustee, Hull, in 1865 sold and conveyed, under the power conferred by said deed of trust, all the interest of John Cargill in said real estate to his mother, Agnes or Nancy, G. Cargill. In 1868, by a deed dated September 5th of that year, Mrs. Cargill, in consideration of one dollar and natural love and affection, made a deed containing covenants of warranty to her daughter Abby N. Ford, purporting to convey to her "the one divided fourth part" of certain described real estate, including said lots 3, 4, 5, 6, 7, and 8, of which the lots sued for are a part. To the introduction of this deed in evidence by plaintiff the defendant objected, because it was incompetent and irrelevant, because the deed was void and ineffectual to pass title to

ranty in the deed being void because of D's failure to record his deed, B was entitled to recover of D for breach of covenant the amount paid by him for the land. *Burke v. Beveridge*, 15 Minn. 206.

So when one having no title makes a deed with warranty and the grantee enters upon the premises and the grantor afterwards takes a release from the owner it will operate as a confirmation of the title of the grantee, though neither the owner nor the grantor was in possession at the time of the release. *Oakes v. Marcy*, 10 Pick. 195.

And an estoppel to assert an after-acquired title takes place whether the prior grantee is seised in fact of the premises or not. *King v. Gilson*, 32 Ill. 348, 83 Am. Dec. 289.

So also an heir who conveys the lands of his ancestor during his lifetime which subsequently descend to him is estopped from recovering the property from his grantee. *McPherson v. Ounliff*, 11 Serg. & R. 422, 14 Am. Dec. 642.

And the heirs of one who sold and conveyed lands to which he had no title but to which he afterwards acquired title are estopped to deny the title of the grantee. *McWilliam v. Nisly*, 2 Serg. & R. 537, 7 Am. Dec. 54.

A covenant of general warranty binding the grantor and his heirs runs with the land and inures to the benefit of all subsequent purchasers. *Torrey v. Minor*, 18 Medes & M. Ch. 439.

And subsequent grantees as well as the grantor himself are estopped to claim that he was not seised in fee of the estate conveyed at the time of the conveyance to the first grantee. *White v. Patten*, 24 Pick. 324; *Knight v. Thayer*, 125 Mass. 25.

And an estoppel vests title in the grantee which is good as against strangers coming in after the estoppel as well as against the grantor and those claiming under him. *Somes v. Skinner*, 3 Pick. 53.

Thus when an administrator granted lands for the payment of debts conveying also a special privilege of carrying the water of a brook across adjoining lands of the intestate and such adjoining lands were afterwards distributed to the administrator as heir-at-law, and he conveyed them to a third person without making the reservation of the water rights, his grantee is estopped to deny 23 L. R. A.

the right to the special privilege. *Coe v. Talcott*, 5 Day, 88.

The estoppel created by the subsequent acquisition of title to lands which had been previously conveyed, operates the instant the grantor becomes the owner, the covenants in his deed passing the estate to his grantee. *King v. Gilson*, 32 Ill. 348; *Jarvis v. Alkana*, 25 Vt. 635; *Somes v. Skinner*, *supra*.

And his title is not affected by the failure to record or improperly withholding or the loss or destruction of the deed by which the title is subsequently acquired. *King v. Gilson*, *supra*.

In *Shaw v. Galbraith*, 7 Pa. 111, however, the estoppel against a subsequent grantee was held to take place, when he took with notice of the first deed.

A deed with covenants of warranty or quiet enjoyment operates as an estoppel against a claim of the grantor or his privies to a subsequently acquired estate where he had an interest which passed under the grant as well as where he had no interest at that time. *House v. McCormick*, 57 N. Y. 310.

Thus when lands of the state held under contract are sold and the grantor thereof afterwards acquires title from the state, it will inure to the benefit of his grantee and estop him and all persons claiming under him to claim adversely to the grantee. *Fairbanks v. Williamson*, 7 Me. 93.

So if a tenant for life sells the property by a deed which affirms the existence of an estate in fee simple in himself and the remainderman subsequently dies and the life tenant inherits the fee simple absolute, he and those who claim under him are estopped by the deed thus given before his fee-simple title accrued to him. *Van Rensselaer v. Kearney*, 52 U. S. 11 How. 297, 13 L. ed. 708.

So also a deed given with warranty by a widow in connection with the heirs of an estate to secure a debt due from the estate and other purposes will estop her from afterwards claiming power in the lands conveyed as against persons claiming under that deed, and the fact that the lands have been sold under a decree of the court for the benefit of creditors will not prevent the application of the rule. *Hoppin v. Hoppin*, 96 Ill. 265.

In Georgia after lands are drawn but before the

any real estate, and because no real estate was described therein; but the court overruled said objection, and the defendant saved its exceptions. In fact, defendant objected to the introduction of every instrument except the patent, the plat, and defendant's original answer, read in evidence by plaintiff, on the ground, among others, that such instruments were irrelevant and incompetent, and saved exceptions to the action of the court in overruling defendant's objections thus made. After introducing a deed from Mrs. Abby N. Ford to the plaintiff, who is Mrs. Ford's son, and the admission by defendant to the effect that, at the death of her father, Abby N. Ford was a married woman, and that she continued to be such until February, 1890, when her husband, Erastus D. Ford, died, the plaintiff rested. Defendant demurred to plaintiff's evidence, which being overruled, the defendant duly excepted. The defendant's title, as shown by the deeds introduced in evidence, runs by two chains into Saxton, whence, becoming united, it runs into defendant. One of these chains of title into Saxton passes from John C. Cargill by his deed of trust to Joseph Hull, trustee, conveying his fourth, subject to his mother's life estate in the land; and by the trustee's

deed from Joseph Hull, trustee, to Mrs. Cargill; and by the warranty deed from Mrs. Cargill to Sarah L. Cargill; and by the deed of trust from Sarah L. Cargill to James Hull, trustee; and by the trustee's deed from James Hull, trustee, to the Real Estate & Savings Association; and by the warranty deed from the Real Estate & Savings Association to the Real Estate Loan Company, and by it to A. M. Saxton. All these deeds were executed upon valuable considerations. The other chain of title into Saxton passed from Abby N. Ford, by the deed of trust of herself and husband, to Saxton, trustee, and by the trustee's deed from Saxton, trustee, to John D. Richardson, and by the deed from John D. Richardson to Saxton. By these two chains of title, the defendant contends that two fourths of the land (the John Cargill fourth and the Abby N. Ford fourth) passed into Saxton, but that, if only one fourth passed into him, it is sufficient to uphold defendant's title. The chain of title from Saxton to defendant passed through the warranty deed from Saxton to Floyd, Ransom & Steinacker, and through the warranty deed from Floyd, Ransom & Steinacker to defendant, the consideration expressed in the former deed being \$3,500, and, in the latter, \$4,500. At

grant of the state issues, the equitable title is in the drawer and the legal title is in the state for his use, and in such case if the drawer conveys the lands and afterwards obtains the grant the legal title passes through him to his vendee by virtue of the statute of uses clothing the vendee with a complete title leaving the vendor nothing which he can convey to another. *Henderson v. Hackney*, 22 Ga. 383, 68 Am. Dec. 529; *Thursby v. Myers*, 57 Ga. 155.

When a person grants lands in which he has a mere equitable interest and afterwards acquires the legal title, he holds the title in trust for the grantee, and if he afterwards conveys it to another without the consent of the former grantee, the latter grantee, if he had notice of the prior deed, will be deemed to be substituted in the place of his grantor as trustee; but if the conveyance is made with the consent of the former grantee, he takes it discharged of the trust. *Doyle v. Peerless Petroleum Co.* 44 Barb. 230.

The fact that suit has been brought for breach of a covenant of seisin will not prevent a subsequently acquired title from inuring to the benefit of the grantor, if acquired before the assessment of damages is had. *King v. Gilson*, 82 Ill. 348, 53 Am. Dec. 269.

The above rules apply to mortgages containing covenants of warranty, executed by persons having no title to the mortgaged lands but who afterwards acquire title, the after-acquired title inuring to the benefit of the mortgagee and the mortgagor and his privies in estate in blood and in law, being estopped to question the mortgagor's title at the time of making the mortgage. *Tefft v. Munson*, 5 N. Y. 97; *Christy v. Dana*, 34 Cal. 548, 48 Cal. 174; *Clark v. Baker*, 14 Cal. 612, 70 Am. Dec. 449; *Kirkaldie v. Larrabee*, 31 Cal. 455, 89 Am. Dec. 205; *Camp v. Grider*, 62 Cal. 20; *Sherman v. McCarthy*, 57 Cal. 507; *Vallejo Grand Asso. v. Viera*, 48 Cal. 572; *Gochenour v. Mowry*, 38 Ill. 331; *Rigg v. Cook*, 9 Ill. 336, 46 Am. Dec. 463; *Pike v. Galvin*, 29 Me. 183; *Baxter v. Bradbury*, 20 Me. 260, 37 Am. Dec. 49; *Lawry v. Williams*, 13 Me. 280; *Plowman v. Shidler*, 36 Ind. 484; *Boone v. Armstrong*, 37 Ind. 168; *Gotham v. Gotham*, 55 N. H. 440; *Bush v. Cooper*, 59 U. S. 18 How. 82, 15 L. ed. 373.

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Thus when A mortgages to B while the title to the lands remain in the United States and afterwards obtains title by purchasing from C who had purchased from the government, and again mortgages the lands to D, A's title inures to the benefit of the first mortgagee. *Warburton v. Mattox*, *Morris* (Iowa) 387.

So, when one mortgages his property and afterwards mortgages it to another with warranty of title, and subsequently the second mortgagee buys in the first mortgage, taking a quitclaim deed after the mortgagor's equity of redemption is barred, and delivers a mortgage deed on the property to a third person, the estate covenanted for by the second mortgage vests in the holder of the mortgage deed by estoppel. *Dudley v. Cadwell*, 19 Conn. 227.

In *Middlebury College v. Cheney*, 1 Vt. 386, it was held that the subsequent acquisition of an outstanding title by one who had conveyed lands with covenants of warranty, discharges and satisfies such covenants.

And in *Cornell v. Jackson*, 8 Cush. 506, it was held that if a grantor of lands with warranty recovers a part of them, of which he was not in fact seized at the time of making the deed, it will go to reduce the damages *pro tanto* in an action for a breach of the covenant.

When one who has no title conveys to another and afterwards procures the holder of the title to convey to a third person instead of himself for the fraudulent purpose of preventing the title from inuring to the benefit of his grantee, his deed will be treated as a covenant to convey, and where the subsequent grantee takes with notice and without consideration equity will grant relief. *Moore v. Crawford*, 130 U. S. 122, 32 L. ed. 878.

No title not then *in esse*, however, and no after-acquired title, will pass by a conveyance not containing covenants of warranty, and no estoppel is created thereby. *Jackson v. Wright*, 14 Johns. 19; *Pelletreau v. Jackson*, 11 Wend. 110; *Dart v. Dart*, 7 Conn. 250; *Allen v. Sayward*, 5 Me. 227, 17 Am. Dec. 321; *Ham v. Ham*, 14 Me. 351; *Brawford v. Wolfe*, 103 Mo. 391; *Kimmel v. Benna*, 70 Mo. 62; *Valle v. Clemens*, 18 Mo. 486; *Bogy v. Shoab*, 13 Mo. 366; *Kinaman v. Loomis*, 11 Ohio, 473; *Doswell v.*

the close of the evidence the court gave three instructions which peremptorily required the jury to find for plaintiff, to all of which defendant objected and excepted. Defendant asked eight instructions embodying its views of the law, all of which were refused and it excepted.

Messrs. M. A. Reed and B. R. Vineyard, for appellant:

The words "the one divided fourth part of," in the deed dated September 5, 1868, from Mrs. Cargill to Mrs. Ford and on the covenants in which plaintiff relies for inurement of title afterwards acquired by Mrs. Cargill, evidently apply to and limit the interest sought to be conveyed in all the tracts described in the deed, and cannot be restricted in their application to the first tract mentioned. The fourth of A, also B, also C, means the fourth of each A, B, and C.

Hagood v. Whitman, 18 Mass. 464; *Wolfe v. Dyer*, 95 Mo. 550; *Burnett v. McCluey*, 78 Mo. 676.

The description is "the one divided fourth part of," etc. The land had not then been divided, and could not have been divided under the fourth clause of the will of James Cargill until after the death of his widow. On

the face of the deed it is impossible to tell which "divided fourth" is meant, and if plaintiff had been permitted to try, and had tried at the trial to locate it, he could not have done so. The ambiguity is a patent one, appearing on the face of the deed, and not susceptible of removal by parol testimony, and renders the deed absolutely void, for uncertainty of description.

Campbell v. Johnson, 44 Mo. 247; *Goode v. Goode*, 23 Mo. 522, 66 Am. Dec. 630; *Bell v. Dawson*, 82 Mo. 79; *Holme v. Strautman*, 85 Mo. 298; *Hardy v. Matthews*, 38 Mo. 131; *Jennings v. Brizeadine*, 44 Mo. 832; *Bradshaw v. Bradbury*, 64 Mo. 384; *King v. Pink*, 51 Mo. 209; *Jefferson v. Whipple*, 71 Mo. 519; *Fos v. Courtney*, 111 Mo. 147; *Freed v. Brown*, 41 Ark. 495; *Harrell v. Buller*, 92 N. C. 20; *Radford v. Edwards*, 88 N. C. 847; *Dul v. Blum*, 68 Tex. 299; *Brown v. Chambers*, 63 Tex. 181; *Brandon v. Laddy*, 67 Cal. 43; *Tryon v. Huntton*, Id. 325; *Jackson v. Still*, 11 Johns. 215, 6 Am. Dec. 368; *Plenny v. Ferrill*, (Miss.) Feb. 29, 1892; *Vickers v. Henry*, 110 N. C. 371; *Fuller v. Fellows*, 30 Ark. 657; *Bean v. Thompson*, 19 N. H. 290, 49 Am. Dec. 154; *Shackelford v. Bailey*, 85 Ill. 387.

Where there is a description on the face of the deed which will apply equally to two or

Buchanan, 8 Leigh, 365, 23 Am. Dec. 280; *Reynolds v. Cook*, 88 Va. 517.

If there is no liability upon the covenants of the deed there is no foundation for the estoppel. *Smiley v. Fries*, 104 Ill. 416.

Thus a subsequently acquired title will not inure to the benefit of the grantee of a married woman though the deed contains covenants of warranty, where the statute provides that no covenant express or implied shall bind the wife or her heirs except so far as may be necessary to effectually pass from her and her heirs all her right, title, and interest expressed to be conveyed therein, but all the interest which she then has, passes. *Brawford v. Wolfe*, *supra*; *Barker v. Circle*, 60 Mo. 259.

As to effect of covenants of married women or estoppel by their deeds, see *note* to *Watkins v. Watson* (Tex.) 22 L. R. A. 779.

Covenants of seisin in fee and lawful right to convey in a deed where there is no warranty of title do not estop the grantor from setting up an after-acquired title against the grantee. *Allen v. Sayward*, *supra*.

At common law a subsequently acquired title will not pass when the conveyance was by bargain and sale, or by lease and release without covenants of warranty, but under the California statute the conveyance is of all the estate which the grantor then possesses or might thereafter possess and a subsequently acquired title inures to the benefit of the grantee as effectually as if it had originally belonged to him. *Clark v. Baker*, 14 Cal. 612, 76 Am. Dec. 449.

In Missouri covenants created by the words "grant, bargain, and sell," do not operate as a warranty to transmit a subsequently acquired title. *Gibson v. Chouteau*, 39 Mo. 536; *Gatewood v. House*, 65 Mo. 666.

But in Illinois the rule is that a deed given by one without title to the premises conveyed, containing the words "grant, bargain, and sell," will operate to transfer a subsequently acquired title to the grantee, such words of themselves importing a sufficient warranty to set the rule into operation. *King v. Gibson*, 32 Ill. 342, 83 Am. Dec. 369; *DeWolf v. Haydn*, 24 Ill. 525.

A deed of "all my right, title, and interest," is 23 L. R. A.

limited to the interest which the grantor then had, though it contains covenants of ownership and warranty, etc., and the grantor is not thereby estopped to claim a subsequently acquired interest as against the grantee. *Butcher v. Rogers*, 60 Mo. 128; *Blanchard v. Brooks*, 12 Pick. 47; *Allen v. Holton*, 20 Pick. 435; *White v. Brocaw*, 14 Ohio St. 339; *Wight v. Shaw*, 5 Cush. 56; *Miller v. Ewing*, 6 Cush. 84; *Hanrick v. Patrick*, 119 U. S. 156, 80 L. ed. 396.

Neither is an estoppel created where the grantor has an interest in the premises and the warranty is confined to the title granted or released. *Comstock v. Smith*, 13 Pick. 112, 23 Am. Dec. 670.

A deed, in order to pass a subsequently acquired title, must undertake to convey not merely the grantor's title but the land itself by an indefeasible title in such a manner that the grantee is not to be disturbed by any one. *Gibson v. Chouteau*, *supra*.

But whatever may be the form or nature of the conveyance used to pass real property if the grantor sets forth in the face of the instrument by way of recital or averment that he is seised or possessed of a particular estate in the premises, and which estate the deed purports to convey, or if the seisin or possession of a particular estate is affirmed in the deed either in express terms or by necessary implication, the grantor and all persons in privity with him are estopped from ever afterwards denying that he was so seised and possessed at the time he made the conveyance. *Van Rensselaer v. Kearney*, 52 U. S. 11 How. 297, 13 L. ed. 708; *Ryan v. United States*, 136 U. S. 64, 34 L. ed. 447; *Reynolds v. Cook*, 88 Va. 517.

Estoppels bind privies in estate, in blood, and in law only. The doctrine is not applicable to persons claiming under a paramount, an adverse, or an independent title. *Buckingham v. Hanna*, 2 Ohio St. 561; *San Francisco v. Lawton*, 18 Cal. 465, 79 Am. Dec. 187; *Russ v. Alpaugh*, 118 Mass. 399, 19 Am. Rep. 464.

Where one person executes a mortgage on lands with covenants of warranty to another where he has no title and to which a third person has a paramount equitable title, and the mortgagor subsequently obtains the legal title, which is taken from him by decree in favor of the holder of the equitable title, it passes to such holder unincumbered by

more distinct tracts, the deed is void for uncertainty, and cannot be helped out by parol testimony.

Campbell v. Johnson, Brandon v. Luddy, and Fuller v. Fellows, supra.

In a deed the description of the real estate, where it purports to be a segregated or "divided" portion of a larger tract, must be so definitely described as to enable a surveyor to go upon the ground and measure it off by courses and distances. If it be impossible to do this from the language of the deed, or such reference therein to physical facts as will enable such survey to be made, no legal title will be transferred.

Lamb v. Nelson, 84 Mo. 500.

The deed of Mrs. Cargill to her daughter Mrs. Ford reciting a consideration of one dollar and natural love and affection, could only operate as a deed of gift, and not as one of bargain and sale.

Peck v. Vandenberg, 80 Cal. 11; Salmon v. Wilson, 41 Cal. 595; Bradley v. Love, 60 Tex. 472; 1 Devlin, Deeds, § 11.

Hence only the intention of the grantor must be looked for, just the same as that of a testator in a will.

Long v. Timms, 107 Mo. 512.

Where no valuable consideration passes a

grantor cannot be compelled to correct a mistake in a deed, or to carry out an imperfectly executed gift, or to specifically perform a promise, made orally or in writing, to make a gift.

Brownlee v. Fenwick, 108 Mo. 420; Anderson v. Scott, 94 Mo. 687; Dougherty v. Harsel, 91 Mo. 161; Goode v. Goode, 22 Mo. 518, 68 Am. Dec. 680; Sturgis v. Work, 122 Ind. 184; Funk v. Davis, 108 Ind. 281; Sherwood v. Sherwood, 45 Wis. 357, 30 Am. Rep. 757; Young v. Young, 80 N. Y. 487, 86 Am. Rep. 684.

If, as between the parties thereto, the covenants in the deed, of Mrs. Cargill to Mrs. Ford, executed in 1863, would have transferred to Mrs. Ford the John Cargill fourth of the lands by inurement, so soon as it was transferred to Mrs. Cargill by the trustee's deed to her in 1865, yet it could not have such effect as against defendant and said grantors, because they were not bound to search for deeds from Mrs. Cargill, covering or endeavoring to convey the John Cargill fourth, prior to the time of her acquiring title thereto. That lay entirely outside of their chain of title, and the record thereof was no notice to them.

New Orleans & O. R. Co. v. Melien, 79 U. S. 12 Wall. 365, 20 L. ed. 435; Dodd v. Will-

any estoppel in favor of the mortgagee. *Buckingham v. Hanna, supra.*

So where one conveys property in which he has no interest and afterwards inherits the same and it is sold under a judgment against him rendered previous to his unauthorized transfer, title vests in the purchaser under the judgment, the rule that a deed with warranty creates an estoppel and passes an after-acquired estate applying only to the grantee and those claiming under him but not to purchasers under a judgment rendered previous to the conveyance under which the estoppel is claimed. *Jackson v. Bradford, 4 Wend. 619.*

So also where a person without title conveys by deed of warranty and afterwards acquires title as trustee for the rightful owner for the purpose of transmitting it to a bona fide purchaser, the doctrine of estoppel will not apply to defeat the trust estate. *Burchard v. Hubbard, 11 Ohio, 316.*

In *Jones v. King, 25 Ill. 883*, it was held that a subsequently acquired title by a grantor inures to the benefit of grantee unless the new title is derived through a judicial sale as for taxes or otherwise.

The principle which forbids a party to deny the title under which he holds does not apply where the deed under which he holds does not refer to the common source and the record does not convey the information. In such case his title is adverse and he may controvert the title opposed to his. *Blight v. Rochester, 20 U. S. 7 Wheat. 547, 5 L. ed. 512.*

The doctrine of notice from registration.

The general doctrine of notice from registration applicable to this class of cases is that the registry of a conveyance is constructive notice of its existence and contents only to persons claiming what is thereby conveyed under the same grantor by subsequent purchase and not to strangers to that conveyance. *Gillett v. Gaffney, 3 Colo. 351; Kerfoot v. Cronin, 105 Ill. 609; Tilton v. Hunter, 24 Me. 35; Roberts v. Richards, 84 Me. 1; Spofford v. Weston, 29 Me. 140; Corbin v. Sullivan, 47 Ind. 856; Roberts v. Bourne, 23 Me. 165, 39 Am. Dec. 616; Bates v. Norcross, 14 Pick. 224, 28 Am. Dec. 371; Losey v. Simpson, 11 N. J. Eq. 249.*

And that a purchaser is chargeable with con-

structive notice of such instruments of record only as lie in the apparent chain of title or are made by one in some way connected with the property involved in question. *Carbine v. Pringle, 90 Ill. 309; Manly v. Petree, 88 Ill. 128; Langworthy v. Golden, 28 Ill. App. 119; Woods v. Farmers, 7 Watta, 383, 23 Am. Dec. 773.*

The case of *Dexter v. Harris, 2 Mason, 531*, which decided merely that notice of facts extrinsic and collateral to a deed was not given by a record of it, has been frequently cited to support the general doctrine as to the record of deeds outside the chain of title.

And that he need not search for incumbrances upon the premises purchased as against his grantor previous to the time such grantor obtained title thereto; and where he pays the purchase price and obtains title before he receives actual notice of such prior incumbrance his legal title will prevail over the incumbrance. *Farmers Loan & T. Co. v. Malthy, 8 Paige, 361, 4 L. ed. 462; Way v. Arnold, 18 Ga. 181; Connecticut v. Bradish, 14 Mass. 296; Calder v. Chapman, 52 Pa. 369, 91 Am. Dec. 163; Dodd v. Williams, 3 Mo. App. 273; Corbin v. Sullivan, supra; Losey v. Simpson, 11 N. J. Eq. 249; Bingham v. Kirkland, 84 N. J. Eq. 233; Doswell v. Buchanan, 3 Leigh, 365, 23 Am. Dec. 230.*

And if the record of an incumbrance is not within the line within which the subsequent purchaser or incumbrancer is bound to look, he need not notice it. *Maul v. Rider, 59 Pa. 167; Harper v. Bibb, 84 Miss. 472, 39 Am. Dec. 397; McLaughan v. Reeside, 9 Watta, 510, 36 Am. Dec. 136.*

Nor is the registry of a conveyance of lands executed by one not in possession and who does not appear from the records to have had any connection with the title constructive notice to a subsequent purchaser. *Fenno v. Sayre, 3 Ala. 458; De Yampert v. Brown, 26 Ark. 168; Thursby v. Myers, 57 Ga. 155; Felton v. Pittman, 14 Ga. 580; Chicago v. Witt, 75 Ill. 211; Irish v. Sharp, 89 Ill. 261; Kerfoot v. Cronin, 105 Ill. 609; Veasie v. Parker, 23 Me. 170; Pierce v. Taylor, Id. 248; Leiby v. Wolf, 10 Ohio, 83; Keller v. Nuts, 5 Serg. & R. 248; Lightner v. Mooney, 10 Watta, 407; Single v. Phelps, 20 Wis. 398.*

The purchaser cannot be required to look one day or one page beyond that which contains the

iams, 3 Mo. App. 278; *Crockett v. Maguire*, 10 Mo. 34; *Odle v. Odle*, 73 Mo. 299; *Bates v. Norcross*, 14 Pick. 281; *Jones v. Richardson*, 10 Met. 493; *Farmers Loan & T. Co. v. Maltby*, 8 Paige, 361, 4 L. ed. 462; *Stuyvesant v. Hall*, 2 Barb. Ch. 168, 5 L. ed. 596; *Calder v. Chapman*, 52 Pa. 358, 91 Am. Dec. 163; *Burke v. Beveridge*, 15 Minn. 205; *Jackon v. Bradford*, 4 Wend. 619; *Buckingham v. Hanna*, 2 Ohio St. 551; *Wing v. McDowell*, Walk. Ch. 175; *Single v. Phelps*, 20 Wis. 399; *Ely v. Wilcox*, Id. 530, 91 Am. Dec. 436; *Carbine v. Pringle*,

90 Ill. 803; *McCabe v. Grey*, 20 Cal. 509; *Chow v. Barnet*, 11 Serg. & R. 389; *Sands v. Beardsley*, 32 W. Va. 594; *Way v. Arnold*, 18 Ga. 181; *Faircloth v. Jordan*, Id. 850; *Doswell v. Buchanan*, 3 Leigh, 365, 23 Am. Dec. 280; 2 Pom. Eq. Jur. § 658; *Rawle, Covenants*, 6th ed. § 259; 1 Devlin, *Deeds*, § 734.

If it was the intention of Mrs. Cargill in her deed to Mrs. Ford, as seems clear in the light of the circumstances under which it was made, to convey only that fourth which Mrs. Ford was to receive under her father's will,

title of his grantor. *Connecticut v. Bradish*, *supra*; *Corbin v. Sullivan*, 47 Ind. 356.

When he has traced the title down to one out of whom the record does not carry it, he is protected by the registry acts. *Lozey v. Simpson*, 11 N. J. Eq. 246.

And he is not obliged to search the records for mere equitable right which might be asserted against a good record title. *Odle v. Odle*, 73 Mo. 299.

Thus where one who has a mere equitable right to a conveyance of lands mortgages the same and the mortgage is recorded and he afterwards acquires title and conveys portions of the lands for value to innocent third persons, the first mortgagee can enforce his lien against such purchasers only to the extent of the unpaid purchase money which remained due when they received actual notice of such mortgage, the record thereof before the mortgagor obtained the legal title not being constructive notice to such purchasers. *Farmers Loan & T. Co. v. Maltby*, 8 Paige, 361, 4 L. ed. 462.

So where a person enters into a contract to purchase lands whereby a deed is to be delivered after certain payments are made, and the purchaser mortgages the lands to a third person, which mortgage is first recorded, and afterwards he obtains his deed and gives back a purchase money mortgage, the purchase money mortgage is the prior lien, and the prior mortgage simply attaches to the interest which the mortgagor had at the time it was made, the deed and purchase money mortgage being construed together as one contract. *Dusenbury v. Hulbert*, 60 N. Y. 541.

And when a deed and mortgage for purchase money are executed and afterwards recorded; but in the mean time the grantee executes another mortgage which is recorded a few minutes earlier than the first mortgage and deed, the first mortgage is the prior lien; the vendee's deed not having been registered; the registration of the second mortgage is not notice to the first mortgagee. *Boyd v. Mundorf*, 30 N. J. Eq. 545.

The rule which protects a purchaser against the operation of a deed of his grantor's property made by a stranger without authority applies to a devise by a testator of property to which he had no title, and when a husband devises property to his wife including lands belonging to her, for life, remainder to his grandson in fee, and she elects to take under the will which is admitted to probate and recorded, but afterwards mortgages her lands thus included in the will, the record of the will is not constructive notice of the mortgage of the equitable interests of the grandson. *Hibbs v. Union Cent. L. Ins. Co.* 40 Ohio St. 543.

The recording of a deed of trust which gives a lien on the equitable estate made when the grantor had title to only part of the lands conveyed does not impart notice to a subsequent purchaser of the legal title. *Doswell v. Buchanan*, 3 Leigh, 365, 23 Am. Dec. 280.

Nor is the record of a trust deed made by one who had the equitable title to lands conveyed, after which both the legal and equitable title is vested in another, constructive notice to one who 23 L. R. A.

takes a trust deed from such holder of the legal and equitable title, and in the absence of actual notice the latter trust deed will have priority. *Sands v. Beardsley*, 32 W. Va. 594.

Nor is one who purchases from a trustee charged with notice by the record of a deed between strangers to the record title rectifying the execution of the declaration of trust. *Murray v. Ballou*, 1 Johns. Ch. 506, 1 L. ed. 247.

In *Wing v. McDowell*, Walk. Ch. 175, it was held that in a contest between the holder of a mortgage made by one who held a bond for a deed, and a holder of a subsequent mortgage made by one who owned the premises in fee, where the equities of the parties are equal and neither has the legal title, the prior equity will prevail, and subsequently obtaining the legal title in the right of another will not aid the holder of the postponed equity.

So a recital in a recorded deed of sale under a judgment against the original owner, there being no record of any conveyance from him to the grantor, is not notice to a mortgagee of the premises under a regular paper title duly recorded traceable to the original owner. "a mortgagee is not bound to search for conveyances from a person to whom there was no conveyance on record. *Cook v. Travis*, 22 Barb. 328, affirmed in 30 N. Y. 400.

And a purchaser of land is not presumed to know of the registry of a will containing a devise of lands which he claims by a paramount or an adverse title. *Woods v. Farmers*, 7 Wats. 322, 33 Am. Dec. 772.

And the record of a deed from executors of a person through whose heirs the chain of title is properly traced is not constructive notice to a subsequent purchaser under the record title of an equity shown by recitals in such deed. *Blake v. Graham*, 6 Ohio St. 530, 67 Am. Dec. 360.

The rule that a purchaser is not bound to search the records for incumbrances as against a title not appearing in the direct chain by the records is not applicable where the purchaser has actual notice of the existence of a mortgageable estate in the person against whom the search is made prior to the date of the conveyance by which he received the absolute title. *Crane v. Turner*, 7 Hun, 357, 67 N. Y. 437.

Several of the states, however, seem to have adopted the rule, laid down by the commission of appeals in New York in the case of *Tefft v. Munson*, 37 N. Y. 97, that a conveyance and the record thereof is notice to subsequent purchasers in good faith though made before the grantor therein had obtained title. In this case a majority of the court held that a recorded mortgage by one who had no title except under a forged deed was valid after he obtained title as against his subsequent grantees since the latter were bound by his estoppel as privies.

Thus in Iowa, where a first mortgage is made and recorded while title remains in the United States, and the second is made after the mortgagor has acquired title, the second mortgagee will be deemed

and in which the mother had a life estate, then the covenants in this deed were in no way broken.

If A executed a deed of general warranty to B containing the covenants involved in the words "grant, bargain, and sell," for a tract of land which B already owns, there is no breach of the covenants of A's deed. The covenants only extend to a title existing in a third person, which may defeat the estate granted by the covenantor.

Furness v. Williams, 11 Ill. 229; *Smiley v.*

Fries, 104 Ill. 416; *Fitch v. Baldwin*, 17 Johns. 161.

In such case, an interest afterwards acquired by the grantor will not inure or pass to the grantee.

Smiley v. Fries, *supra*.

The deed of Mrs. Cargill to Mrs. Ford was a deed of gift, and being such, no suit could be maintained on any of the covenants therein, even though the land "sought to be conveyed" had been sufficiently described.

Calcott v. Elkin, (Tenn.) Jan. 13, 1891.

a purchaser with notice of an outstanding mortgage of record. *Warburton v. Mattox*, Morris (Iowa) 367.

So in Michigan the record of a mortgage made by one in possession under a contract of purchase is constructive notice to a subsequent purchaser or incumbrancer of the legal title, although the contract is not acknowledged or recorded. *Balen v. Mercier*, 75 Mich. 43.

But in this case the effect of possession as notice may be considered a material factor.

The same was decided in *Edwards v. McKernan*, 45 Mich. 520, overruling *Wing v. McDowell*, Walk. Ch. 175, in which it is said that conveyances which are entitled to be recorded are constructive notice to all persons of the interest conveyed by any person in the chain of title from the government to the last purchaser.

In this case the contest was between two mortgages of the equitable title under mortgages both of which appeared to have been made before the mortgagor obtained the legal title.

While the effect of possession of the premises as notice may be sufficient to render a recorded incumbrance made by the possessor constructive notice, an interesting question suggests itself as to the continuation of such record notice after the possession of the premises has terminated, but no decisions on this point have been found.

So in *Digman v. McCollum*, 47 Mo. 372, it was held that a purchaser must at his peril inquire into the state of his grantor's title even though he purchases nothing but an equitable title, as in case of one holding lands under contract of purchase giving a trust deed to secure the purchase money and afterwards selling and delivering the title to another. But in this case as the purchase was of an equitable title only and the vendor never had or assumed to convey the legal title, the question decided is merely that the purchaser of an equitable title must be charged with notice of prior instruments executed by his own vendor affecting that title. See *Dodd v. Williams*, *infra*.

Comparison and limitation of the opposing principles.

In the few cases in which the collision of the opposing doctrines is discussed a decided preference is given to the supremacy of the principle involved in the registry laws, and the same position is taken by nearly, if not all, the text-book writers.

Thus in *Bingham v. Kirkland*, 34 N. J. Eq. 232, the court holding that a subsequent purchaser is not chargeable under the registry acts with constructive notice of a mortgage made and recorded before the mortgagor had acquired title explained *White v. Patten*, cited *supra*, under heading "The doctrine of estoppel," saying that that case involved the doctrine of estoppel only, the effect of the registry laws not having been mentioned.

So in *Calder v. Chapman*, 53 Pa. 350, 21 Am. Dec. 168, holding that the record of an incumbrance placed upon property before the incumbrancer had 23 L. R. A.

acquired title thereto would not be notice to subsequent purchasers, it was said that the doctrine of estoppel will not be permitted to interfere with the operation of the recording acts.

And in *Chew v. Barnett*, 11 Serg. & R. 369, it was held that a conveyance which is duly recorded from C who had no title, to D with covenants of warranty, and a subsequent conveyance of the legal title by E to C, does not vest title in D clear of the incumbrance of a mortgage placed upon the property by C, partly to secure the purchase price of the land. But nothing is said in this case about the effect of the record as notice to such mortgagees while it is said that the grantee is chargeable with notice that he was purchasing an equitable title only.

So in *Dodd v. Williams*, 3 Mo. App. 273, the rule was laid down that the doctrine of inurement and estoppel that covenants of title and warranty operate to transfer an after-acquired estate by operation of law is not to be enforced to the extent of removing the protection designed to be given to purchasers by the registry laws.

And in *Doswell v. Buchanan*, 3 Leigh, 365, 23 Am. Dec. 280, it was said that recording acts are expressly declared to have been made for the protection of subsequent purchasers and ought not to be turned to their injury unless it be in obedience to some express provision contained in them, and under them it was held that a deed, if recorded, passes to the bargainee the title which it purports to convey providing the bargainor had that title, but if he had not the deed cannot pass it.

In Georgia the doctrine that the principles of estoppel should be applied only in subordination to the requirements of the registry acts has been strongly asserted. Thus in *Way v. Arnold*, 18 Ga. 181, it was held that where lands are sold by any of the modern conveyances, in which the grantor had nothing at the period of executing the deed, the title he may subsequently acquire does not pass to the grantee by estoppel, and the warrantor or his heirs is not debarred from recovering under any right or title not vested in the grantor at the time of making the conveyance. The court was strongly of the opinion that the registry acts under the modern form of conveying is a virtual repeal of the doctrine of estoppel, but no question as to records is presented in the case.

But the doctrine of estoppel by conveyance made when the grantor did not have title is recognized in several later Georgia cases in which no question of registration was raised. See *Hennerson v. Hackney*, 23 Ga. 383, 68 Am. Dec. 529, and *Thursby v. Myra*, 57 Ga. 155, cited *supra* under heading "The doctrine of estoppel."

Where a mortgage is given before the mortgagor acquires title to the mortgaged premises but recorded afterwards it is constructive notice to a subsequent purchaser as he would have found the mortgage had he examined the title of the mortgagor back to the time he received his conveyance, that is to the date thereof. *Semon v. Terhune*, 40 N. J. Eq. 364.

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The donee must take the subject of the gift in the condition the donor gives it.

Eaton v. Eaton, 15 Wis. 260; *Hanson v. Michelson*, 19 Wis. 498; *Calcote v. Elkin*, *supra*; *Young v. Young*, 80 N. Y. 487, 86 Am. Rep. 634.

In such a deed, the agreement implied in the covenants to transfer what may be acquired in the future by the grantor can be no stronger than an express agreement to transfer what he may so acquire, and such an agreement is not enforceable.

Kaufman v. Cook, 114 Ill. 11; *Tunisin v. Bradford*, 49 N. J. Eq. 210.

An agreement to give something not in existence, cannot certainly be more efficacious than one to give that which the promisor already has. And yet an agreement, whether verbal or written, to give in the future something already in being is not susceptible of enforcement, and is void for want of a valuable consideration to support it.

Brownlee v. Fenwick, 108 Mo. 420; *Anderson v. Scott*, 94 Mo. 687.

Hence, the doctrine of inurement of title cannot apply to covenants in deeds of gift.

Re Wilbur v. Warren, 104 N. Y. 196; *Kaufman v. Cook*, *supra*; *Fink v. Fox*, 18 Johns. 145, 9 Am. Dec. 191; 2 Kent, Com. *489; *Johnson v. Otterbein University*, 41 Ohio St. 527; 2 Randolph, Com. Paper, § 458.

Messrs. James A. Plotner, Hall & Pike, and *Joseph Morton* for respondent.

Gantt, P. J., delivered the opinion of the court:

The plaintiff's case may be stated in a few words: By the will of his grandfather, James Cargill, an estate for life, only, was given to his grandmother, Agnes G. Cargill, and a remainder of one fourth to each of his children at her death. That fourth was to be set off by commissioners to be appointed by his executor. After his grandfather's death, on September 5, 1868, his grandmother, who had a life estate in all the lands, made a deed with covenants of warranty to his mother, Mrs. Ford, "in consideration of natural love and affection and one dollar," which purports on its face to convey a fee simple absolute to the one divided fourth of the real estate devised by her husband, including the land in controversy. He concedes that at that time no division had been made of James Cargill's lands, and none could have been made under his will prior to the widow's death, and that, if the deed is to be construed as it is written, it is void for uncertainty; but he invokes the rule that where one part of a description is false and impossible, but, by rejecting that part, a perfect description remains, that part should be rejected, and the deed held good and effectual; and he therefore asks that the word "divided" be entirely rejected. That this court has often, in actions at law, rejected inconsistent and repugnant clauses in both deeds and wills, where their retention was evidently contrary to the intention of the parties, is abundantly attested by its decisions. *West v. Bretelle*, 115 Mo. 653; *Gibson v. Bogy*, 28 Mo. 478; *Rutherford v. Tracy*, 48 Mo. 326, 8 Am. Rep. 108. In so doing, however, it was seeking to carry out the intention

of the grantor or testator by a reasonable construction of the language used. But in *Campbell v. Johnson*, 44 Mo. 247, while this rule was recognized and approved, it was said: "But, if the land granted be so inaccurately described as to render its identity wholly uncertain, then it is admitted the grant is void. *Boardman v. Reed*, 81 U. S. 6 Pet. 328, 8 L. ed. 415. . . . The ambiguity must be patent." Accordingly, in that case, where the description in the deed was "the southwest quarter of section 11, containing forty acres," the court was asked to reject the words "forty acres." Judge Wagner said: "This description, by rejecting the quantity of acres, would pass the title to the whole quarter section. That such was not the intent of the maker of the deed is demonstrable from the fact that one of the other tracts conveyed is the southwest fourth of the same quarter section. . . . To give effect to the deed according to its literal import, the plaintiff would have eighty acres more than she contracted for. . . . It is not insisted that the plaintiff bought more than the forty-acre tract sued for in this action. . . . The ambiguity is patent, and cannot be removed by the application of extrinsic evidence." Now, if the court had been merely governed by a desire to get a legal description, irrespective of the intention of the grantor or the right of the case, nothing would have been simpler than to have rejected the number of acres, and it could have called to its aid the familiar canon that "a call for quantity must give way to metes and bounds," but, when it was considered that by rejecting those words the grantor was made to convey four 40 acre tracts instead of one, and his covenants made to convey 80 acres more than he had sold, the court wisely left the parties where it found them, and indicated that the place to reform the deed was in equity, where the rights of both could be preserved. See also *Jennings v. Brissadine*, 44 Mo. 332; *King v. Fink*, 51 Mo. 209.

Now, in this case, what will be the effect of rejecting the word "divided?" If the deed thereby only conveyed what her mother then owned, or only secured to Mrs. Ford, the daughter, the life estate in the one fourth on which she owned the remainder, and thereby enabled her to anticipate her father's will, and realize on her share in remainder, it would be at once conceded that it ought to be done; but when it appears that this is not the purpose, but that plaintiff proposes, if this patent ambiguity is removed, to claim that it conveyed to Mrs. Ford, not her one fourth, free of her mother's life estate, but the fourth in fee simple remainder devised to John Cargill, and subsequently bought in by Mrs. Agnes Cargill under foreclosure sale of John's fourth, it is perfectly evident that a result that never was contemplated by Mrs. Cargill, or Mrs. Ford either, will be attained. That Mrs. Cargill never for a moment considered she had accomplished such a result is fully evidenced by her own warranty deed to Mrs. John Cargill, her son's wife, made after she had purchased his remainder in fee. Putting ourselves in the place of Mrs.

Cargill, and understanding that she only had a life estate in this land, and her daughter Mrs. Ford a remainder in a fourth of it, and that Mrs. Cargill had three other children having the same interest, and that Mrs. Cargill did not acquire the title to John Cargill's fourth interest in remainder for more than two years after the execution of the deed to Mrs. Ford, is it not clear that she had no intention of giving to Mrs. Ford John's share when she should buy it? To reject any part of her deed to reach such a result would be to ignore her intention. If Mrs. Ford was not satisfied with this description, she should have applied to her mother, in her lifetime, to correct it, for it is very clear that, this deed being a simple gratuity, a court of equity would not have enforced it. *Mulock v. Mulock*, 81 N. J. Eq. 602; Fry, Spec. Perf. p. 71; *Brownlee v. Fenwick*, 108 Mo. 420; *Anderson v. Scott*, 94 Mo. 637.

But, granting that the word "divided" should be rejected from the description, and that the deed is construed to convey one "undivided" fourth,—the very opposite of what the grantor declared she was conveying,—can the claim of plaintiff be sustained that the subsequently acquired title of Mrs. Agnes Cargill to the fourth devised to her son John passed to Mrs. Ford by that deed? This claim is based upon the statute as it stood in 1855. "If any person shall convey any real estate by conveyance, purporting to convey the same in fee simple absolute, and shall not at the time of such conveyance, have the legal estate in such real estate, but shall afterward acquire the same, the legal estate subsequently acquired shall immediately pass to the grantee, and such conveyance shall be valid, as if such legal estate had been in the grantor at the time of the conveyance." 1 Rev. Stat. 1855, p. 855, § 3. This section came under review in *Bogy v. Shoab*, 13 Mo. 365. Judge Napton said in that case, in regard to the words "fee simple absolute:" "It then depends upon the character of the deed whether it is to be affected by our statute. It must be a conveyance purporting to pass the fee simple absolute. . . . The term 'fee simple' is known at the common law as one which defines the quantity of estate. It is used in contradistinction from a fee tail, a life estate, or a term of years. It is evidently not employed in this sense in this provision of the act. It was surely not intended that a quitclaim deed, although the deed uses language to pass the fee, and not any smaller estate, would therefore pass a new title not belonging to the grantor when he makes the deed. It was hardly intended to apply to a deed conveying all the right, title, and interest of the grantor. Such a deed will undoubtedly pass the land itself if the grantor has an estate therein at the time of the conveyance, but it passes no estate which was not then possessed." *Brown v. Jackson*, 16 U. S. 8 Wheat. 452, 4 L. ed. 432. . . . So, where a party had a vested interest, and also a contingent remainder in lands, and conveyed 'all his right, title, and interest,' the deed was held only to convey his vested interest, although it contained a general warranty." *Pelletreau v. Jackson*, 11 Wend. 111; *Vails v. Clemens*, 23 L. R. A.

18 Mo. 486. In *Brauford v. Wolfe*, 108 Mo. 391, it was held that the doctrine of inurement, whether under the statute or common law, is raised upon the covenants of title contained in the deed under which it operates, and consequently the deed of a married woman only operated to pass all her existing right, title, and interest, citing *Barker v. Circle*, 60 Mo. 259; *Reese v. Smith*, 12 Mo. 848; *State Nat. Bank of St. Joseph v. Robidoux*, 57 Mo. 446. The common-law reason for asserting that the title passed by way of estoppel was that it prevented circuity of action, and hence, where no right of action ever existed on the covenants, and they had been released, extinguished, or otherwise classed, some courts held there was no estoppel, and the after-acquired estate would not pass. To this rule that, where no action existed, no estoppel was created, there are, however, a number of well-defined exceptions. Among these, Mr. Bigelow, in his work on Estoppel (5th ed. 445), mentions as a sixth exception to the rule,—that "wherein the consideration of the grant with warranty was love and affection only." In *Robinson v. Douthitt*, 64 Tex. 101, the father conveyed to his son for love and affection only. The father had previously mortgaged the land. Under the mortgage it was sold and purchased by a stranger, from whom the father subsequently bought again. The father again sold it to a third person. In a contest between the son and the last purchaser from the father it was held that the father's purchase from the purchaser under his mortgage inured to the son, Stayton, J., saying: "We are of the opinion that the estoppel exists in all cases against a grantor and subsequent purchasers from him with notice of the prior conveyance, when a valid conveyance, having such covenants as are found in the deed before us, is executed." Rawle, Cov. 5th ed. § 257; 8 Washb. Real Prop. 399-407, and cases cited. We think the deed in this case must be considered as founded on a consideration of love and affection alone, and that the mere nominal sum of one dollar does not change it into one for bargain and sale. *Hatch v. Straight*, 3 Conn. 84, 8 Am. Dec. 152; *Peck v. Vandenburg*, 80 Cal. 11; *Salmon v. Wilson*, 41 Cal. 595; *Bradley v. Loe*, 60 Tex. 472; Devlin, Deeds, § 11.

But, notwithstanding it was a pure donation, if otherwise valid, a subsequently acquired title obtained by Mrs. Cargill would inure, by virtue of its covenants, to Mrs. Ford and her grantees, as against subsequent purchasers of Mrs. Cargill with notice of said deed. Conceding, then, that it would carry an after-acquired title as against one having notice, the only notice with which Saxton and his grantees are charged is such as is imparted by our recording acts. When Mrs. Cargill made the deed,—September 5, 1863,—she had no title to the remainder in the fourth of said lands devised to John Cargill, her son; and, construing her deed as not void for uncertainty, it purported to convey a fee simple; it did not and could not pass John Cargill's fourth until she acquired it in 1865 by the trustee's deed recorded December 4, 1865. On March 4, 1871, by a

warranty deed, she conveyed this share of John Cargill so purchased by her to Sarah L. Cargill, his wife, which deed was duly recorded. By mesne conveyance, for value, Saxton became the purchaser of this John Cargill's fourth. Mrs. Nancy Cargill died in 1877. Saxton and all the purchasers subsequent to him bought after Mrs. Cargill's death. The question now is: When they came to search the record of conveyances, were they bound to look for deeds by her to this fourth, antedating her purchase of this land at the trustee's sale in December, 1865? Perhaps no more important question affecting the title of real estate could be raised than the effect of this doctrine of inurement of after-acquired title by estoppel, considered with reference to our recording acts, when rights of innocent purchasers for value are involved. Some courts hold that "the obligation created by estoppel not only binds the party making it, but all persons privy to him; the legal representatives of the party, those who stand in his situation by act of law, and all who take his estate by contract stand in his stead, and are subjected to all the consequences which accrue to him. It adheres in the land, and is transmitted with the estate; it becomes a monument of title, and all who afterward acquire the title take it subject to the burden which the existence of the fact imposes on it. These principles had their origin at a very early period in the common law." *Douglass v. Scott*, 5 Ohio, 198; *Knight v. Thayer*, 125 Mass. 25. Now, this language is broad enough, if logically followed, to lead to the result that the after-acquired title vested in the grantee, not only as against the grantor and his heirs, but as against a subsequent purchaser from the latter of the after-acquired title. Mr. Rawle, who has given the subject a most thorough and rigid analysis, says: "This rule, when applied to the case of a bona fide purchaser for value without notice, cannot harmonize with the spirit of our registry laws in force in this country, and leads to the position which certainly cannot be considered as tenable,—that a purchaser must search the registry of deeds, not only from the time when his grantor acquired the title, but also for a series of years before that time, in order to discover whether he had previously made any conveyance (though without title) to any other person; for, if he had, that person, according to this doctrine, holds the estate as against this person, and, if the property has passed through several hands, a similar search must be made as to each." He says nothing is more simple than what is termed "the line of title." It is that the first purchaser should search the title for the deed to his vendor, and trace the title thence back to its source. If he finds no title in him, as would have been the case here, then it is his fault if he takes the deed.

Now, as to the second purchaser,—one who buys after the vendor acquires a title. He searches till he finds the deed to his vendor, and traces the title back to its source. He finds it regular, and that since his vendor acquired the title he has not conveyed to any one else. He is not expected to look for con-

veyances from his vendor prior to the time the vendor acquired the title. "Yet," as Mr. Rawle says, "according to the practical effect of the doctrine now being considered, and apart for counter equities, the purchaser who has brought himself within all the provisions of the registry laws is not protected at all if his vendor had, before he had acquired title, conveyed to another, with covenants, a title which was without existence or value." Judge Hare concurs in Mr. Rawle's views, and says, in a note to *Duchess of Kingston's Case*, 2 Smith, Lead. Cas. 8th ed. 734: "It necessarily tends to give a vendee, who has been careless enough to buy what the vendor has not to sell, a preference over subsequent purchasers who have expended their money in good faith, and without being guilty of negligence." In *Crockett v. Maguire*, 10 Mo. 84, Judge Scott said: "The registry of a deed is only evidence of notice to after-purchasers under the same grantor." In *Dodd v. Williams*, 8 Mo. App. 278, the St. Louis court of appeals held that an examiner of titles was not bound to examine for deeds of any person in the chain of title before the date of his record title. In *Calder v. Chapman*, 52 Pa. 359, 91 Am. Dec. 163, Judge Read said: "It is said 'that if a man sells and conveys land to which he has no right or title, and afterwards buys or acquires the title to the same land, he cannot claim it as against his grantee,' and, whether this rule is based on estoppel or rebutter, or upon the equity as practiced in Pennsylvania, by which that which ought to be done is considered as done, is perhaps immaterial, as the effects of our recording acts must be the same in either case. . . . 'It is a doctrine, . . . when properly understood and applied, that concludes the truth in order to prevent fraud and falsehood, and imposes silence on a party only where, in conscience and honesty, he should not be allowed to speak.' Now, in the present case, in searching for incumbrances or conveyances, the search against Calder would begin with his title from Chapman, and the search beyond would be against Chapman and those through whom he claimed; and a search against Calder during the same period would be considered an utter absurdity." In *Ely v. Wilcox*, 20 Wis. 523, 91 Am. Dec. 436, it is said: "In Massachusetts it is held that in searching the title it is not necessary to search the record, as against an antecedent grantor of land, further than the registry of a deed duly executed by him, and that, when such a deed has been registered, a purchaser under the grantee will not be affected with notice of his prior deed, recorded subsequently, but before the period of his purchase" (*Connecticut v. Bradish*, 14 Mass. 296; *Trull v. Bigelow*, 16 Mass. 418, 8 Am. Dec. 144; *Somes v. Breuer*, 2 Pick. 184, 18 Am. Dec. 406); and the Massachusetts rule is approved by the Wisconsin court. *Carbine v. Pringle*, 90 Ill. 303; *Odle v. Odle*, 73 Mo. 289; 2 Pom. Eq. Jur. § 658.

Our conclusion is that a recorded deed by one who has no title, but who afterwards acquires the title by recorded deed, is not constructive notice to a subsequent purchaser

in good faith from the common grantor. We think, when he searches till he finds the deed by which his grantor acquires the title, he is not bound to look for deeds made prior to that time. Such prior deeds are not "in the line of title," as that term is used by conveyances and searches. When Saxton and those who claimed under him bought, Mrs. Agnes Cargill was dead. The fourth they bought, on the face of the deed, purported to be John Cargill's fourth. That fourth was conveyed to Sarah Cargill by Mrs. Agnes Cargill. Looking back, then, they would discover that John Cargill's fourth was sold to his mother in December, 1865. The mother was dead. Were they required to look back of the time she acquired John's fourth to see whether she had deeded it to Mrs. Ford in 1863. We think not. But plaintiff claims that, admitting the rule to be as we think it most clearly should be, still Mrs. Sarah Cargill was bound to look back, and see whether Mrs. Agnes Cargill had not conveyed her life estate in John's share which she was conveying to her. For several reasons we think this will not avail plaintiff. First, there are no

words in the deed of 1863 to Mrs. Ford that in any manner indicate that Mrs. Agnes Cargill had the slightest intention of conveying the John Cargill share at that time, and, as she was conveying only one fourth out of four, and as she had no title to John's share, there was nothing in that deed which would carry notice as to her life estate in John's share. *Gatewood v. House*, 65 Mo. 663. But, more than that, John Cargill, by his father's will, only took a fourth in remainder. He only mortgaged a fourth in remainder. His mother only bought what he mortgaged, and by her deed she only conveyed what she purchased at that sale, so that her life estate was not involved in the examination; and we must hold that the subsequent purchasers were unaffected by Mrs. Ford's deed, even if it were not void for uncertainty. The plaintiff and his mother have paid no taxes on this land since obtaining the deed in 1863, have asserted no title, and his claim is wholly without merit.

The judgment of the Circuit Court is reversed. All concur.

PENNSYLVANIA SUPREME COURT.

Adaline CARPENTER, *Appt.*,

v.

UNITED STATES LIFE INSURANCE CO.

(161 Pa. 2.)

The assumption of parental relations, although without any legal obligation, by a man who sends a girl to school and pays her expenses, is sufficient to give her an insurable interest in his life so as to sustain a policy which he procures and assigns to her.

(April 2, 1894.)

APPEAL by plaintiff from a judgment of the Court of Common Pleas for Lycoming County in favor of defendant in an action brought to recover the amount alleged to be due on a life insurance policy. *Reversed.*

The facts sufficiently appear in the opinion.

Mrs. Watson & McLean, for appellant:

The only question to be determined in this case is whether, as between the parties to this policy and assignment it (viz. the assignment), is void as a gambling contract.

The offers of evidence plainly show that Alanson B. Tyrell intended, in case of his death, that Adaline Carpenter should receive the amount of the policy, viz., \$2,000, and here the case of *Overbeck v. Overbeck*, 155 Pa. 5, is directly applicable.

The supreme court says: "It is certain that Overbeck did not intend the proceeds to go to the appellant in case of his death, although she was his lawful wife. On the contrary, he des-

ignated the appellee, Mary Overbeck, as the beneficiary, and as she is living and the first named, she cannot be passed by for 'the heirs at law.'"

It was held in *Scott v. Diakson*, 108 Pa. 6, 56 Am. Rep. 192, that a man may insure his own life, paying the premiums himself, for the benefit of another who has no insurable interest, and that such a transaction is not a wagering policy.

See also *Cunningham v. Smith*, 70 Pa. 450; *Elliott's App.* 50 Pa. 75, 88 Am. Dec. 525; *Bliss, Life Ins. p. 35*, § 28; 2 May. Ins. chap. 19, § 398A; 1 May. Ins. § 112, 1 Biddle, Ins. chap. 4, § 194; 1 Phillips, Ins. p. 58; 2 Parsons, Cont. p. 479.

An insured has a right to dispose of his policy in any way or to any person he pleases. The fact that his assignees have no interest in his life is no defense to an action.

Valton v. National Fund Life Assur. Co. 20 N. Y. 33, 22 Barb. 9, 1 Keyes, 21, 4 Abb. App. Dec. 437, 17 Abb. Pr. 288.

If a policy of insurance on the life of another is issued to a person having an insurable interest in such life, an assignment of such policy to a person having no such interest does not render the assignment void.

Mutual L. Ins. Co. of New York v. Allen, 138 Mass. 24, 53 Am. Rep. 245; *Eckel v. Renner*, 41 Ohio St. 232; *Clark v. Allen*, 11 R. I. 439, 23 Am. Rep. 496; *Valton v. National Fund Life Assur. Co. supra*; *St. John v. American Mut. L. Ins. Co.* 13 N. Y. 81, 64 Am. Dec. 529; *Ashley v. Ashley*, 3 Sim. 149; *Bliss, Life Ins.* 40; *Reynolds, Life Ins.* 151-154; *Kent*,

NOTE.—The above case, we believe, is somewhat in advance of any prior decisions on the subject of insurable interest in life, although it is somewhat analogous to cases in respect to insurable interest 23 L. R. A.

of a woman in the life of a man with whom she has an engagement to marry. See, as to these, *Alexander v. Parker* (Ill.) 19 L. R. A. 187, and *note*.

Com. 869; *Connecticut Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 457, 462, 24 L. ed. 251, 254.

Any person has a right to procure an insurance on his own life and assign it to another, provided it be not done by way of cover for a wager policy.

Connecticut Mut. L. Ins. Co. v. Schaefer, supra; *Warnock v. Davis*, 104 U. S. 775, 26 L. ed. 924; *Mutual L. Ins. Co. of New York v. Armstrong*, 117 U. S. 591, 28 L. ed. 997; *Anderson's Estate*, 85 Pa. 202; *Hill v. United Life Ins. Assn.* 154 Pa. 29; *Madeira's App.* 17 W. N. C. 202.

Messrs. S. J. Strauss, Addison Candor, and C. La Rue Munson, for appellee:

The assignment of a policy out and out to one having no insurable interest in the life insured (the assignor delivering the policy to the assignee and parting with its control) renders it a wagering contract as to such an assignee who takes no title thereto and cannot recover thereon.

Gilbert v. Moore, 104 Pa. 74, 49 Am. Rep. 570; *Meily v. Hersherberger*, 16 W. N. C. 186; *Downey v. Hoffer*, 110 Pa. 109; *Ruth v. Katterman*, 112 Pa. 251; *Keystone Mut. Ben. Assn. v. Norris*, 115 Pa. 447; *U. B. Mutual Aid Soc. v. McDonald*, 122 Pa. 824; *Vanormer v. Hornberger*, 142 Pa. 579; *Smith v. Steffy*, 6 Lanc. L. Rev. 172; *Brockway v. Connecticut Mut. L. Ins. Co.* 29 Fed. Rep. 766.

Of what moment are Tyrell's intentions when the fact is that he parted with the possession and control of the policy, and put it within the absolute ownership of one who had not the slightest interest in the preservation of his life—the very gist and essence of insurable interest.

Corson's App. 113 Pa. 488, 57 Am. Rep. 479; *U. B. Mutual Aid Soc. v. McDonald*, 122 Pa. 831.

In many of the courts our rule has been upheld with great vigor.

Warnock v. Davis, 104 U. S. 775, 26 L. ed. 924; *Mutual L. Ins. Co. of New York v. Armstrong*, 117 U. S. 591, 29 L. ed. 997; *Missouri Valley L. Ins. Co. v. Sturges*, 18 Kan. 93, 26 Am. Rep. 761; *Missouri Valley L. Ins. Co. v. McCrum*, 86 Kan. 146, 59 Am. Rep. 537; *Helmetag v. Miller*, 76 Ala. 183, 52 Am. Rep. 816; *Franklin L. Ins. Co. v. Hazard*, 41 Ind. 116, 23 Am. Rep. 818; *Stevens v. Warren*, 101 Mass. 564; *Roller v. Moore*, 6 L. R. A. 136, 86 Va. 512; *Equitable L. Assur. Soc. v. Haslewood*, 7 L. R. A. 217, 75 Tex. 838.

The offer to prove that the policy was a gift was to contradict, alter, and vary the terms of the written assignment, wherein it is recited that the assignment was "for value received."

In the absence of fraud, accident, or mistake, latent ambiguity or matter of inducement, the writing could not be altered by parol.

Jackson v. Payne, 114 Pa. 67; *Sylvius v. Koeck*, 117 Pa. 67.

The Act of 1887 excludes a party from testifying "to any matter occurring before the death of said party."

De Coursey v. Johnston, 134 Pa. 828.

The policy of the law forbids the plaintiff to testify when death has stopped the mouth of Tyrell.

Karns v. Tanner, 66 Pa. 304; *Duffield v. Hue*, 129 Pa. 94; *Parry v. Parry*, 180 Pa. 95; 28 L. R. A.

Sutherland v. Ross, 140 Pa. 379; *Arrott Steam Power Mills Co. v. Way Mfg. Co.* 143 Pa. 435; *Griggs v. Vermilya*, 151 Pa. 429.

Dean, J., delivered the opinion of the court:

Alanson B. Tyrell, a man about sixty years of age, living with his family near Wilkes Barre, had in his house, as a domestic, a poor girl, named Adaline Carpenter. So far as appears from the evidence, prompted solely by a benevolent and kindly disposition, this old man befriended this girl, sent her to school, and paid her expenses. In return, she, at times, for small wages, performed some services for him, such as keeping his books and copying his letters. He was a designer and builder of coal breakers, and seems to have had considerable business. On the 10th of December, 1892, he took out a policy of insurance on his life, in the sum of \$2,000, payable to himself, in the defendant company. He paid the first annual premium, \$104.84. Thirteen days thereafter, on the 23d of the same month, he assigned the policy, in writing, to Adaline Carpenter, sealed it in a package, and delivered it to her, with the injunction not to open it until after his death. Notice of the assignment, as provided by the policy, was duly given the company; and, without objection, acknowledgment of the notice was made by indorsement on a duplicate. On April 1, 1893, Tyrell died. Adaline Carpenter inspected the package delivered to her, found in it the policy regularly assigned to her, and made proper proof of the death of the insured, and demand for payment. The company, on the ground that the policy was a wagering contract, refused payment. Thereupon, this suit was brought, and the learned judge of the court below, holding that, so far as concerned this plaintiff, the contract was a wagering contract, and therefore void, nonsuited her; and from that judgment we have this appeal.

The judgment of the court below is based on *Gilbert v. Moore*, 104 Pa. 74, 49 Am. Rep. 570; *Meily v. Hersherberger*, 16 W. N. C. 186; *Downey v. Hoffer*, 110 Pa. 109,—and that line of cases which holds that the absolute assignment of a policy to one having no interest in the life of the insured, the assignor parting with all control over the policy, renders it a wagering contract as to such assignee, and he cannot recover thereon. It seems to us the learned judge's conclusion is not drawn from all the material facts, but only from a part of them. At the trial, counsel on both sides admitted the following facts, which were put upon the record: "Alanson B. Tyrell, after he had made the assignment of the policy in question to the plaintiff, placed the policy and the assignment and the receipt in an envelope, and sealed it, and inclosed it in a package, and delivered it to the plaintiff, and it has remained in her possession ever since; and further, that, at the time the papers in question were delivered to the plaintiff, she was not a creditor of the insured, nor a relative, nor connected by ties of blood or marriage, but only a friend of the insured." The facts, as contained in this ad-

mission, were assumed to be all of the material facts bearing on the issue. From them it was inferred the plaintiff had no insurable interest in the life of Tyrell; and as he had, by the assignment and delivery of the policy, relinquished control over it, it was, under the authority of the line of cases already noticed, held to be a wagering contract. But do all the facts of which there was evidence, when taken together, warrant the conclusion that this plaintiff had no insurable interest in the life of Tyrell? If Tyrell, when she was young, had taken this girl into his family, treated her as a member of it, reared and educated her; when she was of age, had assisted her in getting remunerative employment, had watched over her, and interested himself in her welfare,—it could have been truthfully said he stood in the place of a parent to her, not by virtue of the legal relation of a child born to him in wedlock, or by adoption under our statute, but by his voluntary assumption of the paternal relation towards her, with her consent. Without any legal obligation other than friend, he chose to assume all the burdens incident to this domestic relation of parent and child. His conduct and promises for years warranted her in believing the relation would continue while his life lasted. Having thus raised her from the humbler station in which he found her, he was continuing his kindness at the date the policy was assigned; for this offer, although rejected by the court as immaterial, must be taken as the facts: Plaintiff, among other facts, offers to prove: "That, during the first two years of her acquaintance with the insured, she was a servant girl in his house, he being a married man with a family, and about sixty years of age; that, about the time she quit his service, he told her that she ought to educate herself, so that she might be fit to earn a living by keeping books and type writing; that he then told her, if she would go to a business college at Wilkes Barre, he would pay her tuition; that she went to a business college, and was there for several months, and studied bookkeeping; that the insured paid her tuition there; that when she left the business college that insured purchased for her a desk and chair, and secured her desk room in the office of Mr. Gunster, of Wilkes Barre; that, when in Mr. Gunster's office, she kept the insured's time book (the insured being a builder of coal breakers, and employing a large number of men); that for keeping said books the insured paid her at the rate of \$20 per month; that she left the office of Mr. Gunster in February, 1893, and came to Williamsport, for the purpose of entering Pott's Commercial College, to learn shorthand writing and type writing; that the insured told her before she left Wilkes Barre that he would pay her tuition at said college; that she entered said college, and studied shorthand writing and type writing, and the insured paid her tuition; that after she came to Williamsport she received several letters from S. W. Tyrell, the son of the insured, informing her of his father's sickness, and that she also received two letters in the mean time from the insured, stating the fact of his

sickness, and inquiring how she was getting along; that, in response to said letters, she went to the home of her father and mother, in the borough of Edwardsville, near the home of the insured, and while there the insured died."

As this case stood upon the record, the plaintiff, as the assignee of the deceased, stood in his place,—was his representative. So far as appears, she was making no claim adverse to the right of deceased, or any representative of his right. The antagonist was the obligor in the policy. Therefore, she was not incompetent, under clause 6, § 5, Act 1887. Her competency as a witness against some other representative of the deceased assignor could not be properly raised in this issue between these parties. Therefore, the offer was material, the witness was competent, and the facts offered to be proven must be taken as proven. The court below, in the opinion refusing to take off the nonsuit, treats these facts as proven, but considers them wholly immaterial. We think, having in view these facts, as well as those admitted of record, the plaintiff had an insurable interest in the life of the deceased. It does not matter that this interest was one without legal obligation on part of the insured. It was a relation in every other respect parental. Peculiarly and otherwise he assumed a parent's part towards her, and she was justified in expecting the continuance of it. The question in *Gilbert v. Moore, supra*, was as stated by this court in these words: "Can one having no interest in the life of the insured, and for the purpose of speculation only, acquire, by assignment or otherwise, such title to the policy as the law will enforce?" In *Downey v. Hoffer, supra*, this court assumes, with the court below, that the purchase by Downey was purely for a speculative purpose, and says: "The mischief resulting from a sale of the policy for purposes of speculating on human life is so contrary to the policy of the law, and so in conflict with the just principles of life insurance that it is unsafe to relax the rule that the holder of the policy must have some pecuniary interest in the life of the insured." And so with all the other cases cited by appellee where no recovery by the assignee of a policy was permitted. In each, the holder of the policy was interested in the death, rather than in the life, of the insured, and the policy was speculative. In the case before us the plaintiff's interest was wholly in the life of the insured. From the facts, the benefit to her from his fatherly care and pecuniary aid would, in a very few years, have far more than equalled the \$2,000 policy assigned to her. From the severance of this relation by death, she perhaps sustains a greater pecuniary loss than any of his children. There may be an insurable interest not accompanied by kinship. Such interest implies a pecuniary interest, present or prospective. *Cooke, Life Ins. § 59*. A moral obligation is sufficient to support it. *Ferguson v. Massachusetts Mut. L. Ins. Co.*, 82 Hun, 806. A creditor has an insurable interest in the life of his debtor, who has been discharged in bankruptcy. Says May

on Insurance (sec. 107): "The relationship seems to be of but little importance, except as tending to give rise to the circumstances which justify the expectation. Indeed, the doctrine of the latest of the Massachusetts cases before cited is broad enough to cover a case where there is no relationship at all, save one, perhaps, of mere friendship, if the circumstances are such as to show that the loss of the insured life will probably result in pecuniary disadvantage to the person procuring the insurance." Here the plaintiff had nothing whatever to do with the procurement of the policy, or its assignment; paid no part of the premium, and, so far as appears, never expected to pay any, for she was ignorant of its existence during the lifetime of the insured. She had substantial grounds for expecting decided pecuniary advantage from his life. Why, then, should the contract be termed speculative? Her expectancy, except in the one feature,—the absence of legal obligation to enforce it,—was as well founded as that of a wife or creditor. If a voluntary copartnership gives to each partner an insurable interest in the lives of the others; if the relation of superintendent or manager of a business concern gives to his employers an insurable interest in the life of the superintendent or manager, as is well settled,—then the voluntary relation here gave to this plaintiff an insurable interest in the life of one who, in all pecuniary respects, occupied towards her the place of a parent, and the court below ought not to have held otherwise.

The judgment is reversed, and a procedendo is awarded.

Mary McHUGH

v.

John B. SCHLOSSER *et al.*, *Appts.*

(150 Pa. 480.)

1. An innkeeper is liable for the death of a person who while sick is driven out into the storm without adequate covering and left for about half an hour in a stream of melting ice and snow where he falls from inability to stand on his feet if it was reasonable to suppose that death might follow such sudden exposure in his condition.
2. Evidence of the age, health, and habits of a person is not sufficient to sustain a verdict based on his probable earnings without anything to show his earning power or his business habits or past earnings.

(January 22, 1894.)

A PPEAL by defendants from a judgment of the Court of Common Pleas, No. 3, for Allegheny County in favor of plaintiff in an action brought to recover damages for the death of plaintiff's husband, which was alleged to have been caused by the wrongful acts of defendants. *Reversed.*

NOTE.—An unusual and interesting case reported above adds, we believe, a new point to the law of innkeepers. However clear the liability of an innkeeper might have seemed for any wanton ex-

The facts sufficiently appear in the opinion. *Mr. Willis F. McCook* for appellants. *Mr. John Marron* for appellee.

Williams, J., delivered the opinion of the court:

The defendants are hotel keepers in the city of Pittsburgh. McHugh was their guest, and died in an alley appurtenant to the hotel on the 2d day of February, 1891. Mary McHugh, the plaintiff, is his widow, and she seeks to recover damages for the loss of her husband, alleging that it was caused by the improper conduct of the defendants and their employés. An examination of the testimony shows that McHugh came to the Hotel Schlosser late on Friday night, January 30, registered, was assigned to, and paid for, a room for the night, and retired. On Saturday and Sunday he complained of being ill, and remained most of both days in bed. A physician was sent for at his request, who prescribed for him. He also asked for and obtained several drinks during the same time, and an empty bottle or bottles remained in his room after he left it. During the forenoon of Monday he seemed bewildered, and wandered about the hall on the floor on which his room was. About the middle of the day the housekeeper reported to Schlosser that he was out of his room, and sitting half dressed on the side of the bed in another room. Schlosser and his porter both started in search of McHugh, and Schlosser seems to have exhibited some excitement or anger. He was found, and the porter led him to his room. While this was being done Schlosser said to him, "You can't stay here any longer;" to which McHugh replied, "I'll git." The porter, on reaching his room, put his coat, hat, and shoes on him, and at once led him to the freight elevator, put him on it, and had him let down to the ground floor. He then took him through a door, used for freight, out into an alley some four or five feet wide, that led to Penn avenue. Rain was falling, and the day was cold. A stream of rain water and dissolving snow was running down the alley. McHugh was without overshoes, overcoat, or wraps of any description. When the porter had gotten him part way down the alley he fell to the pavement. While he was lying in the water, and the porter standing near him, a lady passed along the sidewalk on Penn avenue and saw him. She walked a square, found Officer White, and reported to him what she had seen. He went to the alley to investigate, and when he arrived McHugh had been gotten to his feet, but was leaning heavily against the wall of the hotel, apparently unable to step. The porter was behind him, with his hands upon him, apparently urging him forward. What followed will be best told in the officer's own words. He says: "I asked, 'What's the matter with this man, Mr. Powers?' He says, 'He's sick.' I says, 'He ought to have something done for him,'

posure of a guest by expelling him from the inn an authority clearly in point would have been probably sought in vain prior to this decision.

and at that time he fell right in the alley on his back. He had his coat open, no vest, and his shoes were untied. He had strings in his shoes, but not tied." The officer was asked if the man spoke after he reached the place where he was, and he replied thus: "He spoke to me. Somebody said he was drunk. He rolled his eyes up, and he says: 'Officer, I am not drunk. I am sick. I wish you would get an ambulance and have me taken to the hospital.' Then I ran to the patrol box." It required about twenty minutes to get an ambulance on the ground. During all this time the man continued to lie on the pavement in the alley. At length, after an exposure of about half an hour in the storm, and on the pavement, the ambulance came. He was placed on a stretcher, lifted into the ambulance, and taken to police headquarters, and thence to the hospital; but all signs of life had disappeared when he was laid on the hospital floor. The *post mortem* examination disclosed the fact that the immediate cause of death was valvular disease of the heart. The theory of the plaintiff was that the shock from exposure to wet and cold in the alley had, in his feeble and unprotected condition, brought on the heart failure from which he died; and, as the exposure resulted from the conduct or directions of the defendants, they were responsible for his death. Three principal questions were thus raised: First. What duty does an innkeeper owe to his guest? Second. What connection was there between the defendants' disregard of their duty, if they did disregard it in any particular, and the death of Mr. McHugh? Third. If the plaintiff be entitled to recover, what is the measure of her damages?

The attention of the court was drawn to the first of these questions by the defendants' third point, in which the learned judge was asked to instruct the jury, in substance, that if the deceased was troublesome to the defendants, and annoying to their guests, they might rightfully put him out of their house, if they used no unnecessary force or violence. This point was refused as framed, but the learned judge proceeded to state the rule thus: "If the annoying acts were willful, the defendants could remove decedent in the manner stated in point. If, however, they were the result of sickness, although they might, under certain circumstances, remove him, such removal must be in a manner suited to his condition." This was saying that if McHugh was intoxicated, and the disturbances made by him were due to his intoxication, he might be treated as a drunken man; but if he was sick, and the disturbances caused by him were due to his sickness, he must be treated with the consideration due to a sick man. This is a correct statement of the rule. In the delirium of a fever a sick man may become very troublesome to a hotel keeper, and his groans and cries may be annoying to the occupants of rooms near him; but this would not justify turning him forcibly from his bed into the street during a winter storm. What the condition of the decedent really was went properly to the jury for determination. If they

found the fact to be that he was suffering from sickness, then the learned judge properly said that, if his removal was to be undertaken, it should be conducted in a manner suited to one in his condition. The second question was raised by the defendants' fourth point, which was as follows: "If McHugh died of heart disease, and defendants had no reason to believe that he was so sick that his removal from the house would cause his death, they cannot be held responsible in this action, even though the mere incident of his removal from the house may have in some degree contributed to bring it on at that time." This was refused. It could not have been affirmed without qualification; but its refusal, without more, left the jury without any rule whatever upon the subject. The question which the defendants were bound to consider before putting the decedent out in the storm was not whether such exposure "would" surely cause death, but what was it reasonable to suppose might follow such a sudden exposure of the decedent in the condition in which he then was. What were the probable consequences of pushing a sick man, in the condition the decedent was in, out into the storm, without adequate covering, and, when he fell, from inability to stand on his feet, leaving him to lie in the stream of melting ice and snow that ran over the pavement of the alley, for about a half hour in all, in the condition in which Officer White found him? The third question was raised by the defendants' first point. No evidence was given tending to show the earning powers or the habits of industry and thrift of the deceased. For this reason the court was asked to instruct the jury that "nothing more than nominal damages can be recovered in this action." This was refused, and the jury was told in the general charge that, as the evidence fixed his age, and gave information about his health and habits, they might from this data estimate his earning capacity, and the pecuniary loss of the plaintiff. Now, it is true, as said in *Pennsylvania R. Co. v. Keller*, 87 Pa. 300, that since the Acts of 1851 and 1855 life has a value which the law will recognize, and which the survivors who are entitled to sue may recover at law. It is true that this value is to be fixed by the jury in view of all the circumstances, and it is not necessarily limited to what is known as "nominal damages." But it is also true that when the probable earnings of the deceased are to be taken into account in fixing the damages it is the duty of the plaintiff to show the earning power of the deceased, or give such evidence in regard to his business, business habits, and past earnings, as may afford some basis from which earning capacity may be fairly estimated. *Pennsylvania R. Co. v. Zebe*, 83 Pa. 318; *Pennsylvania R. Co. v. Vandever*, 86 Pa. 298. The true measure of damages is the pecuniary loss suffered, without any *solatium* for mental suffering or grief; and the pecuniary loss is what the deceased would probably have earned by his labor, physical or intellectual, in his business or profession, if the injury that caused death had not befallen him, and which would

have gone to the support of his family. In fixing this amount consideration should be given to the age of the deceased, his health, his ability and disposition to labor, his habits of living, and his expenditures. *Pennsylvania R. Co. v. Butler*, 57 Pa. 385; *Lehigh Iron Co. v. Rupp*, 100 Pa. 95; *Manafield Coal & Coke Co. v. McEnery*, 91 Pa. 185, 36 Am. Rep. 682.

It is very clear that the refusal of the first and fourth points without explanation left the jury without any adequate instruction

on the important questions to which these points related. The consequence was a verdict based on the earning power of the deceased, which the learned judge felt constrained to reduce, and which was unsupported by the evidence. It will not do to permit such a verdict without some evidence from which the calculation of the pecuniary loss of the plaintiff may be made.

The judgment is reversed, and a venire facias de novo awarded.

MINNESOTA SUPREME COURT

MINNEAPOLIS THRESHING MACHINE CO., *Resp't.*,
v.
FIREMEN'S INSURANCE COMPANY
OF CHICAGO, *Appt.*

(.....Minn.....)

*The defendant insured against loss by fire a threshing machine engine and separator "while not in use." The property, which had not been used for threshing for some two weeks, was hauled out into the country, and left standing near a farm house, preparatory to its intended use a few days later, and, while standing there, the separator was destroyed by fire. The fire was not caused by any hazard incident to the actual use or operation of either the engine or separator. *Held*, that the property was not "in use" within the meaning of the policy.

(April 14, 1894.)

A PPEAL by defendant from an order of the District Court for Hennepin County overruling a motion for new trial after verdict in favor of plaintiff in an action upon a policy insuring a separator. *Affirmed*.

The facts sufficiently appear in the opinion. *Messrs. C. M. Hertig and R. A. Daly*, for appellant:

An insurer is not liable except upon proof that the loss has occurred within the terms of the policy, and when making the policy he is at liberty to select the character of the risk he will assume. If the terms of this risk are distinct, and without ambiguity, the assured cannot complain if the risk assumed does not cover the loss.

Machinney v. Southern Ins. Co. of New Orleans, 20 L. R. A. 87, 98 Cal. 184.

In *DeGraff v. Queen Ins. Co.*, 38 Minn. 508, the court said: "First: The language of a condition in a policy, being that of the insurer, selected by him, and intended for his benefit, must be clear and unambiguous, and any reasonable doubt as to its meaning must be resolved in favor of the insured. The tendency of such stipulations is to narrow the range of the underwriter's principal obligation; and,

again, if the meaning is ambiguous, it is his own fault in not making use of more definite terms in which to express it. *Chandler v. St. Paul, F. & M. Ins. Co.* 21 Minn. 85, 18 Am. Rep. 885; *Loy v. Home Ins. Co.* 24 Minn. 315, 81 Am. Rep. 846; *Cargill v. Millers & M. Mut. Ins. Co.* 33 Minn. 90; *Boright v. Springfield F. & M. Ins. Co.* 34 Minn. 852; *Olsen v. St. Paul F. & M. Ins. Co.* 35 Minn. 432, 59 Am. Rep. 338. A second rule is that the language of a policy must be construed with reference to the nature of the property to which it is applied. Such policies must be presumed to have been made with reference to the purposes for which such property is ordinarily used, as well as the manner in which it is usually kept. *Holbrook v. St. Paul F. & M. Ins. Co.* 25 Minn. 229; *Boright v. Springfield F. & M. Ins. Co. supra*. It may be added, as within this rule, that the terms and conditions of a policy should be construed, if possible, so as to give them a meaning reasonably applicable to the kind of insurance upon the particular species of property insured."

The words "while not in use," applied either to a separator or other article, are not ambiguous. Ambiguity is primarily twofold:

1. Where words in themselves, not ambiguous, are linked with such loose-jointed relatives that they slip past or off what may have been their object.

DeGraff v. Queen Ins. Co. supra.

2. Where there is no ambiguity in the object to which the words apply, and the ambiguity, if any, is in the meaning of the words considered in themselves with reference to their object. The case at bar would furnish an ambiguity under this second head, if ambiguity there were.

In *Kinney v. Baltimore & O. Employes' Assn.*, 15 L. R. A. 142, 85 W. Va. 885, Kinney, plaintiff's decedent, was a member of said association, whose constitution, in the language of the court, "provides for relief only in case of accident while in discharge of duty in the service of the Baltimore & Ohio Railroad Company. Kinney was an employe, and had been on the day of this accident cleaning the outside of passenger-cars, had quit work at the hour for quitting, 5 o'clock, and in from four to ten minutes, according to one witness, and from

*Headnote by MITCHELL, J.

NOTE.—The above decision construing the words "while not in use" in a policy of insurance on a threshing machine seems to be a novel one. We 23 L. R. A.

call attention to a case which is in some respects similar. *Machinney v. Southern Ins. Co. of New Orleans (Cal.)* 20 L. R. A. 87.

dive to fifteen, according to another, while on his way home, crossing the tracks, in passing through an opening between cars, was caught between them," and killed. Held, plaintiff could recover. "Was he not," asks the court, "while passing over the railroad tracks in going and returning from his home in the course of his labors, as much in the discharge of his duties and in the service of the company, as when he had the tools with which he worked in his hands, for the purposes of the question in hand?"

In *United States v. Morris*, 39 U. S. 14 Pet. 464, 10 L. ed. 543, Chief Justice Taney stated the case before the court, as follows: "The question in this case is, whether a vessel on her outward voyage to the coast of Africa, for the purpose of taking on board a cargo of slaves, is 'employed or made use of' in the transportation or carrying of slaves from one foreign country or place to another, before any slaves are received on board."

This was a question of the construction of a penal statute. The vessel was bound to Africa, fitted up as a slaver, but had not yet reached Africa, nor had she taken any slaves aboard, yet the court held that she had been "employed or made use of" within the terms of the statute.

If a vessel fitted as a slaver, and intended to be used as such, though with no slaves aboard, and not yet reached the African coast, was held to be "in use" as a slaver within the purview of a penal statute, with how much stronger reason, shall a separator be held to be "in use" within the purview of an insurance policy, under the facts disclosed by this record.

See also *The Emily* and *The Caroline*, 22 U. S. 9 Wheat. 881, 6 L. ed. 116.

Mr. James O. Pierce, for respondent:

The most obvious and ordinary interpretation of the words "in use" is, in use in the business or service for which the separator was made, that is, the business of threshing.

If the plain meaning of the words "while not in use" was not the one intended by the insurer, then the expression was ambiguous. In such cases, the rule is that such ambiguity is to be construed against the insurer and favorably to the insured.

De Graff v. Queen Ins. Co. 38 Minn. 508; *Loy v. Home Ins. Co.* 24 Minn. 317, 31 Am. Rep. 346; *Olson v. St. Paul F. & M. Ins. Co.* 35 Minn. 432, 59 Am. Rep. 338; *Pettit v. State Ins. Co.* 41 Minn. 303.

Mitchell, J., delivered the opinion of the court:

On October 8, 1891, the defendant issued to one Foss its policy of insurance for one year against loss by fire on his threshing machine engine and separator "while not in use;" loss, if any, payable to the plaintiff, as its interest might appear. The separator was destroyed by fire on October 1, 1892, and really the only question in the case is whether the property was "in use," within the meaning of the policy, at the time of the loss. The engine and separator

had been used in threshing in the early part of September, 1892, but had not been so used for two weeks prior to the date of the fire, having been taken and kept during that time in the village of Madella, for the purposes of repairs. On October 1, 1892, the engine was fired up, and used as a traction engine in hauling the separator seven miles out in the country, preparatory to the intended use, two days later, of both engine and separator in threshing. The property was left standing about ten rods from a farm house and some fifteen rods from the stacks of grain which it was intended to thresh. The fire in the engine was extinguished. During the succeeding night, while the property was standing there, the separator was destroyed by fire. The origin of the fire is unknown, but it is supposed to have been incendiary. It is evident that the fire was not occasioned by any use of either the separator or the engine, and was not due to any risk incident to their actual use in the operation of threshing or otherwise. The most obvious and natural meaning of the words "in use," as applied to this property, is use in the business or work for which it was designed, to wit, threshing; and evidently the object of the limitation of the risk contained in the policy was to exclude any possible liability on part of the insurer for losses by fire so peculiarly liable to occur during the actual operation of steam threshing machines. We do not think that the separator was "in use," within the terms of the policy, when the loss occurred. The very most that can be claimed is that the expression is ambiguous, and in such case the rule is well settled that such ambiguity must be construed against the insurer, and favorably to the insured. If the defendant desired to limit the risk to the property while "in store," or to exclude from the risk all losses during "the threshing season," it would have been very easy to have said so in plain and unmistakable language.

There was a provision in the policy that it should be void "if the hazard be increased by any means within the control or knowledge of the insured," and it is claimed that under this provision the policy was entirely avoided by reason of the use of the property for threshing in the month of September. There is no merit whatever in this point. To say nothing of the fact that no such defense was pleaded, this provision is not to be construed so broadly as to include hazards incident to a reasonable use of the insured property, having regard to its nature and circumstances. The insurance, unless the terms of the policy forbid, must be presumed to be made with reference to the character of the property insured and to the owner's use of it in the ordinary way. While it is true that the risk only covered the property while not in use, yet the policy nowhere forbade its use, or provided that the policy should become entirely void if it was used.

Order affirmed.

NORTH CAROLINA SUPREME COURT.

LOUCHEIMER, MANN & CO., *Appts.*,
v.
Solomon WEIL, Trustee for the Benefit of
Creditors of Stern & Saks, *et al.*

(118 N. C. 181.)

A trustee for creditors, who, under the advice of his own counsel and after consultation with and by the consent of counsel employed by a creditor, compromises suits affecting the trust estate, is not chargeable by that creditor with lack of good faith and proper diligence which will render him liable for assets which upon the compromise the creditors suing are allowed to retain under attachment.

(October 31, 1893.)

A PPEAL by plaintiffs from a judgment of the Superior Court for Wayne County in favor of defendants in an action brought to compel an accounting by the trustee for the benefit of creditors of Stern & Saks, and a settlement of his accounts. *Affirmed.*

The case was referred to a master and came before Judge Graves in 1888, upon the correctness of the master's rulings. The judge made an order in the cause and sent the case back to

the master for further consideration. The complainants contended that Judge Graves' order concluded all matters in plaintiffs' favor, except the one question of the ratification by complainants of the action of the attorney Grainger, and that the case was subsequently open only on that point. The referee's subsequent report on that point was in their favor, but he assumed to decide other points in the case, and the plaintiffs took the following exceptions to his report:

"The plaintiffs except to the report of the referee, filed at January term, 1891, and for grounds of exception specify and say that said report is erroneous, for that: (1) In paragraph 18 thereof the referee finds as a fact that H. F. Grainger was the attorney of the creditors secured in the second class of said deed of assignment, whereas the evidence shows that he was employed to represent the trustee in the actions brought against him by the attaching creditors, and his services in that behalf were paid by said trustee (\$75), as shown in his account filed, marked 'B. B.' (2) In paragraph 14 thereof the referee finds as a fact that plaintiff Mann told Mr. Grainger that he (Mann) would leave the matter entirely in his (Grainger's) hands, and to do the best he could with it,

NOTE.—Right of assignee for creditors to compromise claims.

Generally a power conferred on the assignee by a deed of assignment authorizing him to compromise doubtful claims, or claims and debts owing to the assignor, is valid and will be sustained. *Linsinger v. Raymond*, 9 Neb. 40; *Brigham v. Tillinghast*, 15 Barb. 618; *Bellows v. Partridge*, 19 Barb. 176; *Bagley v. Bowe*, 105 N. Y. 171, 50 Am. Rep. 488; *Watkins v. Wallace*, 19 Mich. 67; *Robins v. Embury*, 1 Smedes & M. Ch. 207.

These authorities sustain the position taken in the main case, that an assignee compromising a claim due the estate will not be liable therefor where the complaining creditor co-operated or consented.

And the New York Act of 1877, providing that the county court may authorize the assignee to compromise or compound claims, will not affect this power. *Ginther v. Richmond*, 18 Hun, 232; *Dow v. Platner*, 16 N. Y. 562; *Coyne v. Weaver*, 84 N. Y. 386.

And in *Conkling v. Coonrod*, 6 Ohio St. 611, a deed providing for compromises of debts due the assignor was sustained, but that was not the question involved in the case.

In *Woodburn v. Mosher*, 9 Barb. 255, it was held that an assignment authorizing the assignee "to ask, demand, sue, etc., and to compound and agree for all or any part of the debts due and owing to the assignor as the assignee shall deem meet," and authorizing the assignee to discharge his duty at his pleasure, was fraudulent.

A deed authorizing an assignee generally to adopt such measures in relation to the settlement of the estate, as will in his judgment promote the true interests thereof is valid as this will be construed to mean a discretion within legal limits. *Mann v. Witbeck*, 17 Barb. 388.

Whether or not a provision in an assignment, giving the power to the assignees to compound with any or all of the creditors in such manner and upon such terms as they deem proper, avoids 28 L. R. A.

the assignment, was not decided in *Grover v. Wakeman*, 11 Wend. 187, 25 Am. Dec. 624.

Some courts hold that an assignee for creditors is authorized to compromise claims when it is for the best interests of all the parties that it should be done, but if the assignee makes a disastrous compromise, he is in danger of being held to account for the same. His good faith largely operates in his favor. *Anonymous v. Gilpope*, 5 Hun. 245; *Jessup v. Herzfield*, 1 N. Y. Week. Dig. 241; *Blue v. Marshall*, 3 P. Wms. 381.

So in New York. *Re Croton Ins. Co.* 3 Barb. Ch. 642, 5 L. ed. 1041. See *Ginther v. Richmond*, *supra*.

And on the application by an assignee for authority to compromise a claim due the estate, a court may in its discretion require notice to be given to the creditors. *Re Youngs*, 5 Abb. N. C. 846.

It was held in *Shipman's Petition*, 1 Abb. N. C. 406, that the powers of a county judge exercised in New York city by a judge of the court of common pleas, do not extend to directing the assignee to unite in a plan of reconstruction of a railroad, where he represents the bondholders.

A clause in an assignment authorizing the assignee to compromise with creditors of the assignor renders the assignment void—as it causes delay and hindrance in the collection. *McConnell v. Sherwood*, 84 N. Y. 522, 38 Am. Rep. 557, affirming 19 Hun, 519; *Hudson v. Maze*, 4 Ill. 573; *Gazzam v. Poyntz*, 4 Ala. 374, 37 Am. Dec. 745.

So a reservation in a deed of assignment directing the disposition of the property "unless the indebtedness of the firm can be paid or settled otherwise by amicable arrangement between the creditors of the firm," renders the assignment void. *Keedil v. Donaldson*, 20 Kan. 165.

But in *White v. Monsarrat*, 18 B. Mon. 890, an assignment was sustained that provided for a full right and authority to collect and sue for and settle and compromise all debts due to said M., or owing by him, on the ground that the grant of a power to compromise does not change the order of payment from that prescribed in the deed.

whereas the evidence shows that Grainger was employed to defend the suits brought by the attaching creditors against the said trustee, and no authority given him, or any one else, to compromise said suits. (3) In paragraph 19 thereof the referee finds as facts that in said compromise the said H. F. Grainger represented the second-class creditors, among whom were the plaintiffs in this action, whereas the evidence shows that said Grainger was employed to defend the actions brought against said trustee by the attaching creditors; and the action of Sol. Weil, trustee, to plaintiffs, shows that the compromise was recommended by the trustee's lawyers, and only by them, and the said Grainger had no authority to advise or consent to any compromise or judgment so far as these plaintiffs were concerned. (4) In paragraph 22 thereof the referee finds as facts that said Sol. Weil acted in good faith in assenting to said compromise and judgment, and for the best interests of his trust, whereas the evidence shows that the said compromise was only made that he (Weil) might get payment in full of a debt due H. Weil Bros., of which he was a member, in utter disregard of the right of the other creditors secured in said deed of trust, and without their knowledge or consent, or without the approval of a court of justice; that in this connection the referee should have found as

a fact that, before the attaching creditors sued, the plaintiff Jacob Mann offered to take goods at cost prices in payment of plaintiffs' claim, they being in the second preferred class, and the defendant trustee refused, requiring the said Mann to pay for the same in cash, when the said Weil, trustee, well knew that the goods assigned to him inventoried at cost \$6,437.39, and the debts in the first class only aggregated \$2,886.23; that said action on the part of the trustee was a scheme to save his own debt at the expense of the other creditors, and was not in good faith, and the referee should have so found."

Exceptions to conclusions of law: "(1) For that the referee, in his first conclusion of law, omitted to charge the defendant trustee with the full amount of goods seized by the attaching creditors,—that is, 75 per cent of their inventoried price,—in making up his account, so far as the plaintiffs are concerned. (2) For that the referee, in his second conclusion of law credits the account of the defendant trustee with disbursements as shown in his twenty-sixth finding of facts, whereas no disbursement subsequent to the time plaintiff Jacob Mann offered to take goods at cost price in payment of plaintiff's claim should be allowed. (3) For that the referee, in his third conclusion of law, finds that H. F. Grainger was attorney of the plaintiffs in

An assignment made to compel the creditors to compromise their claims, is fraudulent. *Bennett v. Ellison*, 23 Minn. 242; *Kerolis v. Schloss*, 49 How. Pr. 284.

And it is a fraud to authorize an assignee to employ the proceeds of the assignment in defending suits, which may be brought against the assignor by his creditors. *Planck v. Sohermerborn*, 3 Barb. Ch. 644, 5 L. ed. 1042.

But in *Jewett v. Woodward*, 1 Edw. Ch. 195, 6 L. ed. 103, a deed providing, "should the avails of the assignment be insufficient to pay the debts in full, the assignees are authorized to compromise the same requiring discharges on payment of the dividend"—was sustained as it was not attacked in that case, the court saying the authority to compromise debts would not bind the creditors if so it would have been void. And it should be noticed that this assignment contemplates a compromise with all creditors on the same basis of a *pro rata* dividend.

In *Hone v. Henriquez*, 13 Wend. 240, 27 Am. Dec. 204, it was held that a deed of assignment for the benefit of those who would release their claims could not be attacked by a party assenting thereto.

Statutory provisions.

Cal. Act 1880, § 21, gives the assignee of an insolvent estate the power to settle all matters and accounts between the debtor and his debtors subject to the approval of the court. And under the order of the court to compound with any person indebted to such debtor.

Under Ga. Code 1882, § 2539, all persons acting in a fiduciary capacity, are authorized to compromise doubtful debts belonging to such estate, where such settlement would advance the interests of those represented.

Under Ind. Rev. Stat. 1894, § 2915, a trustee may compound or compromise any debt or claim belonging to the assignor, which cannot be recovered without endangering the recovery of such claim.

Under Me. Rev. Stat. 1888, p. 582, the assignee

may, with the consent of the county judge, settle any demand or controversy, by compromise or arbitration.

Under Mass. Pub. Stat. 1882, p. 798, probate courts may authorize trustees to adjust by arbitration or compromise any demands in favor of, or against, the estate they represent.

Under Mo. Rev. Stat. 1890, p. 205, the circuit court or judge may make an order directing the assignee to sell, compound, or compromise all bad or doubtful debts upon such terms and conditions as appear proper and most beneficial to the estate and to release any vested or contingent right in or to the estate assigned upon such terms as the court or judge may deem proper.

Under N. J. Rev. 1877, p. 39, "the assignee shall have as full power to dispose of all the estate, real and personal, assigned as the debtor had, "and to sue for and recover . . . everything belonging or appertaining to said estate, real or personal, of said debtor or debtors, and shall have full power and authority to refer to arbitration, settle and compound with any person concerning the same."

Under N. Y. Rev. Stat. (Birdseye, vol. 1, p. 120), the county judge may authorize the assignee to sell, compromise, or compound any claim or debt belonging to the estate of the debtor.

Under Ohio Rev. Stat. 1890, vol. 1, p. 1599, § 6350, "the assignee or trustee may, with the approval of the court, compromise or sell any claim or demand on behalf of the assignor, which is desperate or difficult of collection."

By Va. Code 1887, p. 655, § 2702, "it shall be held lawful for any fiduciary to compound and compromise any liability due to or from him: provided, that said compounding and compromise be ratified and approved by a court of equity of competent jurisdiction all parties in interest being before said court by proper process."

In this note, cases of assignments requiring the creditors to come in and release their claims, and cases involving the question of preferences, are not included.

I. T.

this action, and leaves the inference that he legally represented them in said compromise, which said finding, accompanied by the qualification that he was only employed to assist the defendant trustee in defending suits of attaching creditors, and for no other purpose, is misleading, and not predicated upon the facts. (4) For that the referee, in his sixth conclusion of law, finds that the defendants are entitled to judgment against the plaintiffs and their surety upon this prosecution bond for cost, whereas judgment should have been rendered in favor of the plaintiffs for the full amount of their claim, with interest and costs, as demanded in the complaint filed in said action."

The following is the opinion of the court on the exceptions: "This cause came on to be heard before me upon exceptions of plaintiffs to the report of referee. The principal exception argued before me was as to the alleged want of authority by Grainger to Mann to compromise the suits of Claffin *et al.* vs. S. Well, Trustee, etc. It appears that Grainger represented Mann's firm of Loucheimer, Mann & Co. in that suit, although they were not parties to the record. It appears that he was associated with Well's counsel, and the two agreed to a certain judgment. Inasmuch as Loucheimer, Mann & Co's counsel consented to the judgment, it is binding, whether Grainger had authority to agree to that judgment or not. Grainger's estate is admitted or found to be solvent, and the plaintiffs' remedy is against that, if they have any. It seems that Grainger had general authority to represent interest of plaintiffs in the suit. After considering the testimony, I see no reason to overrule any of the referee's findings of fact, and I see no error in any of his legal conclusions. The report is therefore confirmed, and the several exceptions overruled. The judgment is affirmed."

Messrs. Fuller & Fuller for appellants.
Mr. S. A. Woodard for appellees.

Burwell, J., delivered the opinion of the court:

The plaintiffs are creditors of a firm—Stern & Saks—which in 1879 made an assignment to the defendant Well to secure the distribution of their assets among their creditors, with certain preferences therein provided for, and in this action they require of him a settlement of his trusteeship. The facts found by the referee have been confirmed by his honor, and are thus conclusively determined. We find no error in the conclusions of law which were drawn from those facts. As is stated in the judgment, the contention of the plaintiffs is that the defendant trustee should be held liable to them for the value of a portion of the property assigned to him, which

had been attached by two of the creditors of Stern & Saks, to wit, H. B. Claffin & Co. and Armstrong, Cator & Co. It is found that the suits brought by these two creditors, in which warrants of attachment were issued and a portion of the assigned property was seized and sold, were compromised by the trustee; and, by the terms of the compromise so made, the attaching creditors were allowed to have about two thirds of the proceeds of the attached goods, while only one third was paid over to the trustee. The plaintiffs had a right to demand that the defendant trustee should be diligent and faithful in the management of the estate committed to his charge in part for their benefit. But his compromising the suits mentioned above was not at all incompatible with either good faith or due diligence. A trustee may compromise suits brought against him affecting the assets in his hands, and he will not be liable to the *cestuis que trustent*, provided he has acted with due care, and in good faith has done what, under the circumstances that surrounded him at the time, seemed best for the interest of those whom it was his duty to honestly serve. It may be conceded that an attorney has no authority to compromise his client's cause that has been committed to his charge without special authority so to do. That is well settled. A general employment as attorney does not include such authority. But that recognized principle does not fit the case before us. Here is a question of diligence and fidelity on the part of the defendant trustee. The charge against him is that he sacrificed the assets committed to him by the compromise of these suits,—that he allowed \$1,000 of the assets to be, by that compromise, diverted from the creditor to whom it belonged to the plaintiffs in those suits; and his reply to this charge is that he acted in this matter in good faith and with due diligence, and to prove this he asserts that his compromise was made by counsel whom he had employed to represent the interest of the creditors, and after consultation with an attorney in whose hands the appellants had placed their claim against Stern & Saks for collection. We repeat that the question here is not whether an attorney, under a general authority to conduct a suit, has authority to compromise his client's cause (which of course must be answered in the negative), but whether a trustee who, under advice of his own counsel, and after consultation with and by the consent of counsel employed by the creditor, compromises suits affecting the trust estate, is chargeable by that creditor with lack of good faith and proper diligence because he made that compromise. We think that this query must also be answered in the negative, and that there is no error in the judgment.

Affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

UNION PACIFIC R. CO., *Plff. in Err.*,
v.
Andrew S. ARTIST.

(60 Fed. Rep. 365.)

1. A release of claims against a railroad company for specified personal injuries will not include a claim for damages not then known to either party for negligent treatment of such injuries in a hospital maintained by such company, although the release was expressly made to cover all claims and demands whatsoever in law or in equity "by reason of any matter, cause, or thing whatever, whether the same arose upon contract or upon tort, from the beginning of the world to this day."

2. A railroad company is not liable for the malpractice of physicians, or the carelessness of attendants at a hospital maintained as a charitable enterprise by contributions of the company and small sums deducted monthly from the wages of its employes.

(February 12, 1894.)

ERROR to the Circuit Court of the United States for the District of Wyoming to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from the negligence of physicians and attendants in a hospital maintained by defendant, to which plaintiff was sent for treatment. *Reversed.*

Statement by *Sanborn, Circuit Judge:*

This writ of error is brought to reverse a judgment against the Union Pacific Railway Company for the malpractice of physicians and the negligence of attendants in a hospital maintained by it, for the benefit of its employes, at Denver, in the state of Colorado. The evidence tended to show these facts:

The Union Pacific Railway Company requires each of its employes to contribute from his wages twenty-five cents a month towards the support of a medical department. The railway company contributes the amount required in addition to the sum thus raised from the contributions of the employes to pay the expenses of this department. At the time the defendant in error was treated at the hospital, the company was contributing from \$2,000 to \$4,000 per month for this purpose. With this fund the railway company maintained several hospitals for the treatment of its employes when they were sick or injured, and employed physicians and attendants to care for them at the hospitals, and physicians and surgeons to attend them outside the hospitals, at important points on its lines of railroad. All the employes of the railroad company, except those injured in fights, those injured when drunk, those sick from chronic diseases, and those suffering from certain specific diseases, were

received and treated at these hospitals free of expense or charge, whenever they were sick or injured, regardless of the manner in which, or the time at which, the injury was received or the disease contracted, and whether the railway company had or had not any connection with the cause of it. The physicians attending the hospitals had the privilege of treating their private patients in them, and these patients were the only ones who were required to pay for their board and treatment; but the moneys received from this source were inconsiderable,—not more than \$300 per annum. Andrew S. Artist, the defendant in error, had his foot and leg injured on the 4th day of October, 1889, while he was in the employment of the company, and was treated at one of the hospitals maintained by it in the way we have stated from October 7, 1889, until January 7, 1890, when he was discharged as cured. In the course of his treatment the physicians at the hospital properly inserted a rubber drainage tube, but, through the carelessness of the physicians or of the attendants, a portion of it was left in the leg as the wound healed, and when he was discharged. It caused suffering and partial disability until it was removed by a surgical operation in April, 1892. January 13, 1890, while both parties were ignorant that this tube remained in the leg, Artist received from the company \$150, and signed a receipt or release, the material parts of which are as follows:

"The Union Pacific Railway Company,
"To Andrew S. Artist of Cheyenne, Wyoming.

"1890.

"January 13.

"For amount agreed upon in settlement of claim of Andrew S. Artist against the Union Pacific Railway Company on account of injuries received at McCammon, on Oregon Short Line, on October 4, 1889, while assisting in switching a burning baggage car from main track to side track, said Artist being an engineer in the employ of said company, but returning from leave of absence at time of accident, said injury consisting of deep, punctured, and lacerated wounds, as follows: On inner surface of right thigh. On inner surface of right foot. Comp. fracture of fourth toe of right foot. Contusion in region of spine. Contusion on left foot and face. (Settlement is in full of all claims and demands of whatever character.)

"Received, Pocatello, Idaho, January 13 1890, of the Union Pacific Railway Company, one hundred and fifty dollars in full payment of the above account. In consideration of the payment of said sum of money, I, Andrew S. Artist, of Cheyenne, in the county of Laramie, in the state of Wyoming, hereby remise, release, and forever discharge the said company, its operated, leased, controlled, and auxiliary lines and companies,

NOTE.—The case above presents a new application of the doctrine that denies the liability of a charitable institution for negligence of agents.
23 L. R. A.

For the authorities on that subject, see *note* to *Williamson v. Louisville Industrial School* (Ky.) *ante*, 200.

See also 27 L. R. A. 296, 840; 31 L. R. A. 224; 36 L. R. A. 442.

of and from all manner of actions, causes of action, suits, debts and sums of money, dues, claims and demands, whatsoever, in law or equity, which I have had or now have against said company by reason of any matter, cause, or thing whatever, whether the same arose upon contract or upon tort, from the beginning of the world to this day.

"In testimony whereof, I have hereunto set my hand this thirteenth day of January, 1890."

Counsel for the company requested the court to charge the jury that this release was a complete defense to the action, and the refusal to give that request is the first error assigned. The same counsel requested the court to charge the jury as follows: "If you believe from the evidence that the hospital was maintained by the defendant, not for the purpose of deriving profit therefrom, but as a charitable enterprise, so far as defendant's employes were received therein, then the only obligation of the defendant, in receiving its employes at said hospital, was to use ordinary care in selecting its physicians and attendants therein; and, since no negligence in the employment of physicians is here charged, you will, in case you find the hospital to have been maintained as above stated, find for the defendant." The court refused to give this instruction, and charged the jury that the hospital was not a charitable institution, in any sense that those words are used in the law, and that the company was bound to use reasonable care to see that the treatment given to patients in this hospital was such as was ordinarily given in hospitals of this kind to such patients; and this ruling is the second error complained of.

Argued before Sanborn, *Circuit Judge*, and Thayer, *District Judge*.

Messrs. John M. Thurston, John W. Lacey, and Willis Van Devanter, for plaintiff in error:

If the parties intended to release claims of every character, known or unknown, they had the power so to contract, and if they have manifested such intention by the words used by them, the release must have that effect.

1 Greenl. Ev. § 277.

Where general words are used in a release, in the absence of intrinsic evidence to the contrary, the presumption is that they were intended to cover all that is included within their meaning; and that meaning will be construed most strongly against the releasor.

Jackson v. Stackhouse, 1 Cow. 123, 13 Am. Dec. 514.

Contracting parties, choosing to do so, may, in the absence of fraud, agree with one another to release one the other from every possible claim, known or unknown.

Duff v. Hutchinson, 57 Hun, 152.

The contract between a charitable hospital and its patients, if any contract is to be inferred from the relation of the parties, can be only on the part of the hospital that it shall exercise reasonable diligence and care in the selection of its agents—the surgeons, internes, and attendants, and for the negligence of such agents where their selection has been made

with due and reasonable care there is no liability on the part of the hospital.

McDonald v. Massachusetts Gen. Hospital, 120 Mass. 432, 21 Am. Rep. 529; *Van Tassel v. Manhattan Eye & Ear Hospital*, 39 N.Y. S. R. 781; *Boyd v. Insurance Patrol of Philadelphia*, 113 Pa. 269; *Fire Ins. Patrol of Philadelphia v. Boyd*, 1 L. R. A. 417, 120 Pa. 624; *Richardson v. Carbon Hill Coal Co.* 20 L. R. A. 335, 6 Wash. 52; *Glavin v. Rhode Island Hospital*, 12 R. I. 411, 34 Am. Rep. 675; *Secord v. St. Paul, M. & M. R.Co.* 18 Fed. Rep. 221; *Laudheim v. De Koninglyke Nederlandsche Stoomboot Maatschappij*, 107 N. Y. 238.

Mr. Frank H. Clark for defendant in error.

Sanborn, Circuit Judge, delivered the opinion of the court:

General words, alone, in a release, are taken most strongly against the releasor. But when there is a particular recital followed by general words the latter are qualified by the particular recital. *Jackson v. Stackhouse*, 1 Cow. 123, 13 Am. Dec. 514, and cases cited; 2 Parsons, Cont. 633, note. The court below properly applied this rule to the release in this case. The general words in the last half of it are limited by the very specific recital of the injuries that the \$150 was to be in settlement of, which is contained in the first half of the release. It was the claims for these injuries, and for these only, that this release discharged the company from. The injury now complained of was then unknown to both parties, and their settlement was without reference to it. A disregard of the rule would work manifest injustice, and impose upon the defendant in error a release he did not intend to make. There was no error in this ruling.

Was the company liable for the malpractice of the physicians, or the carelessness of the attendants, at the hospital, if that hospital was maintained as a charitable enterprise, and not for the purpose of deriving profit from it? If one contracts to treat a patient in a hospital—or out of it, for that matter—for any disease or injury, he undoubtedly becomes liable for any injury suffered by the patient through the carelessness of the physicians or attendants he employs to carry out his contract. If one undertakes to treat such a patient for the purpose of making profit thereby, the law implies the contract to treat him carefully and skillfully, and holds him liable for the carelessness of the physicians and attendants he furnishes. But this doctrine of *respondere superior* has no just application where one voluntarily aids in establishing or maintaining a hospital without expectation of pecuniary profit. If one, out of charity, with no purpose of making profit, sends a physician to a sick neighbor or to an injured servant, or furnishes him with hospital accommodations and medical attendance, he is not liable for the carelessness of the physicians or of the attendants. The doctrine of *respondere superior* no longer applies, because, by fair implication, he simply undertakes to exercise ordinary care in the selection of physicians and attendants who are reason-

ably competent and skillful, and does not agree to become personally responsible for their negligence or mistakes. The same rule applies to corporations and to individuals, whether they are engaged in dispensing their own charities, or in dispensing the charitable gifts of others intrusted to them to administer. One reason why corporations and individuals conducting hospitals supported by charitable endowments and contributions, and operated to heal the sick and injured, but not for profit, are not liable for the negligence of their employes, is, that the moneys in their hands constitute a trust fund devoted to a charitable purpose, and the courts refuse to permit it to be diverted to the very different purpose of paying for the malpractice of their physicians or the negligence of their attendants. Moreover, the corporations or individuals that administer such trusts must, after all, leave the treatment of the patients to the superior knowledge and skill of the physicians. They cannot direct the latter, as the master may ordinarily direct the servant, what to do, and how to do it. If they did do so, the physicians would be bound to exercise their own superior skill and better judgment, and to disobey their employers, if, in their opinion, the welfare of the patients required it. And, finally, the patient is not required to accept the proffered accommodations and attendance. They are but freely offered to him. He may refuse to accept them, and seek other physicians and other accommodations. It would be a hard rule, indeed,—a rule calculated to repress the charitable instincts of men,—that would compel those who have freely furnished such accommodations and services to pay for the negligence or mistakes of physicians or attendants that they had selected with reasonable care. No such rule has ever prevailed in this country. The rule is that those who furnish hospital accommodations and medical attendance, not for the purpose of making profit thereby, but out of charity, or in the course of the administration of a charitable enterprise, are not liable for the malpractice of the physicians or the negligence of the attendants they employ, but are responsible only for their own want of ordinary care in selecting them. *McDonald v. Massachusetts Gen. Hospital*, 120 Mass. 432, 21 Am. Rep. 529; *Fire Ins. Patrol of Philadelphia v. Boyd*, 120 Pa. 624, 647, 1 L. R. A. 417; *Van Tassel v. Manhattan Eye & Ear Hospital*, 15 N. Y. Supp. 620, and note; *Glavin v. Rhode Island Hospital*, 12 R. I. 411, 34 Am. Rep. 675; *Laubheim v. De Koninglyke Neder Landsche Schoonboot Maatschappij*, 107 N. Y. 228; *Secord v. St. Paul, M. & M. R. Co.* 18 Fed. Rep. 221; *Richardson v. Carbon Hill Coal Co.* 6 Wash. 52, 20 L. R. A. 338.

Under the evidence in this case, the medical department and hospitals of the Union Pacific Railway Company fall fairly within this rule, and the reasons that support the rule apply to this case with all their force. The test which determines whether such an enterprise is charitable or otherwise is its purpose. If its purpose is to make profit, it is not a charitable enterprise. If it is to heal the sick and relieve the suffering, without

hope or purpose of getting gain from its operation, it is charitable. Tried by this test, the hospitals and medical department of this company are a great public charity. They are supported by the voluntary contributions of this great corporation and of its employes, without the purpose to profit thereby. We say by their "voluntary contributions" not unadvisedly. We have not failed to notice that the defendant in error testified that the contribution of twenty-five cents a month made by each employé was a compulsory assessment, and that the company took it out of the pay of such employé. But how it could be compulsory does not appear. If it was a part of the pay of the employé, the company could not lawfully take it out without his consent. If he did not consent, then he did not contribute, and the company still owes him the amount of this assessment. If he did consent, he voluntarily contributed the amount of his assessment. Whatever may be said of the contributions of the employé, there is no question whatever but that the gift of \$2,000 to \$4,000 per month made by the company was purely voluntary and charitable. These contributions of twenty-five cents per month from each employé, and of from \$2,000 to \$4,000 per month from the company, constituted a trust fund devoted to the purpose of furnishing hospital accommodation, physicians, and surgeons for the relief of the sick and injured employes without charge or expense to them. For this purpose this fund was intrusted to this company to administer. There is no evidence that there ever was any purpose or intention on the part of the company of making any profit through the operation of this hospital or the supplying of these physicians. The sole purpose that this record discloses was to relieve these employes from sickness and suffering.

In *Jackson v. Phillips*, 14 Allen, 556. Mr. Justice Gray defined a "charity" as follows: "A charity, in the legal sense, may be more fully defined as a gift to be applied, consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government."

The gifts of this corporation and its employes are clearly within this definition. There is no doubt that any one of these employes could compel the application of this fund to the purpose for which it was collected, in any court of equity having jurisdiction. There was no express contract made by this company to treat this defendant in error in the hospital, for his injuries. It is true that he made his contribution to the fund to maintain this charitable enterprise, but he paid nothing further for his hospital accommodations or his treatment. He neither contributed nor paid any more than he would have contributed if he had never been treated at all. The company, as the trustee and administrator of this charity, offered him the

hospital accommodations and the physicians in its employment, and he accepted them. From these facts no contract to treat him with ordinary skill and care can be implied, because, in all that it did in this behalf, this company was conducting a charitable enterprise. The company was not organized for the purpose of furnishing and operating hospitals and supplying medical attendance for gain, and such a business would be clearly beyond its chartered powers. It was chartered to construct and operate a railroad and telegraph line. It was under no legal obligation to give thousands of dollars per annum to furnish hospitals and physicians for its employes, and its appropriation of this money to this purpose was a gift,—a charity. If it be urged that this gift may have been prompted by an ulterior and selfish motive,—that the company may have thought that the operation of its medical department would protect it from excessive claims for injuries resulting to its servants—the answer is that the true test of a public charity is not the motive of the donor, but the purpose to which the money given is to be applied. If argument, authority, and illustration in support of this proposition are wanted, they will be found in the learned and exhaustive opinion of *Mr. Justice Paxson in Fire Ins. Patrol of Philadelphia v. Boyd*, 120 Pa. 642, 648, 1 L. R. A. 417. If a dozen of the employes of this company had contributed a fund, out of charity, to furnish one of their number, who was injured, with hospital accommodations

and medical attendance, they certainly would not have been liable to him for the malpractice of the physicians or the negligence of the attendants they employed. If they had intrusted such a fund to a third person to administer, who, out of charity, contributed to it more largely, and he furnished the accommodations and attendance by the use of this fund, it goes without saying that he would not be liable for the negligence of the physicians or attendants he employed. That the party to whom this charitable gift is intrusted, the party that contributes most liberally to it, and the party that cannot by any possibility derive any direct profit or benefit from it, since it is not subject to bodily ailments and injuries, is a corporation, cannot extend the limits of legal liability here.

The result is that the doctrine of *respondent superior* has no application to this case. The only contract the law implies here is the agreement on the part of the company to use reasonable care to select and obtain skillful physicians and careful attendants, and if the company performed that contract it was responsible no further. In other words, it was responsible for the discharge of its own personal duty, and not for the performance of the duties of its employes.

In our opinion the instruction on this subject requested by the counsel for the company should have been given, and the judgment is accordingly reversed, with costs, and the case remanded, with instructions to grant a new trial.

NEW YORK COURT OF APPEALS.

John E. PHILLIPS, Receiver of the National Bank of Sumter, *Appt.*,

v.
MERCANTILE NATIONAL BANK of
New York, *Respt.*

(140 N. Y. 556.)

1. Checks drawn by the cashier of a bank in its name upon another bank, in which it has a deposit, for the purpose of speculating in stocks without the knowledge of the officers of the bank, the names of the payees being actual customers of the bank but such customers having no knowledge of the checks or connection with the transaction, are subject to the same rule as if fictitious names were selected and used and the payment by the drawee bank of such checks upon indorsements made by such cashier is good as against the bank of which he is an officer.

2. A bank is so far concluded by the acts of its cashier authorized to draw a check upon the bank's funds in drawing checks payable to fictitious payees or to customers whose names are used for fictitious purposes and indorsed by him upon the checks as to be estopped from denying the validity of such acts as against the bank upon which the checks are drawn and which has paid them in good faith.

(January 16, 1894.)

APPEAL by plaintiff from a judgment of the General Term of the Supreme Court, First Department, affirming a judgment of the New York Circuit in favor of defendant in an action brought to recover an alleged balance of the deposit account of the insolvent bank with defendant. *Affirmed.*

The facts are stated in the opinion.

Mr. George W. Wingate, for appellant:

The indorsement by Bartlett of the name of the payees upon the checks which he had drawn as cashier to the order of Brown & Stubbs was forgery.

A check is a complete instrument without the indorsement. The indorsement is not part of the check, but is a distinct contract.

Miller v. People, 52 N. Y. 805, 11 Am. Rep. 706; *Com. v. Adams*, 7 Met. 51.

The indorsement is an act presumed in law to be done after the instrument is completed.

Com. v. Ward, 2 Mass. 397; 2 Russell, Crimes, 480.

The fact that Bartlett in making these indorsements skillfully imitated the signatures of two well known dealers of the bank, with the express intention of delaying suspicion and preventing any inquiry being made into the

NOTE.—As to the nature of a cashier's check, see note to *Exchange Bank of Wheeling v. Sutton Bank (Md.) ante*, 171.

The facts of the above case seem to be novel.
23 L. R. A.

For a case somewhat similar, see *Shipman v. Bank of the State of New York (N. Y.)* 12 L. R. A. 791, with note.

entries which he was obliged to make in the bank books, shows a deliberate attempt to commit forgery, in the ordinary sense in which the word is used, i. e. to imitate the signature of a living person to cheat somebody.

Shipman v. Bank of the State of New York, 12 L. R. A. 791, 126 N. Y. 818; 3 Chitty, Crim. L. 1029; 8 Am. & Eng. Encyclop. Law, 455; 2 Bishop, Crim. L. §§ 432, 495; 2 Archbold, Crim. Pr. & Pl. 552; *Harris v. People*, 9 Barb. 684; *People v. Harrison*, 8 Barb. 560; *People v. Shall*, 9 Cow. 778; *People v. Cady*, 6 Hill, 490; *King v. Pooler*, 2 Leach, C. C. 909; 2 Russell, Crimes, 327; *Rea v. Taylor*, 2 East, P. C. 960; 2 Bishop, Crim. L. §§ 432, 495; *Rea v. Whitley*, Russ. & R. C. C. 90; Bayley, Bills & Notes, 434, 436; *Rea v. Francis*, Russ. & R. C. C. 209; *Rea v. Peacock*, Id. 278; *People v. Peacock*, 6 Cow. 72; *Rea v. Mazagora*, Russ. & R. C. C. 291; *Rea v. Sheppard*, Id. 167; *People v. Rathbun*, 21 Wend. 509; *Com. v. Costello*, 120 Mass. 871; 2 East, P. C. 941, and cases; *Mead v. Young*, 4 T. R. 28; *Reg. v. Rogers*, 8 Car. & P. 629; *Com. v. Foster*, 114 Mass. 811, 19 Am. Rep. 353; *People v. Stearns*, 21 Wend. 409; *Reg. v. Geach*, 9 Car. & P. 499; *Brown v. People*, 8 Hun, 562; *Com. v. Henry*, 118 Mass. 460; *Com. v. Tenney*, 97 Mass. 59; *Reg. v. Beard*, 8 Car. & P. 143; *Reg. v. Todd*, 1 Cox, C. C. 57; *United States v. Moses*, 4 Wash. C. C. 726; *Arnold v. Coit*, 3 Gill & J. 220, 22 Am. Dec. 302; *Com. v. Adams*, 7 Met. 50; *United States v. Shellmire*, Baldw. C. C. 870; *People v. Fitch*, 1 Wend. 199, 19 Am. Dec. 477.

If a person knowingly pays a forgery away as a good bill, it is a consequence and almost a consequence of law that he must intend to defraud the person to whom he pays the bill and also the person whose name is used.

Reg. v. Clois, 8 Car. & P. 586; *Reg. v. Wardell*, 8 Post. & F. 82.

The New York bank which paid these checks has a perfect cause of action against the New York firms as indorsees, and will compel them to refund if the plaintiff herein recovers.

That they are liable is well settled.

Canal Bank v. Bank of Albany, 1 Hill, 287; *Kingsdon Bank v. Ellings*, 40 N. Y. 400, 100 Am. Dec. 516; *Bank of Commerce v. Union Bank*, 3 N. Y. 230; *New York Nat. Bank of Commerce v. National Mechanics Bkg. Assn. of N. Y.* 55 N. Y. 211, 14 Am. Rep. 283.

Every indorsement of a note or bill has two distinct effects. It is a present transfer and assignment of the paper to the indorsee and an executory contract by which the indorser agrees upon certain conditions to pay the amount of the note or bill himself.

Chitty, Bills & Notes, 254; *Babcock v. Bemau*, 11 N. Y. 200.

Bartlett's act was not within his implied authority.

Bank of Genesee v. Patchin Bank, 13 N. Y. 809, 19 N. Y. 812; *Casco Nat. Bank of Portland v. Clark*, 189 N. Y. 807; *Robinson v. Chemical Nat. Bank*, 86 N. Y. 404; *Holtzinger v. National Corn Echk. Bank*, 6 Abb. Pr. N. S. 292; *Thomson v. Bank of British North America*, 82 N. Y. 1; *Bank of the United States v. Dunn*, 81 U. S. 6 Pet. 51, 8 L. ed. 816; *United States v. City Bank of Columbus*, 63 25 L. R. A.

U. S. 21 How. 356, 16 L. ed. 130; *Martin v. Webb*, 110 U. S. 7, 28 L. ed. 49; *West St. Louis Sav. Bank v. Shawnee County Bank*, 95 U. S. 557, 24 L. ed. 490.

The authority given to a cashier to draw checks in the name of the bank clearly does not authorize him to afterwards commit forgery by indorsing the payee's name.

Coggill v. American Echk. Bank, 1 N. Y. 119, 49 Am. Dec. 810.

To charge a bank upon such a draft it would be necessary to show that an act so unprecedented was specifically authorized by the directors of the bank, as was held by this court to be required where a president of a bank certified his own check upon it.

Clafin v. Farmers & C. Bank of Long Island, 25 N. Y. 298.

It is not in the power of the agent by assuming this extraordinary authority to create any estoppel against the bank.

Bank of Genesee v. Patchin Bank, *supra*.

Prima facie the act was unlawful, and unless actually authorized the purchaser will be deemed to have taken the obligations of the bank with knowledge of the rights of the corporation.

Wilson v. Metropolitan Elev. R. Co. 120 N. Y. 145; *Clafin v. Farmers & C. Bank of Long Island*, *supra*; *United States v. Bank of Columbus*, 63 U. S. 21 How. 354, 16 L. ed. 133.

The Corn Exchange Bank and the defendant took the drafts upon the faith of the indorsement of Cummings & Russell and never knew Bartlett had done anything but sign the drafts as cashier.

Shipman v. Bank of the State of New York, 12 L. R. A. 791, 126 N. Y. 818.

The court below erred in confounding an act by an agent within the scope of his authority and publicly exercised by him as its agent, with a personal, unofficial act designed to defraud his principal, and by which no estoppel is created against the latter.

Frank v. Chemical Nat. Bank of New York, 84 N. Y. 209, 98 Am. Rep. 501; *Weisser v. Denison*, 10 N. Y. 69, 61 Am. Dec. 731; *Welsh v. German American Bank*, 78 N. Y. 424, 29 Am. Rep. 175.

Where the agent's act is itself a fraud on the principal, the latter will not be bound by the knowledge of the former.

Re European Bank, L. R. 5 Ch. App. 858; *First Nat. Bank of Hightstown v. Christopher*, 40 N. J. L. 485, 29 Am. Rep. 262; *De Kay v. Hackensack Water Co.* 88 N. J. Eq. 158; *Seneca County Bank v. Nease*, 5 Denio, 337; *Casco Nat. Bank of Portland v. Clark*, 139 N. Y. 818.

When an agent of a corporation himself contracts with the company, or otherwise deals with it in a transaction in which his interests are opposed to the interests of the company, his knowledge will not be deemed the knowledge of the company, as to matters connected with that transaction, for the agent could not represent the company in such transaction.

La Farge F. Ins. Co. v. Bell, 23 Barb. 54; *Washington Bank v. Lewis*, 22 Pick. 24; *Commercial Bank v. Cunningham*, 24 Pick. 270, 55 Am. Dec. 822; *West Boston Sav. Bank v.*

Thompson, 124 Mass. 506; *Platt v. Birmingham Axle Co.* 41 Conn. 255; *National Security Bank v. Cushman*, 121 Mass. 490.

There is no difference in the rule in question between the case of a principal who is an individual and one that is a corporation.

New York & N. H. R. Co. v. Schuyler, 34 N. Y. 35; *Hortsmen v. Henshaw*, 52 U. S. 11 How. 177, 13 L. ed. 658.

The defendant bank can only protect itself by showing that it has paid money in pursuance of instructions of the Sumter Bank.

Leather Mfrs. Nat. Bank v. Merchants Nat. Bank, 128 U. S. 26, 32 L. ed. 842; *Morgan v. Bank of the State of New York*, 11 N. Y. 404; *Rouse v. Putnam*, 181 Mass. 281.

The only way that these payees can be held to be fictitious persons is by establishing such an estoppel against the bank as will in equity prevent it from asserting the contrary.

Shipman v. Bank of the State of New York, 12 L. R. A. 791, 126 N. Y. 327.

An estoppel is defined by this court in *People v. Bank of North America*, 75 N. Y. 547, as only arising when a party either by his declarations or conduct has induced another person to act in a particular manner.

So far as these forgeries are concerned the case is the same as if Bartlett had indorsed paper sent to the bank for the account of Brown or Stubbs, and does not differ from any other case of forgery by a trusted employe, and the principles involved are identical in all respects with those considered adversely to defendant in the cases of *Shipman v. Bank of the State of New York*, 12 L. R. A. 791, 126 N. Y. 327, cases cited at p. 327; *Frank v. Chemical Nat. Bank of New York*, 84 N. Y. 207, 38 Am. Rep. 501; *Welsh v. German American Bank*, 73 N. Y. 424, 29 Am. Rep. 175; *Weisser v. Denison*, 10 N. Y. 68, 41 Am. Dec. 731.

A "fictitious person" is a non-existent person. The payees of these checks were not, either in law or in fact, fictitious persons, because the proof was that persons of those names did exist in the town of Sumter who were customers of the bank and that no other persons of these names did exist in the town or the county. The presumption of law and fact from the identity of names is that these were the persons intended as payees of the checks.

Hatcher v. Rocheleau, 18 N. Y. 86; *Trebilcock v. McAlpine*, 46 Hun, 469; *Spotten v. Keeler*, 22 Abb. N. C. 105.

The statute says that "notes made payable to the order of a fictitious person shall, if negotiated by the maker, have the same effect, and be of the same validity as against the maker and all persons having knowledge of the facts, as if payable to bearer."

Section 5, title II, chap. 9, part 2, 2499; 4 Rev. Stat. 8th ed. Throop, p. 1; Rev. Laws, 161, 2499.

In the cases under the statute no indorsement is required.

Irving Nat. Bank v. Alley, 79 N. Y. 538.

The statute was made for the purpose of obviating a difficulty in the way of the holder in making title and suing on a note which had not been indorsed by the person to whose order it was made payable.

Plets v. Johnson, 3 Hill, 112; *Maniort v. Roberts*, 4 E. D. Smith, 83.

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The whole purpose of the act was that when the maker has put the bill in circulation and obtained the money on it the law holds him to be estopped from denying that the person whose name was indorsed is an actual person and his indorsement genuine, which is consistent with natural justice.

In almost all the cases the persons were non-existing as in—

Minet v. Gibson, 8 T. R. 481; *Gibson v. Minet*, 1 H. Bl. 697; *Collis v. Emmet*, 1 H. Bl. 818; *Tatlock v. Harris*, 3 T. R. 174; *Hennett v. Farnell*, 1 Campb. 181; *Stevens v. Strang*, 3 Sandf. 188; *Cooper v. Meyer*, 10 Barn. & C. 487; *Beeman v. Duck*, 11 Mees. & W. 251; *Rogers v. Ware*, 2 Neb. 29; *Armstrong v. Pomeroy Nat. Bank*, 6 L. R. A. 625, 46 Ohio St. 512.

When the New York bank disobeyed the mandate of the drawer of these checks and did not pay to the order of Stubbs & Brown as it was instructed to do, the legal contemplation of its act, so far as its depositor was involved, was as if no payment at all had been made and the payment made was from the New York bank's own money.

Crawford v. West Side Bank, 100 N. Y. 53, 53 Am. Rep. 152; *First Nat. Bank v. Whitman*, 94 U. S. 847, 24 L. ed. 231; *Bank of British North America v. Merchants Nat. Bank*, 91 N. Y. 106; *Corn Exch. Bank v. Nassau Bank*, 91 N. Y. 80, 43 Am. Rep. 655.

As between a bank and its depositors, it is its business to see to it that their money shall not be expended except as they direct.

Corn Exch. Bank v. Nassau Bank, 91 N. Y. 81, 43 Am. Rep. 655; *Weisser v. Denison*, 10 N. Y. 68, 41 Am. Dec. 731.

Mr. John M. Bowers, with *Mr. Chas. A. Davison*, for respondent:

The act of writing the names of the payees on the back of the check by the drawer was not forgery.

Forgery is the attempted imitation of another's act, by means of which it is intended to cheat or defraud. It must be without authority; it must be an imitation, and it must be for the purpose of cheating.

Mann v. People, 15 Hun, 155.

Forgery is defined, "The fraudulent making or alteration of a writing to the prejudice of another man's right."

4 Bl. Com. p. 247.

The fraud was the drawing of drafts in favor of Latham, Alexander & Co. and the other parties in New York to whom the cashier sent them. He did commit larceny, but did not commit forgery.

Com. v. Baldwin, 11 Gray, 197, 71 Am. Dec. 703; *Rex v. Aickles*, 1 Leach, C. C. 438; *Reg. v. Martin*, L. R. 1 C. C. 214.

The parties named as payees of the checks having no interest in the checks and being strangers to the transaction, and it not being intended that they should become parties to the checks, they were, therefore, in law payable to bearer.

Dan. Neg. Inst. p. 44; *Plets v. Johnson*, 3 Hill, 112; *Coggill v. American Exch. Bank*, 1 N. Y. 113, 49 Am. Dec. 810.

As between the defendant and the National Bank of Sumter, the act of the cashier was the act of the National Bank of Sumter.

Bank of Genesee v. Patchin Bank, 19 N. Y.

312; *Farmers & M Bank of Kent County v. Butchers & D. Bank*, 16 N. Y. 125, 49 Am. Dec. 678; *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 80; *Oddis v. National City Bank of New York*, 45 N. Y. 785, 6 Am. Rep. 160; *Continental Nat. Bank v. National Bank of the Commonwealth*, 50 N. Y. 575; *Hortsmann v. Henshaw*, 52 U. S. 11 How. 177, 18 L. ed. 653; *Fifth Ave. Bank of New York v. Forty-Second Street & Grand Street Ferry R. Co.* 44 N. Y. S. R. 879, affirmed, 19 L. R. A. 331, 187 N. Y. 231.

The account between the Sumter Bank and the defendant, having been from time to time stated and settled between the two banks in the course of which the checks in question were returned to the Sumter bank and retained by it, cannot be opened except for fraud or error.

Bank of United States v. Bank of State of Georgia, 28 U. S. 10 Wheat. 333, 6 L. ed. 334; *Leroy v. Bank of the United States*, 4 U. S. 4 Dall. 234, 1 L. ed. 814; *Price v. Neale*, 3 Burr. 1355; *Weisser v. Denison*, 10 N. Y. 68, 41 Am. Dec. 731; *Welsh v. German American Bank*, 73 N. Y. 424, 29 Am. Rep. 175; *Frank v. Chemical Nat. Bank of New York*, 84 N. Y. 209, 38 Am. Rep. 501; *Leather Mfrs. Nat. Bank v. Morgan*, 117 U. S. 116, 29 L. ed. 312.

The directors were guilty of negligence in the management of the bank by means whereof the cashier was enabled to perpetrate the frauds in question.

Morse, Banks & Banking, p. 77; *Outting v. Marlor*, 78 N. Y. 480; *Preston v. Prather*, 137 U. S. 608, 34 L. ed. 739; *Griswold v. Haven*, 23 N. Y. 599, 53 Am. Dec. 380; *Ouderkerk v. Central Nat. Bank of Troy*, 119 N. Y. 263.

Gray, J., delivered the opinion of the court:

The plaintiff is the receiver of the National Bank of Sumter, in South Carolina, and through this action seeks to recover a balance alleged to be due on a deposit account with the defendant bank. The question presented by the record is whether certain twelve checks, drawn by the cashier of the Sumter bank, which were paid by the defendant bank, could properly be debited in account to the Sumter bank. Bartlett, its cashier, had drawn them upon the defendant for various amounts, some to the order of A. S. Brown, and some to the order of C. E. Stubbs. In the check book he would enter sometimes the real amount of the checks, and sometimes an amount much less than the checks actually were drawn for. The names of these payees were those of persons who actually resided in Sumter, and were dealers with the bank, but they knew nothing of these checks, and had no connection whatever with the transactions of the cashier in issuing these checks. Bartlett, after having drawn the checks, indorsed them in the name of the payee, making them payable to the order of some firm of stock brokers in New York, who collected them from the defendant. By subsequent manipulations of the books in his bank, Bartlett was able to prevent a discovery of his dishonest acts until after he had absconded, and the insolvency of the bank was disclosed. The learned trial judge, in dis-

missing the complaint, discussed the question of what the act of the cashier of the Sumter bank amounted to in law. In his judgment, the cashier's indorsement of the checks in the name of the payee which he had written in the body of the check was not, in a legal sense, forgery. He said that act did not defraud the persons whose names were used as payees, nor the bank of New York, nor his own bank, but that the fraud consisted in the unlawful drawing of the check for his own purposes, with the intent to convert his own bank's funds. Regarding the transaction in that light, and the indorsement as a part of one continuous act of preparing a check so that the New York bank should pay the funds drawn upon to the indorsees, he very properly reached the conclusion that, so far as the New York bank was concerned, the cashier's intent was the intent of his bank, and hence the payment of the checks was conclusive upon it. At the general term, the opinion of the court again carefully reviews the legal questions, and sustains the judgment below. Upon the question of the effect upon the transaction of the use by Bartlett of names, as payees, of persons who were customers of the bank, it is said in the opinion that that fact did not prevent the application of the principle which would govern if fictitious names had been selected and used for payees. They held, in substance, that the bank, through its authorized officer, had put in circulation paper with knowledge, chargeable to it, that the names of the payees did not represent real persons, and with the intention to indorse thereon the names of the payees, who, for all intents and purposes, were fictitious payees and whose names were adopted and resorted to as a device to avoid suspicion. We think the judgments below were right. Whether indorsing the check in the name of the payee therein was a forgery in the legal sense or not is not the important question. In a general sense, of course, the cashier did forge the payee's name, but that fact did not affect the title or rights of the defendant. *Coggill v. American Ech. Bank*, 1 N. Y. 113, 49 Am. Dec. 810. In the case cited, a bill was drawn upon the plaintiff to the order of one Truman Billings, and was discounted at a bank. The drawer had indorsed it with the name of the payee, Truman Billings, a person who in fact had no interest in the bill. It was held that the defendant in the case, who had accepted and paid the bill, held it by a good title. Bronson, J., said: "As the payee had no interest, and it was not intended that he should ever become a party to the transaction, he may be regarded, in relation to this matter, as a nonentity; and it is fully settled that, when a man draws and puts into circulation a bill which is payable to a fictitious person, the holder may declare and recover upon it as a bill payable to bearer. In legal effect, though not in form, the bill is payable to bearer."

The case of *Shipman v. Bank of State of New York*, 126 N. Y. 818, 13 L. R. A. 791, which was recently before us, did not decide any question inconsistently with what the courts below have decided. There it had been found that the checks were signed by the firm in the belief that the names of the payee repre-

sented real persons entitled to receive the amounts of the checks, and with the intention that they should be delivered to real payees, and should not go into circulation otherwise than through a delivery to, and an indorsement by, the payees named. Bedell was their clerk, whose employment did not comprehend the drawing or indorsing of checks or drafts; and in indorsing upon the checks the names of the payees he committed the crime of forgery, because he was without authority in that respect, and did so with the intention to deceive his employers, the makers, and to put their checks in circulation for his account. That was a case wholly other than was made out here. It was stated in the *Shipman Case* that the maker's intention is the controlling consideration which determines the character of the paper, and that the statutory rule which gives to paper drawn payable to the order of a fictitious person, and negotiated by the maker, the same validity as paper payable to bearer, applies only when such paper is put into circulation by the maker with knowledge that the name of the payee does not represent a real person. The principle of that decision is quite applicable to the case at bar. Though Bartlett selected, for the execution of his dishonest purposes, the names of persons who were dealers with his bank, it was, in legal effect, as though he had selected any names at random. The difference is that, by the methods resorted to, he averted suspicion on the part of the directors or other officers of his bank. The names he used were, for his purposes, fictitious, because he never intended that the paper should reach the persons whose names were upon it. The transaction was one solely for the fraudulent purpose of appropriating his bank's moneys by a trick which his position enabled him to perform. Concededly, if the names of the payees were of fictitious persons, the Sumter bank would have had no claim upon the defendant. How, then, can the transaction be said to assume a different aspect because the names adopted were of known persons? That the intention was to treat them as being of fictitious persons is manifest. As cashier, invested with the authority to draw checks upon the bank's accounts with its correspondents, instead of drawing them directly to the order of the parties who he intended should get the moneys, he drew them to the order of persons who had no interest in them, and thereupon wrote their names under a direction to pay to

the real parties, who were intended to be the recipients of the funds drawn upon. If the checks had been drawn directly to the order of the real parties, the defendant would undoubtedly have been protected in paying them. As it was, the payees were fictitious persons in the eye of the law, and the only real parties were the firms in New York, to whom the cashier sent them in such form as that they could draw the moneys upon them. The fictitiousness of the maker's direction to pay does not depend upon the identification of the name of the payee with some existent person, but upon the intention underlying the act of the maker in inserting the name. Where, as in this case, the intent of the act was, by the use of the names of some known persons, to throw directors and officers off their guard, such a use of names was merely an instrumentality or a means which the cashier adopted, in the execution of his purpose to defraud the bank, in an apparently legitimate exercise of his authority. The cashier, through his office and the power confined to him for exercise, was enabled to perpetrate a fraud upon his bank which a greater vigilance of its officers might have earlier discovered, if it might not have prevented. If his position and the confidence reposed in him were such as to enable him to escape detection for the while, then the consequence of his fraudulent acts should fall upon the bank whose directors, by their misplaced confidence and gift of powers, made them possible, and not upon others who, themselves acting innocently and in good faith, were warranted in believing the transaction to have been one coming within the cashier's powers. It may be quite true that the cashier was not the agent of the bank to commit a forgery, or any other fraud of such a nature; but he was authorized to draw or check upon the bank's funds. If he abused his authority, and robbed his bank, it must suffer the loss. The distinction between such a case and the many other cases which the plaintiff's counsel cites from is in the fact that it was within the scope of this cashier's powers to bind the bank by his checks. In transmitting them made out and indorsed as they were, the bank was so far concluded by his acts as to be estopped from now denying their validity.

For the reasons given, *the judgment should be affirmed*, with costs.

All concur, except Bartlett, J., not sitting.

INDIANA SUPREME COURT.

Newton JACKSON and Wife, *Appts.*,

v.

Howard S. STANFIELD *et al.*

(.....Ind.....)

1. A combination of retail lumber deal-

NOTE.—As to conspiracies or combinations of employers and employes, see *Cote v. Murphy* (Pa.) 23 L. R. A. 135, and cases referred to in foot note thereto.

For liability on account of inducing another to break a contract with a third person, see *Boysen v. Thorn* (Cal.) 21 L. R. A. 233, and *note*.

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ers to destroy the business of brokers and commission dealers who do not keep a lumber yard with an assorted stock of lumber, by coercing wholesalers to refuse to make sales to such brokers or lose the business of the members of such combination is unlawful and renders a member who procures action by the

For a boycott by an association of dealers very similar to that involved in the above case, but which was held not to be actionable, and the decision as to which is disapproved by the Indiana court, see *Bohn Mfg. Co. v. Northwestern Lumbermen's Association* (Minn.) 21 L. R. A. 337.

, See also 23 L. R. A. 135; 37 L. R. A. 455; 38 L. R. A. 194, 505; 43 L. R. A. 797; 48 L. R. A. 90.

association to the injury of brokers liable to the latter for damages.

2. A policy calculated to destroy or injure the business of another by threats or intimidation is unlawful and creates a liability for damages to the person injured.
3. The damages for loss of business caused by an illegal combination of other persons may include the profits which would have been made except for the unlawful interference.
4. Expenses of travel to another place to purchase lumber are too remote to be included in damages for unlawfully preventing a person from procuring lumber from accustomed sources.
5. An injunction may be granted against enforcing an illegal agreement of dealers to injure the business of another person.

On rehearing.

6. The invalidity of a contract under the statute of frauds is no defense to a third person who wrongfully prevented the performance of the contract.

(February 1, 1894.)

APPEAL by complainants from a judgment of the Circuit Court for St. Joseph County in favor of defendants in a proceeding brought to recover damages from defendants for alleged injuries to plaintiffs' business by reason of wrongful acts of defendants in carrying out an alleged conspiracy to monopolize trade. *Reversed.*

The facts are stated in the opinions.

Messrs. A. L. Brick and Lucius Hubbard, for appellants:

The argument is advanced that plaintiffs were only "incidentally" injured by the act of the defendants in enforcing a penalty against the West Michigan Lumber Company.

Such was not the understanding of the defendants and of the other directors of the association. They understood it to be a combination to suppress the competition of those dealers who did not own yards, with a stock on hand, by driving them out of business. They could not reach the consumer, but they can reach the wholesale dealer, and they compel him to pay an arbitrary penalty, under a threat of financial ruin. What they demand is, that he shall assist to ruin the dealer who does not own a yard.

A combination for the purpose of injuring another is a combination directed personally against the party to be injured; and the law allowing them to combine for the purpose of obtaining a lawful benefit to themselves gives no sanction to combinations which have for their immediate purpose the hurt of another. *Greenhood*, Pub. Pol. 651, citing *Reg. v. Rowlands*, 17 Q. B. 671.

Such a combination is illegal:

1. Unlawful means are employed. They threaten any wholesale dealer with financial ruin if he sell to any one not a "regular dealer."

2. The purpose is unlawful in this: It is to impoverish every dealer that does not come within their definition of "regular" and that

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shall come into competition with them. In the words of the secretary: "He could then sell to any one and we would have no way of reaching him." In this way they effectually "reach him."

8. They restrict the freedom of others, whether members or not, to sell to whom they please. It is not the voluntary act of wholesalers that has injured plaintiffs, but a conspiracy of relatives to monopolize the trade.

Orump v. Com. 84 Va. 921; *Sherry v. Perkins*, 147 Mass. 212; *State v. Stewart*, 59 Vt. 278, 59 Am. Rep. 710; *Dels v. Winfree*, 80 Tex. 400; *Chambers v. Baldwin*, 11 L. R. A. 545, 91 Ky. 121; *Old Dominion S. S. Co. v. McKenna*, 30 Fed. Rep. 48; *Murray v. McGarigle*, 69 Wis. 483; *Buffalo Lubricating Oil Co. v. Standard Oil Co.* 106 N. Y. 669; *Wildes v. McKee*, 111 Pa. 835, 56 Am. Rep. 371; *Reg. v. Hibbert*, 13 Cox, C. C. 88, 13 Moak, Eng. Rep. 483; *Greenhood*, Pub. Pol. 651, citing *Reg. v. Rowlands*, *supra*; *People v. Fisher*, 14 Wend. 9, 28 Am. Dec. 501.

Parties to contracts and their privies are the only persons who can take advantage of the fact that a contract is invalidated under the statute of frauds.

Dizon v. Duke, 85 Ind. 484; *Cool v. Peters Box & Lumber Co.* 87 Ind. 531; *Burrow v. Terre Haute & L. R. Co.* 107 Ind. 482; *Bodkin v. Merit*, 102 Ind. 298.

The objection that the \$500 cannot be recovered because it was unearned commission or profit is not the law in Indiana.

Logansport v. Justice, 74 Ind. 378, 39 Am. Rep. 79; *Niagara F. Ins. Co. v. Greene*, 77 Ind. 590; *Fultz v. Wycoff*, 25 Ind. 321; *Frenzel v. Miller*, 87 Ind. 1, 10 Am. Rep. 62.

Mr. Andrew Anderson, for appellees:

The lumber dealers of the state of Indiana are free men; as citizens of a free state the right to trade and traffic as they please is secured to them by our constitution and laws, and the legislature having never attempted to restrict such rights, it is too late to ask the courts of this state to impose on the business of those dealers bonds and shackles unknown to any court of law or equity.

The retail lumber dealers of the state of Indiana may unite as well as two individuals, and agree that they will purchase no lumber of any citizen of Michigan or Illinois of any Indian or African, of any manufacturer who employs Mongolian help or non-union help, of any firm who sell lumber through the instrumentality of drummers or brokers or auctioneers, or of any red-headed man or gray-headed man, or any class or set of men having any peculiarity in their personal appearance or their business modes, simply for the reason that they are under no legal obligation to deal with such men or class of men.

Payne v. Western & A. R. Co. 18 Lea, 507, 49 Am. Rep. 666.

The question then is, Is an act not unlawful rendered actionable to one suffering injury therefrom, because it is wickedly and maliciously committed in pursuance of a conspiracy to do the injury suffered? Does one render himself liable in damages for wickedly and maliciously exercising his rights or announcing his intention of so doing, if thereby he injures another?

It is unreasonable that an action should be maintained for causing hurt from mere wicked motives and thus violating a moral law if the actor is only exercising his undoubted right of using his own for himself and denying others all privilege in it. This the law does not punish.

Story v. Odin, 12 Mass. 157, 7 Am. Dec. 46; *Mahan v. Brown*, 18 Wend. 261, 28 Am. Dec. 461; *Auburn & C. Pl. Road Co. v. Douglass*, 9 N.Y. 447; *Isala v. Holbrook*, 4 Paige, 169, 2 L. ed. 390, 25 Am. Dec. 524; *Thurston v. Hancock*, 12 Mass. 220, 7 Am. Dec. 57.

It is a part of every man's civil rights that he be at liberty to refuse business relations with any person whomsoever; whether the refusal rests upon reason, or is the result of a whim, caprice, prejudice, or malice. His reasons are to the public or to third persons of no legal concern.

Cooley, Torts, p. 278; *Com. v. Hunt*, 4 Met. 111, 38 Am. Dec. 846; *Bowen v. Mathe-son*, 14 Allen, 499.

It is necessary to show a substantial injury, for "substantial and positive injury must always appear to the satisfaction of the court of equity before it will grant an injunction."

1 High, Inj. §810, 22.

Can an injunction be allowed in this court simply because, for some reason or other, Newton Jackson could deal a little more profitably with the West Michigan Lumber Company than with other concerns, when the amount of extra profit is not shown and might not have been \$10 a year.

Hall v. Root, 40 Mich. 46, 29 Am. Rep. 528.

If it had been found by the court that Mr. Jackson had been authorized by the West Michigan Lumber Company, as its agent and broker, to sell lumber to the Studebaker Brothers Manufacturing Company, and that, as the agent of the West Michigan Lumber Company, Mr. Jackson had made a proposition to the Studebaker Brothers Manufacturing Company to sell to them two million feet of lumber, and that the Studebakers were ready and willing to take it at the price offered, and that the commission which the West Michigan Lumber Company was ready to pay and would have paid, was \$500, and that in consequence of rules of the association and of having paid the penalty mentioned, the West Michigan Lumber Company then refused to sell through Mr. Jackson, and Jackson surrendered his right to act as their agent and complete the sale, then a cause of action might have been stated. But these material facts were not stated, and not being stated, under the well-settled rules of this court in regard to special findings, we insist that there is nothing in this finding to justify the recovery.

Dixon v. Duke, 85 Ind. 434, *Dodge v. Pope*, 98 Ind. 480; *Pittsburgh, C. & St. L. R. Co. v. Spencer*, 98 Ind. 186; *Kehr v. Hall*, 117 Ind. 405.

Dailey, J., delivered the opinion of the court:

This is an action brought by the appellants against the appellees for damages, and for relief by injunction, on the ground that the defendants had entered into an unlawful combination for the purpose of injuring the
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appellees in their business, and that, in consequence thereof, plaintiffs had suffered actual damage, and were threatened with great loss in their business.

By request of the parties, the court below made a special finding of the facts and stated its conclusion of the law thereon, that the plaintiffs were not entitled to recover. There was no motion for a new trial, and the only questions presented by the record are these: First, whether the plaintiffs are entitled to an injunction; second, if not entitled to an injunction, are they entitled to recover damages?

It appears from the special finding that the complainants are husband and wife. Appellant, Newton Jackson, had no means, but his wife had some property of her own. For several years prior to the commencement of this suit, the husband had been engaged in the business of buying and selling lumber, dealing with his wife's means and also on commission, acting as a broker without owning the lumber himself. The business was managed by Jackson in his own name. He occasionally affixed the word "agent" to his transactions. He employed from \$3,000 to \$4,000 of his wife's money, but it was not generally known that he was acting as agent for his wife. The defendants were partners in the business of selling lumber at retail at South Bend, Indiana, and for a number of years kept a lumber yard at that place. Prior to 1889, the defendants, and about one hundred and fifty other retail dealers in lumber organized an association, under the style name of "The Retail Lumber Dealers' Association of Indiana," and adopted a constitution and by-laws for its government. The Constitution declares that the organization was formed "to protect its members against sales by wholesale dealers and manufacturers to consumers."

We have for convenience taken so much of the special finding as we deemed material to the questions involved.

That the plaintiffs, Newton Jackson and Martha E. Jackson, are husband and wife; that Newton Jackson has no means; that his wife has means of her own; and for the past three (3) years Newton Jackson has been engaged in the business of buying and selling lumber. That he has bought and sold lumber, dealing with his wife's means, and also on commission, by negotiating sales as agent of a wholesale dealer or manufacturer, and receiving a commission therefor, without owing the lumber himself. That the arrangement between plaintiffs was that the husband supported himself and family from his earnings and profits, and if any surplus remained, it was the property of his wife.

That the business was managed solely by Newton Jackson, in his own name, he occasionally using the word "Agent" in connection with his own name, and using from \$3,000 to \$4,000 of his wife's means; but defendants had no knowledge that he was acting as agent for his wife.

That plaintiffs have kept no lumber yard or stock on hand in South Bend, Indiana, where they have done business for the past three (3) years.

That the defendants are partners, retail dealers in lumber, in South Bend, Ind., and have kept a lumber yard and stock on hand. That prior to 1889, the defendants and other retail dealers in lumber in Indiana, about one hundred and fifty (150) in number, associated themselves together into an association known and designated as the Retail Lumber Dealers' Association of Indiana, and agreed to a constitution and by-laws for their government, which constitution and by-laws are in these words:

CONSTITUTION.

Article I.

Title.

The title of this organization shall be, "The Retail Lumber Dealers' Association of the State of Indiana," and it shall have for its object the protection of its members against sales by wholesale dealers and manufacturers to consumers, and the giving of such other protection as may be within the limits of co-operative association.

Article II.

Conditions of Membership.

Any person who may be regularly in the retail lumber trade, owing or operating a lumber yard, in which a general assortment of stock in kind and quantity commensurate with the demands of the community where located is kept for sale, may become a member of this association by subscribing to the constitution and paying the annual dues prescribed by the by-laws.

Article VII.

When Membership Shall Cease.

When any member of firm shall cease to keep a regular assortment of lumber, as set forth in article 2, he or they shall cease to be members of this association. . . .

Article IX.

Any manufacturer or wholesale dealer may become an honorary member of this association, with all privileges and benefits save that of voting, upon payment of the annual dues. Provided, that all such members who may violate the rules thereof shall be immediately dropped from the rolls.

Article X.

Any manufacturer or wholesale dealer may become an honorary member of this association, with all the privileges and benefits save that of voting upon payment of the annual dues.

Section 5. Members are entitled to the protection of this association in the towns in which their yards are situated, and the adjacent territory, which must be designated in the application for membership, and written in the membership certificate. If protection is wanted for more than one point (where applicant owns or operates a yard) separate memberships must be taken. . . .

Relations with Wholesalers.

Section 8. Whenever, and as often as any manufacturer or wholesale dealer, or their agents, shall sell lumber, sash, doors, or 23 L. R. A.

blinds to any person not a regular dealer, as contemplated by article 11 of the constitution of the association, any member doing business in the town to which such shipment was made, may notify the shipper, manufacturer, or wholesale dealer who made such shipment, that he has a claim against them for such shipment. If the parties cannot adjust the claim, it shall be the duty of the member to notify the secretary of the facts in the case, who shall refer the case to the executive committee, whose duty it shall be to hear both sides of the question and determine the claim. If the wholesaler or manufacturer refuses to abide by the decision of the executive committee, it shall be the duty of the secretary to notify the members of this association of the name of such wholesaler or manufacturer. It shall also be the duty of the members to no longer patronize said wholesaler or manufacturer. If any member continues to deal with such dealer or manufacturer, he shall be expelled from the association. If the member refuses to abide by the decision of the executive committee, his name shall be stricken from the membership of the association. It is provided that nothing in this section shall be so construed as to entitle members to make complaint on account of lumber sold to manufacturers, and actually used in articles manufactured, nor to railroads or transportation companies, nor in case of sash, doors or blinds, to hardware merchants who keep a regular stock of such goods. . . .

Powers of Executive Committee.

Section 7. The president and secretary, *ex officio*, are constituted the executive committee of his association. In all matters relating to claims made by this association, between the sessions of the board of directors, the said committee shall have the same powers as those conferred upon the said board of directors. That upon request of the secretary, said committee shall convene to determine and adjudicate to such matters as are not clearly defined by the constitution and by-laws, or such other questions as he deems of great importance to the association. Any wholesaler not satisfied with the decisions of the secretary in cases in which demands are made upon him, may appeal to the executive committee, whose decision shall be final. . . .

That said constitution and by-laws were published in May, 1888, and 1890, together with lists of active members, wholesale members, and honorary members, said active members appearing to be doing business in Indiana, and wholesale and honorary members appearing to be doing business in Indiana, Illinois, and Michigan and other states.

That such publications were made in pamphlet form, and a copy of each such pamphlet was sent to every member of the association, and to all retail dealers in Indiana, and to all wholesalers and manufacturers of lumber in the United States, a list of whose names and addresses was in the possession of the secretary of said Retail Lumber Dealers' Association.

That the usual course of proceedings of such association was in case of complaint by any member against a wholesale dealer for a violation of its rules, that a hearing was had, and the person or firm charged was heard before a committee of said association, and if a penalty was assessed by such committee, and such penalty was not paid, a notice was to be sent to each member of the association upon a blank kept to be used for that purpose, which blank embraces section 3 of the foregoing by-laws, and each member is notified that . . . dealer of . . . town, wholesaler, has sold a bill of lumber to some certain party who is not a regular dealer as contemplated and refuses to adjust the same.

That said association has in this manner adjusted all claims that had come before it. That the objects of said association have thus far been made effective, and it is still in full force, and there is no probability of its discontinuance at present.

That the defendants, Stanfield and Dresden have been members of said association for the past three years, and the defendant Stanfield became a director of said association, at its December meeting in 1889, for a term of two years, and is still such director.

That in October, 1889, the Birdsell Manufacturing Company, of South Bend, Indiana, desired to purchase a large bill of lumber, and Newton Jackson and the defendants were competitors in the sale of such lumber, and said Jackson was successful in making such sale, and acting as a broker bought such bill of lumber of the West Michigan Lumber Company, of Woodville, Michigan, and the said bill of lumber was shipped directly by the West Michigan Lumber Company to said Birdsell Manufacturing Company, and a commission on such sale was paid by said West Michigan Lumber Company to Newton Jackson.

That defendants thereupon wrote and sent to said West Michigan Lumber Company the following letter:

South Bend, Ind. Oct. 28th, 1889.
West Michigan Lumber Co. Woodville,
Mich.

Gentlemen: We have bought lumber of your house for a number of years past, and considered you an honorable, upright company, doing a strictly wholesale business, but recently we are informed that you have infringed upon the laws of the Lumberman's Association of the state of Indiana, by selling to a consumer in this city a large bill of lumber, thus coming in competition with ourselves in the retail trade. We trust that you can satisfactorily explain this matter, and we will not be obliged to lay it before the state board. We refer to the Birdsell bill.

Yours, etc.
Dresden & Stanfield.

To which letter the West Michigan Lumber Company sent the following answer:

Woodville, Mich. Oct. 31st, 1889.
Dresden & Stanfield, South Bend, Ind.

Gentlemen: Replying to your letter of the 28th, the bill to which you refer was sold
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through a regular dealer in your city, and he was paid his commission.

Yours truly,
West Michigan Lumber Co.

To which letter defendants replied as follows:

South Bend, Ind. Nov. 5th, 1889.
West Michigan Lumber Co. Woodville,
Mich.

Gentlemen: Your favor of October 31st received. Contents noted. We are credibly informed that your house sold the Birdsell bill to Newton Jackson of this city. According to article II of the constitution of the Retail Lumber Dealers' Association of Indiana, Newton Jackson is not a regular dealer. There is and has been for the past year "too" much encroaching by wholesalers upon the "the" natural and acquired rights of retailers; consequently you should not think us impertinent upon insisting that you give us the name of the regular dealer to whom you sold the bill for Birdsell's use. We are determined to sift this matter to the bottom.

Yours, etc.
Dresden & Stanfield.

And said West Michigan Lumber Company replied as follows:

Woodville, Mich. Nov. 8th, 1890.
Messrs. Dresden & Stanfield, South Bend,
Ind.

Gentlemen: Replying to your letter of the 5th, we sold the bill mentioned through Mr. N. Jackson. As he bought the lumber from us, we supposed he was a regular dealer.

We do not intend to sell except through a regular dealer, and so supposed when the order was accepted.

Yours truly,
West Michigan Lumber Company.

And then, on November 18th, the defendants sent the following letter to said West Michigan Lumber Co.:

South Bend, Ind. Nov. 18th, 1889.
West Michigan Lumber Co., Woodville,
Mich.

Gentlemen: Yours of the 8th is before us. Ignorance of the law is no justification. N. Jackson has not now, nor has he had for at least three years either office or yard in South Bend. He has been and is a notorious scalper.

We demand of you one hundred dollars (\$100.00) on account of the Birdsell bill. If you refuse the demand, we shall refer our claim to Retail Dealers' Association of Indiana, of which you are honorary members, and discover if it has a power in the land, or merely the hollow mockery of a resounding name.

Yours, etc.
Dresden & Stanfield.

That the West Michigan Lumber Company thereupon sent the following letter to defendants:

Woodville, 11-19-'89.
Dresden & Stanfield, South Bend, Ind.

Gentlemen: Yours of the 18th inst. at hand. In regard to that demand for one

hundred dollars (\$100.00) on account of Birdsell Mfg. Co's bill, we shall have to respectfully decline for that reason. If you, or the dealers of South Bend, sold the Birdsell Manufacturing Company one half, or most of the white pine lumber they bought, it would be different; but they write that they bought from the wholesale trade over one million feet per year, and did not buy over five thousand feet from the concerns there. Now, it does not look to us that you should have any claim against this company. If you have, there are others in the same fix as us, and you should make claim on all. We have always been very particular not to interfere with the retail trade, and in the past ten years have had no complaint.

Hoping you will look into the matter fully before making complaint, I am

Yours truly,
E. B. Wright, President.

That these defendants wrote and sent the following letter to W. B. Allen, Secretary of said association at Indianapolis, Ind.:

South Bend, Ind. Nov. 22, 1889.
To the Executive Committee of the Retail Lumber Dealers' Association of Indiana:

Gentlemen: We herewith enclose correspondence, and submit to you our claim against the West Michigan Lumber Company, of Woodville, Michigan. About two months ago, the Birdsell Manufacturing Company, of South Bend, wishing to enlarge their factory, gave us a bill of material to figure on, consisting of joists, timbers, flooring and boards, amounting to 326 M feet, with privilege of increasing 400 M feet, which was afterwards done. The West Michigan Lumber Company got the contract through Newton Jackson, a man without an office or yard, who the railroad companies would not trust one day for freight, really a buyer for the Birdsell Manufacturing Company. The West Michigan Lumber Company shipped direct to Birdsells. Mr. Wright in his favor of the 19th, claim that the Birdsells purchased a million feet of lumber every year of the wholesalers, and not five M feet of the retailers; but he fails to state that this million feet is for manufacturing wagons and clover hullers. There are no more complete stocks carried in Indiana outside of Indianapolis than are ours. There are two other yards in our city nearly as complete. Why do buyers go away from here to buy? Because they can get cheaper from wholesalers than from home concerns, in this case, the West Michigan Lumber Company undoubtedly sold the lumber to the consumers cheaper than they quoted it to us. We, and our predecessors in this location have for years done business with the West Michigan, the last purchase slightly over two months ago. We have never had any trouble, always finding them honorable and upright. We entertain no malice against the company, but we do insist that as members of the Retail Lumber Dealers' Association, we are entitled to our claim against the West Michigan Lumber Company, who are honorary members of the same association, and if there is any strength in the association we will be righted. If

the association cannot enforce its laws, the sooner it gives up the ghost the better.

Yours truly,
Dresden & Stanfield.

That thereafter a hearing of such claim was had before a committee of said association at Indianapolis, in December, 1889, and said committee found that the said claim of defendants against the West Michigan Lumber Company was valid.

And on February 20th, 1890, W. B. Allen, secretary of the association, wrote and sent the following letter to said West Michigan Lumber Company:

"Indianapolis, Ind. Feb. 20th, 1890.
W. B. Wright, Esq., Pres't West Michigan Lumber Co.

Dear Sir: January 27th I wrote your Mr. J. S. Wright that the final decision in regard to South Bend matter was that claim of Dresden & Stanfield is valid, and they are entitled to redress. I wrote J. S. Wright, as he seemed to have the settlement of the claim in his hands, but as I have had no reply since I wrote him, will you kindly advise me what your final answer is in regard to this?

I enclose copy of letter of January 27th.

Yours truly,
W. B. Allen, Secretary."

And on April 14th, 1890, said West Michigan Lumber Company wrote and sent the following letter to said secretary:

Woodville, Mich. April 14th, 1890.
W. B. Allen, Esq., Sec'y Retail Lumber Dealers' Association Indianapolis, Ind.

Dear Sir:—Your favor of the 10th at hand. Please make a full statement of the claim and demand of Dresden & Stanfield, also a statement that the claim was allowed by the Retail Lumber Dealers' Association on the grounds that the West Michigan Lumber Company could sell lumber direct to the Birdsell Mfg. Co., but when sold through N. Jackson they must pay damages, which we believe is correct.

Yours truly,
West Michigan Lumber Co.

—To which said secretary replied as follows:

Indianapolis, Ind. April 17, 1890.
West Michigan Lumber Co., Woodville.

Gentlemen: In regard to complaint of Dresden and Stanfield, would say that above named firm filed a complaint against your company for selling lumber to party or parties that are not dealers, or who are entitled to buy lumber of a wholesaler or manufacturer. This claim was investigated by the executive board of Retail Lumber Dealers' Association. Your firm was allowed representation during the investigation; your letters also admitted the sale, and while we thought and still think it was your intention to make the sale through a bona fide dealer, still the facts go to prove, and are admitted by yourself that it was not sold through a regular dealer; and the board had no alternative but to find in accordance with the rules of the association.

The Birdsell Mfg. Co. had nothing to do

with this case, and we have not been called on to decide whether you have the right to sell Birdsall Mfg. Co., or not. The plain facts are, you sold this bill to N. Jackson, which was so stated in your own correspondence. Mr. Jackson is not a lumber dealer, as defined by our rules, namely, a person or firm who carry a stock adequate to the market where he or they are located. We submit to your own judgment that we are forced to deny Mr. Jackson's right to buy lumber of any one that he pleases, and throw down all the bars, as he could then sell to any one, and we would have no way of reaching him. Mr. Jackson's class is one that does more injury to the yards of this country than any that we have to deal with.

Very truly,
W. B. Allen, Secretary.

That therefore, on April 30th, 1890, the West Michigan Lumber Company sent its draft for one hundred (\$100.00) dollars to said Retail Lumber Dealers' Association of Indiana, and said sum was by said association passed over to defendants in payment of said claim against the West Michigan Lumber Company, which sum was paid and received as a penalty for a violation of the rules of said association in the sale of the Birdsall bill of lumber through N. Jackson.

That therefore, the said West Michigan Lumber Company, and Morton, Lewis & Co., of Grand Rapids, Michigan, refused to sell lumber to said Newton Jackson for the reason that said West Michigan Lumber Company, and said Morton, Lewis & Co., who were wholesale dealers and manufacturers of lumber, were afraid of penalty for violation of the rules of said association.

That said Newton Jackson made an offer to the Studebaker Bros. Manufacturing Company of South Bend, to sell two million feet of lumber to said company, which offer was based on the price lists of said West Michigan Lumber Company, and said Jackson could not obtain said lumber of any other firm as cheaply and conveniently as from said West Michigan Lumber Company. That his commission therein would have been five hundred dollars (\$500). That the offer of said Jackson was accepted by said Studebaker Bros. Mfg. Co., but the West Michigan Lumber Company refused to sell to or through said Jackson by reason of the rules of said association, and on account of having paid said penalty, and said Jackson thereupon did not contract with said Studebaker Bros. Mfg. Co., but turned over such sale to said West Michigan Lumber Company, and allowed said company to make such sale without paying any commission to him.

That the market from which dealers in South Bend, Indiana, can best and most cheaply buy lumber of wholesalers and manufacturers to resell to consumers is in the state of Michigan and said Jackson could most cheaply and profitably buy lumber and sell on commission by dealing with wholesale dealers in Michigan, and most cheaply and profitably buy of the West Michigan Lumber Company to resell and to resell on commission.

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That said Newton Jackson thereafter caused lumber to be purchased for his customers in the name of Smith and Jackson, a firm of regular dealers, as defined by said association, in South Bend, and paid to Smith and Jackson a share of his commission for the use of their names by an agreement with them, and paid to them for that purpose the sum of \$83, which sum was a fair charge for the use of their names.

That by reason of the refusal of the said West Michigan Lumber Company to sell him lumber to fill an existing contract, said Jackson went to Manistee, Michigan, to purchase lumber, and expended in railroad fare and freight (\$82) more than it would have cost him had the West Michigan Lumber Company not refused to sell to him. That except for such refusal, the West Michigan Lumber Company could have sold him lumber to fill such contract.

That during the year 1890, plaintiff's business has decreased. That before the commencement of this suit, plaintiffs requested of defendants to permit plaintiffs to do business as heretofore and to abandon their position in this matter, and not to complain to said association of sales made to plaintiffs, but defendants refused to, and declared their intention to adhere to their position and that they intend to enforce the rules and by-laws of said association.

That defendants and the West Michigan Lumber Company, prior to and at the time of the happening of the matters in controversy aforesaid, were members of said association, defendants as active members, said company as an honorary member, and both defendants and said West Michigan Lumber Company knew its purposes and objects.

We infer from article 2 of the constitution, that "any person, in the retail lumber trade, owning and operating a lumber yard in which a general assortment of stock in kind and quantity commensurate with the demands of the community where located is kept for sale, is a regular dealer." The regular dealer, in accordance with the provisions of section 3 of the by-laws, when his territory is encroached upon by a wholesale dealer or manufacturer, is authorized to notify the person so offending that he has a claim against him for such sale or shipment, and to make a demand therefor. If the parties cannot adjust it, it is made the duty of the member to notify the secretary of the facts in the case, who shall refer the matter to the executive committee, whose duty it is to hear the grievances and determine the claim. If the wholesaler or manufacturer ignores the decision of the committee, it is the duty of the secretary to notify the members of the association of the name of the person so offending and of the members to no longer patronize him. If they continue to deal with the offender, they shall be expelled from the association, and if any member refuses to abide by the decision of the executive committee, his name is to be stricken from the membership of the society.

The facts found by the court disclose that the appellees as members of the combination complained of availed themselves of the

means provided for in section 8 to destroy the business of the appellants as brokers in lumber, because they were not retail dealers within the definition of the term, and that they effectuated their purpose. The special findings of fact clearly show it to be a compact to suppress the competition of those dealers who did not own yards, with an adequate stock on hand, by driving them out of business. By this plan they reach the wholesale dealer and compel him to pay an arbitrary penalty, under a threat of financial injury, and they force him to assist in ruining the dealer who does not own a yard. There is such an element of coercion and intimidation in the by-law under consideration, towards the wholesale dealers, manufacturers and even the members of the society, and such provision made for penalties and forfeitures against them, that it will not do to say it was optional with the wholesale dealer whether it would pay the demand or not, or that it was left to the discretion or choice of the members to either trade with the wholesaler or abandon the association. A conspiracy formed, and intended directly or indirectly to prevent the carrying on of any legal business, or to injure the business of any one by wrongfully preventing those who would be customers from buying anything from the representatives of such business, by threats or intimidation, is in restraint of trade and unlawful. Under a statute of Massachusetts, a combination to restrain trade so as to impoverish a man in his business is indictable. 4 Am. & Eng. Encyclop. Law, p. 608, citing *note 3*. On the same page it is said: "The labor and skill of the workman, the plant of the manufacturer, and the equipment of the farmer are, in an equal sense, property. Every man has a right to employ his talents, industry, and capital as he pleases, free from the dictation of others; and if two or more persons combine to coerce his choice in this behalf, it is a criminal conspiracy, whether the means employed are actual violence, or a species of intimidation that works upon the mind. While the law accords this liberty to one, it accords a like liberty to another, and all are bound to use and enjoy their own liberties and privileges with regard to those of their neighbors."

In *People v. Petheram*, 64 Mich. 252, it is said: "No one is authorized to unlawfully destroy or hinder the lawful business of another for the purpose of helping himself."

In *Hawkins' P. C. chap. 72, § 2*, it is laid down that, "all confederacies whatsoever wrongfully to prejudice a third person, are highly criminal at common law." The same proposition in various forms of expression is declared in a long list of authorities cited in 4 Am. & Eng. Encyclop. Law, 609, so that, as the author states it: "We are compelled to forsake the literature of doubt, and to cleave unto that of authority." It is held in *State v. Stewart*, 59 Vt. 273, 59 Am. Rep. 710, that, "such conspiracies may give the individual directly affected by them a private right of action for damages."

In *Walker v. Cronin*, 107 Mass. 555-564, 23 L. R. A.

it is said that, "every one has a right to enjoy the fruits and advantages of his own enterprise, industry, skill, and credit. He has no right to be protected against competition, but he has a right to be free from malicious and wanton interference, disturbance, or annoyance. If disturbance or loss come as a result of competition or the exercise of the like rights by others, it is *damnum absque injuria*. In *Carew v. Rutherford*, 106 Mass. 1, 14, 8 Am. Rep. 287, it is said: "Every man has a right to determine what branch of business he will pursue, and to make his own contracts with whom he pleases and on the best terms he can." "He may refuse to deal with any man or class of men. And it is no crime for any number of persons, without any unlawful object in view, to associate themselves together and agree that they will not work for or deal with certain men or classes of men, or work under a certain price, or without certain conditions." And in *Com. v. Hunt*, 4 Met. 111, 134, 38 Am. Dec. 346, *Shaw, Ch. J.*, declares that the legality of such association will depend upon the means to be used for the accomplishment of its objects and whether they be innocent or otherwise. In *More v. Bennett*, 140 Ill. 69, 15 L. R. A. 361, the court held that a combination or conspiracy entered into by a stenographic association, by which the prices of reporting legal proceedings by short-hand are to be kept up by the prevention of competition, although such association may embrace but a comparatively small part of the reporters engaged in the business, but which is open for the admission of all reporters who may be induced to join, and by which a schedule of prices is fixed, and by which any member violating its rules as to prices is subject to a fine, is void, as tending to prevent a free and unrestricted competition in business.

In *Lonejoy v. Michels*, 88 Mich. 15, 13 L. R. A. 770, the court held that where the price of goods is not agreed upon at the time of the sale, the law implies an understanding to pay what the commodity is reasonably worth; "that a price arbitrarily fixed by a combination of manufacturers or dealers is not competent evidence to show a reasonable price for the goods sold by the members of the combination; that such combinations are intended to stifle competition, which is a stimulus of commercial transactions, and to substitute that of unconscionable gain, whereby the participants become enriched at the expense of the consumer, beyond what he ought to pay under a healthy spirit of competition in the business community. The effect of such combinations is the same as that in restraint of trade, and public policy places its reprobation alike upon both. Combinations to control prices are against public policy and void, because they have a mischievous tendency, and are injurious to the best interests of the state, which require that all legitimate business shall be open to competition; that the current price of commodities shall be controlled by the law of supply and demand; that the laws of commerce shall flow in their accustomed channels, and not

be diverted by combinations to control prices fixed by the arbitrary decision of interested parties."

In *Texas Standard Cotton Oil Co. v. Adoue*, 89 Tex. 650, 15 L. R. A. 598, the court held that, "every producer or vendor of" commodities "has the right to use all legitimate efforts to obtain the best price for the articles in which he deals. But when he endeavors to artificially enhance prices by suppressing or keeping out of the market the products of others, and to accomplish that purpose by means of contracts binding them to withhold their supply, such arrangements are even more pernicious than combinations not to sell under an agreed price. Combinations of that character have been held to be against public policy and illegal. If they should be sustained, the prices of articles of pure necessity, such as coal, flour, or other industrial commodities, might be artificially raised to a ruinous extent, far exceeding any naturally resulting from the proportion between supply and demand."

In *Greenhood on Public Policy*, 651, the rule is thus stated: "They may combine for the purpose of obtaining a benefit for themselves which by law they can claim. But a combination for the purpose of injuring another is a combination of a different nature, directed personally against the party to be injured and the law allowing them to combine for the purpose of obtaining a lawful benefit to themselves gives no sanction to combinations which have for their immediate purpose the hurt of another."

In *Dela v. Winfree*, 80 Tex. 400, the defendants were wholesale dealers in slaughtered meats, and combined to refuse to sell meat to the plaintiff, a butcher. This was not sufficient, but the petition also alleged that the defendants also induced another dealer in slaughtered meat to likewise refuse to sell to the plaintiff. It was held that such interference with his business was a cause of action and it was error to sustain a demurrer to the petition. In *Murray v. McGarigle*, 69 Wis. 488, the complaint alleged a conspiracy to control the coal trade in Milwaukee, Wis., and as a result an injury to plaintiff in his business and reputation. The complaint is set out in full and held good for civil damages. In *Buffalo Lubricating Oil Co. v. Standard Oil Co.* 106 N. Y. 669, the latter threatened plaintiff's customers with suits for infringement of its patents, depreciated its oil, etc. The object was to drive plaintiff out of business. It was held that the Standard Oil Company was liable for damages. The great weight of authority supports the doctrine that where the policy pursued against a trade or business is of a menacing character, calculated to destroy or injure the business of the person so engaged, either by threats or intimidation, it becomes unlawful, and the person inflicting the wrong is amenable to the injured party in a civil action for damages therefor. It is not a mere passive, let alone policy, a withdrawal of all business relations, intercourse and fellowship that creates the liability but the threats and intimidation shown in the complaint. The learned counsel for the appellees, in his

very able brief, contends that the plaintiffs were only incidentally injured by the acts of the defendants in enforcing a penalty of \$100 against the West Michigan Lumber Company. It will be observed that the Retail Lumber Dealers' Association invites wholesalers to become honorary members, and that said Lumber Company is an honorary member. But the rules of the association do not affect alone members active and honorary. They extend to, and reach any wholesale dealer in the United States with whom the threat to withdraw the trade of one hundred and fifty retail dealers can have weight. It is shown in the finding that Michigan is the source from which most of the lumber in Northern Indiana is procured, and that the rules of the association are published in pamphlet form and sent to every wholesale dealer in the United States. The retail dealers who organized the association in question are members of the various cities and towns where they are located. They have lumber yards, containing stock in quantity and quality suited to and commensurate with the wants of the consumers in their several localities. These gentlemen are prominent, wealthy and influential citizens of our state, whose power from the elevated stations they occupy, so exercised, enable them to control the wholesale dealers of the United States against the agents and brokers within their own territory, and effectually drive them out of business. It is idle to say that the victim of such a combination is only "incidentally" affected thereby. The object of the association and the result attained is a monopoly of the trade by owners of yards and the broker is simply ignored by the wholesale dealers. It is not in point to cite cases where men voluntarily agree to observe rules adopted by themselves. This is no voluntary affair of the wholesale dealers. It is not even a combination of wholesalers. They may and do sometimes become honorary members so as to keep within touch of the retail dealers and secure trade. It is, as stated, an association of retailers to restrict the liberty of wholesalers to sell to consumers and brokers and the wholesalers must obey or lose their trade. It is found as a fact that the market in which the plaintiffs could most profitably buy was in Michigan. Freight and railroad facilities necessarily limited the field. It is also found that the West Michigan Lumber Company is the dealer that made the plaintiff's trade most profitable, and that for fear of the penalties this company and another refused to deal with them. The West Michigan Lumber Company was willing and anxious to sell to the plaintiffs until fined by the defendants and mulcted in the sum of one hundred dollars when it refused to make further sales for the reason that it was afraid of the penalties. Such rules contravene the rights of non-members to earn their living by fair competition. The case of *Bohn Mfg. Co. v. Hollis*, decided by the supreme court of Minnesota, July 20th, 1893, which will be found in vol. 55, N. W. Rep. p. 1119, is cited by appellees as sustaining the decision of the lower court. It was a case in which a large number of lumber dealers

had formed an association, very similar in its character to the one in the case at bar. The plaintiff had made a sale of lumber directly to a consumer and the secretary made a demand upon him for the penalty as provided in section 3 of the by-laws. The plaintiff delayed and evaded payment so long that defendants threatened to send all the members of the association the lists of notices provided for by section 6 of the by-laws, informing them that the plaintiff refused to comply with the rules of the association, and was no longer in sympathy with it. Thereupon the plaintiff commenced his action for a permanent injunction, and obtained *ex parte* a temporary one, enjoining the defendants from issuing these notices, etc. The appeal was from an order refusing to dissolve the same. On appeal, the court found that the action would not lie, and that the injunction should be dissolved, although the defendants were demanding and seeking to recover the penalty by threats, and if these notices should become issued, the members of the association would thereafter refuse to deal with the plaintiff; thereby resulting in loss to it of gains and profits. The opinion proceeds upon the theory that there was no element of coercion or intimidation in the acts complained of, but we think the decision in this respect is in conflict with approved authority and is bad as a precedent. It appears from the facts found by the court that after the payment of the \$100 fine so assessed, the appellant, Newton Jackson, made an offer to the Studebaker Bros. Mfg. Co. of South Bend to sell said company two million feet of lumber, which offer was based on the price list of the West Michigan Lumber Company, that his commission thereon would have been \$500; that the offer of said Jackson was accepted by the Studebaker Brothers Manufacturing Co., but the West Michigan Lumber Company refused to sell to or through Jackson by reason of the rules of said association, and on account of having paid said penalty, and said Jackson thereupon did not contract with said Studebaker Bros. Manufacturing Company, but turned over such sale to the West Michigan Lumber Company, and allowed it to make such sale without paying any commission to him. That said Newton Jackson thereafter caused lumber to be purchased for his customers in the name of Smith and Jackson, a firm of regular dealers as defined by the association, in South Bend, and paid to them \$88 of his commission for the use of their name, which was a reasonable and fair charge therefor. That by reason of the refusal of the said West Michigan Lumber Company to sell him lumber to fill an existing contract, said Jackson went to Manistee, Michigan, to purchase lumber, and expended in railroad fare and freight \$82 more than it would have cost him had said West Michigan Lumber Company not refused to sell to him; that except for such refusal, the West Michigan Lumber Company could have sold him lumber to fill such contract. That during the year 1890, plaintiff's business had decreased, and before the commencement of this suit, plaintiffs requested defendants to permit them to do bus-

iness as heretofore, and to abandon their position in this matter, and not complain to the association of sales made to plaintiffs, but defendants refused to do so, and declared their intention to adhere to their position, and that they intended to enforce the rules and by-laws of said association.

Without further extending this opinion, we only need to say that if it had not been for the wrongful acts of the appellees, the plaintiffs would have made \$588 in profits upon contracts of which they were deprived. They are entitled as compensation to the amount of damages sustained, which is measured by the loss actually incurred. If there was any circumstance to be considered in mitigation of damages, it was incumbent on the defendants to show that fact; but as the record is silent on this question, we must infer that one existed. We think the claim for expenses to Manistee and return too remote to be considered in this case.

The judgment is reversed, with instructions to restate conclusions of law and render judgment upon the special findings in favor of the appellants for five hundred and eighty-three dollars, and with the further instruction to render a judgment perpetually enjoining the defendants from in any way, other than fair, open competition, interfering with the plaintiffs in their business, and from demanding a penalty or making a claim against any one, under the by-laws of said association, who may sell to the plaintiffs, or through them to a consumer.

Howard, C. J., took no part in this decision.

A petition for rehearing was subsequently filed in response to which on April 6, 1894, the following opinion was handed down by **Dailey, J.**:

The learned counsel for the appellees asks that a rehearing be granted for the reason that the conclusion of the court as rendered in its opinion should be modified so far as it relates to the assessment of the damages. As suggested, the main subject discussed by counsel on both sides and considered by the court in its opinion was whether or not the appellants were entitled to an injunction. Counsel does not seek a change in the decision as to the leading question involved, but insists there is nothing in the special findings of facts which would justify a judgment in favor of the appellants for the sum of \$500 commissions claimed to be due Newton Jackson by reason of an attempted sale of lumber by him to the Studebaker Bros. Manufacturing Company. It is found and set forth in the original opinion that Newton Jackson made an offer to said company to sell them 2,000,000 feet of lumber, which offer was based on the price lists of the West Michigan Lumber Company; that said Jackson could not obtain said lumber of any other firm as cheaply and conveniently as from the firm last named; that his commission thereon would have been \$500; that the offer of said Jackson was accepted by the Studebaker Bros. Manufacturing Company, but said West Michigan Lumber Company refused to sell

to or through said Jackson, by reason of the rules of the association, and on account of having paid a penalty of \$100; and thereupon said Jackson did not contract, but turned over said sale to the West Michigan Lumber Company, and allowed the company to make the sale without paying any commission to him. In commenting on this finding, counsel says: "The substance of the first part of this finding is that Jackson offered to sell to the Studebakers two million feet of lumber. It does not show what price he was to pay the lumber company, or what price the Studebakers were to pay him, or what profits he would have made had the proposed contract been carried out. If, as found by the court, he made a straight agreement to sell to the Studebakers a certain amount of lumber, he could not have been entitled to any commission. No dealer can make a commission when he is trading on his own account. If he buys for one price and sells for a higher price, he may make a profit, but certainly not a commission. The word 'commission,' as we understand it, means 'a brokerage or allowance made to a factor or agent for the transacting of business for another.' There is nothing in this finding to show that Mr. Jackson was ever acting as agent or broker for the West Michigan Lumber Company, and, not being so found, it must be held that he was not the agent or factor of that company. Unless he was such agent or factor, he could not have a commission, and, not being such agent or factor, he was entitled to none. The finding of the court below must stand as it is written; that is to say, that he himself, on his own account, offered to sell to the Studebakers certain lumber, and it is not found what his profit on the transaction would have been. It may be implied—and very possibly is implied—that if he had made the sale as agent or broker or commission merchant for the West Michigan Lumber Company, then, in such case, he would have been entitled to a commission for his services. But the fatal defect is this: that it is not found that he was, but, on the contrary, it is practically found that he was not, the agent, broker, or commission merchant or factor for the West Michigan Lumber Company. Therefore it matters not what commission he might have made, had he been such commission merchant or broker or factor or agent, and sold the lumber as such agent or broker; for the finding is, as we have stated, that he did not sell the lumber as an agent or broker. That finding, if it means anything, means that he sold the lumber on his own account; that he made a contract for a future delivery; but what his profits would have been on the transaction does not appear."

We think the essential fact found in relation to this matter was that Jackson's commission or profit—no difference by what name it may be called—would have been \$500 had not the West Michigan Lumber Company "refused to sell, either to or through him, by reason of the rules of the association, and on account of having paid said penalty." It is 28 L. R. A.

found that Jackson could most cheaply and profitably buy of the West Michigan Lumber Company, and based his order on their prices. Appellees cut off this source of supply, and did all they could to exclude him from the market. It matters not whether the \$500 would have been commission or profit. The finding calls it a commission, and says, but for the wrong of the appellees, he would have realized this amount in the transaction.

The naked fact remains that the loss found to have been sustained is so definite and certain as to leave no room for cavil. It is less speculative than the future earnings of a physician or insurance agent, or the profits of a stallion's service, which may constitute the basis of damages. It is urged that the contract between the Studebaker Bros. Manufacturing Company and appellant Newton Jackson is void under the statute of frauds, because the value of the lumber was over \$50, and the finding does not show that the offer was accepted in writing. If this be true, it is no concern of the appellees. Parties to contracts and their privies can alone take advantage of the fact that a contract is invalid under the statute of frauds. Many forms of expression by this and other courts illustrate the doctrine that a third person cannot make the statute of frauds available to overthrow a transaction between other persons; that the defense of this statute is purely a personal one, and cannot be made by strangers. *Burrow v. Terre Haute & L. R. Co.* 107 Ind. 432; *Bodkin v. Merit*, 102 Ind. 298; *Cool v. Peters Box & Lumber Co.* 87 Ind. 531; *Dixon v. Duke*, 85 Ind. 434; *Wright v. Jones*, 105 Ind. 17; *Savage v. Lee*, 101 Ind. 515; 8 Am. & Eng. Encyclop. Law, 659, and cases cited. It concerns the remedy alone, and the modern law is well settled that, in the absence of a statutory provision to the contrary, the effect of the statute is not to render the agreement void, but simply to prevent its direct enforcement by the parties, and to refuse damages for its breach. 8 Am. & Eng. Encyclop. Law, 658, 659, and cases cited.

Counsel also takes the position that the \$500 was unearned commission or profit, and hence not recoverable. In *Niagara F. Ins. Co. v. Greene*, 77 Ind. 59, one cause for a new trial was excessive damages. The appellant contended that the whole verdict was necessarily made up of profits or gains which the appellees might have received, and was therefore erroneous; but the court says that probable profits which might have been received, not remote or speculative, have often been allowed in proof, not as the measure of damages, but to aid the jury in estimating the damages. The evidence is competent as a guide to aid in the exercise of a proper discretion. *Logansport v. Justice*, 74 Ind. 378, 39 Am. Rep. 79; *Fultz v. Wycoff*, 25 Ind. 321; *Frenzel v. Miller*, 37 Ind. 1, 10 Am. Rep. 62.

As a matter of right and justice and of law we feel that the conclusion of the court allowing the appellants to recover the \$500 for profits or commissions should not be set aside.

The petition for a rehearing is overruled.

MISSISSIPPI SUPREME COURT.

R. I. SIMMONS

v.

ATKINSON & LAMPTON CO., *App't*.

(99 Miss. 352.)

Filling blanks in a promissory note by the insertion of the words "or bearer" and of the name of the bank after the word "at" constitutes a material alteration which will avoid the note in the hands of an innocent holder.

(April Term, 1892.)

A PPEAL by defendant from a judgment of the Circuit Court for Pike County in favor of plaintiff in an action to recover the amount alleged to be due on certain promissory notes. *Reversed.*

The facts are stated in the opinion.

Messrs. Price & Sternberger, for appellant:

The holder of a note must show that a material alteration therein was made innocently. *Crowell v. Labree*, 81 Me. 44; *McCauley v. Gordon*, 64 Ga. 221, 37 Am. Rep. 68.

To change the place of payment without the maker's consent avoids a note, though in the hands of an innocent purchaser.

Oakey v. Wilcox, 8 How. (Miss.) 380; *Charlton v. Reed*, 61 Iowa, 166, 47 Am. Rep. 808; 1 Am. & Eng. Encyclop. Law, 508.

There was no authority to fill up the blanks. 2 Parsons, Cont. 723; *Oakey v. Wilcox*, *supra*; *Holmes v. Trumper*, 22 Mich. 427, 7 Am. Rep. 661; *First Nat. Bank of Buffalo v. Wood*, 71 N. Y. 405, 27 Am. Rep. 67; *Fordyce v. Kosminski*, 49 Ark. 40; 1 Am. & Eng. Encyclop. Law, 515.

Because of the blanks the notes could not be regarded as incomplete, and inserting the words was beyond the holder's authority.

Cornell v. Nebeker, 58 Ind. 428; *Gothrup v. Williamson*, 61 Ind. 599; *Marshall v. Drescher*, 68 Ind. 359; *Hert v. Oehler*, 80 Ind. 83; *Worral v. Gheen*, 39 Pa. 888; *Bruce v. Westcott*, 3 Barb. 374; *Goodman v. Eastman*, 4 N. H. 455; *Ray v. Smith*, 1 Allen, 477, 79 Am. Dec. 752; *Draper v. Wood*, 112 Mass. 815, 17 Am. Rep. 92; *Wood v. Steele*, 73 U. S. 6 Wall. 80, 18 L. ed. 726; *McGrath v. Clark*, 56 N. Y. 34, 15 Am. Rep. 372; *Woodworth v. Bank of America*, 19 Johns. 391, 10 Am. Rep. 239.

Messrs. E. H. Thompson and S. E. Packwood, for appellees:

As between two innocent persons, he shall suffer who, by his own act, occasioned the confidence and the loss.

Story, Eq. Jur. § 887; Quick v. Milligan, 108 Ind. 419, 58 Am. Rep. 49; *Ritchie v. Griffiths*, 12 L. R. A. 384, 1 Wash. 429.

The appellant had it in his power to avoid the alleged alterations by striking out the

blanks in the notes. By his own negligence he is estopped to allege, as against appellees, that the words were improperly inserted. Where one writes an instrument, leaving spaces which can be easily filled without exciting suspicion, and the instrument is altered by inserting appropriate words, he will be liable to a bona fide holder, notwithstanding the alteration.

1 Am. & Eng. Encyclop. Law, 515; *Isard v. Torres*, 10 La. Ann. 108; *Toomer v. Rutland*, 57 Ala. 379, 29 Am. Rep. 722; *Kitchen v. Place*, 41 Barb. 465; *Van Duzer v. Howe*, 21 N. Y. 538; *Redlich v. Doll*, 54 N. Y. 284, 18 Am. Rep. 573; *Garrard v. Haddan*, 67 Pa. 82, 5 Am. Rep. 412; *Zimmerman v. Rote*, 75 Pa. 188; *Brown v. Reed*, 79 Pa. 370, 21 Am. Rep. 75; *Blakey v. Johnson*, 13 Bush, 204, 26 Am. Rep. 254; *Yocum v. Smith*, 63 Ill. 321, 14 Am. Rep. 120; *Visher v. Webster*, 8 Cal. 109; *Rinboldt v. Eddy*, 34 Iowa, 440, 11 Am. Rep. 152; *Trigg v. Taylor*, 27 Mo. 245, 72 Am. Dec. 263; *Young v. Grote*, 4 Bing. 253; 2 Dan. Neg. Inst. § 1659; 2 Morse, Banks & Banking § 480.

Appellees having purchased, in the usual course of business, before maturity, the maker ought not to be discharged.

Brown v. Reed and Zimmerman v. Rote, *supra*.

Cooper, J., delivered the opinion of the court:

The appellee sued the appellant on two promissory notes of like tenor one of which is set out in the record, and is as follows: "\$100.00. Magnolia, Miss., April 30, 1890. September 1, 1890, after date, I promise to pay to the order of Camp & Ames, or bearer, one hundred dollars, at Bank of Summit, Miss. Value received. R. I. Simmons."

The defendant pleaded that the notes had been materially altered after execution by him, in this: that the notes, as executed, were in form as follows:

"\$100.00. Magnolia, Miss., April 30, 1890. September 1, 1890, after date, I promise to pay to the order of Camp & Ames —, one hundred dollars, at —. Value received. R. I. Simmons,"—and that they had been altered by the insertion of the words "or bearer" after the words "Camp & Ames," and of the words "Bank of Summit, Miss.," after the word "at."

The plaintiffs replied that they were bona fide purchasers of the notes before their maturity, and that there was nothing upon their face indicating that they had been altered, or sufficient to raise any suspicion that they had; that the added words were written in the same handwriting as the other written

NOTE.—As to materiality of alterations in notes, see *Walton Plow Co. v. Campbell* (Neb.) 16 L. R. A. 463 (as to alteration of note similar to that in main case); *Montgomery v. Crosthwait* (Ala.) 12 L. R. A. 140 (as to adding "& Co." to name of maker); *Sanders v. Bagwell* (S. C.) 7 L. R. A. 743 (as to alteration

by addendum changing rate of interest), and *note* to that case; *Palmer v. Poor* (Ind.) 6 L. R. A. 469 (as to filling blank with figure to show rate of interest), and *note* to that case; and *Wilson v. Hayes* (Minn.) 4 L. R. A. 196 (as to change of interest from annually to quarterly), and *note* to that case.

parts of the notes, and were written in spaces negligently left by the defendant on the notes when signed by him, and that the alteration was by the forgery of the payees, which was made possible and easy by the negligent act of the defendant in leaving blank spaces in the notes. The defendant demurred to this replication, and his demurrer was overruled. This ruling of the court presents the first and principal error assigned.

The question presented is one upon which there is direct and irreconcilable conflict in the American authorities. Courts and text-writers have, in very nearly equal numbers, ranged themselves upon opposite sides: and it is difficult, if not impossible, to determine which view is sustained by the greater number. It is well settled that if one sign a negotiable instrument, leaving blanks to be filled by the payee, and deliver it to him, such payee is thereby made the agent of the maker, and if he exceeds his authority, and inserts an unauthorized amount, the maker will be bound to an innocent holder. *Johnson v. Blasdale*, 1 Smedes & M. 17, 40 Am. Dec. 85; *Hemphill v. Alabama Bank*, 6 Smedes & M. 44; *Davis v. Lee*, 26 Miss. 505; 1 Am. & Eng. Encyclop. Law, 516. The author of the article, "Alteration of Instruments," in Am. & Eng. Encyclop. Law, states the rule to be that "where one writes out a note or other instrument so as to leave spaces which can easily be filled without exciting suspicion, and such note or other instrument is altered by filling in these spaces, he will have to suffer the consequences of his negligence, and be liable to a bona fide holder for value on the altered instrument." Volume 1, p. 515. Mr. Daniel prefers the rule as thus stated. 2 Dan. Neg. Inst. § 1405. On the other hand, Mr. Randolph says: "It has now, however, become, in America, an established rule that, if the instrument was complete without blanks at the time of its delivery, the fraudulent increase of the amount by taking advantage of a space left without such intention, although it may be negligently, will constitute a material alteration, and operate to discharge the maker." 1 Randolph, Com. Paper, § 187. And this seems to be the opinion of Mr. Bigelow. Bigelow, Estop. 4th ed. 512. The courts of Louisiana, Pennsylvania, Kentucky, Alabama, New York, Illinois, and California hold the maker bound on the altered note. *Isnard v. Torres*, 10 La. Ann. 103; *Young v. Leedom*, 87 Pa. 351; *Zimmerman v. Rote*, 75 Pa. 188; *Brown v. Reed*, 79 Pa. 370, 21 Am. Rep. 75; *Blakey v. Johnson*, 13 Bush, 197, 26 Am. Rep. 254; *Toomer v. Rutland*, 57 Ala. 879, 29 Am. Rep. 722; *Redlich v. Doll*, 54 N. Y. 235, 13 Am. Rep. 573; *Yocum v. Smith*, 63 Ill. 321, 14 Am. Rep. 120; *Fisher v. Webster*, 8 Cal. 109.

The courts of New Hampshire, Massachusetts, Michigan, Iowa, Arkansas, and also New York, have adopted the contrary rule. *Goodman v. Eastman*, 4 N. H. 455; *Greenfield Sav. Bank v. Stowell*, 123 Mass. 196; *Holmes v. Trumper*, 22 Mich. 427, 7 Am. Rep. 661; *Knawville Nat. Bank v. Clark*, 51 Iowa, 264, 38 Am. Rep. 129; *McGrath v. Clark*, 56

N. Y. 84, 15 Am. Rep. 372; *Fordyce v. Kosminski*, 49 Ark. 40.

The rule declaring liability upon the maker of an instrument thus altered first found expression in *Young v. Grote*, 4 Bing. 253. In that case a banker, having occasion to be absent, left with his wife some printed checks upon his banker, signed by him in blank, to be filled up by her, and drawn as his business might require. She delivered one of these checks to the clerk to be filled for £50. The clerk filled out the check beginning the word "fifty" with a small letter and in the middle of the blank line left for the same, and showed it to the plaintiff's wife, who directed him to draw the cash. Before presenting it to the banker, this clerk altered the check by inserting before the word "fifty" the words "three hundred and," and then presented it to the banker and drew the larger sum. The plaintiff sued the banker for his balance, and contended that the loss of the £300 should be borne by the banker. Under the circumstances, it was held that the loss was attributable to the negligence of the plaintiff's agent (his wife), and that he could not recover. The English judges have found some difficulty in determining upon what precise principle the decision rests. In *Bank of Ireland v. Evans' Charities Trustees*, 5 H. L. Cas. 889, the lord chancellor (Cranworth) said: "Now, the case of *Young v. Grote* went upon the ground (whether correctly arrived at in point of fact is immaterial) that the plaintiff there was estopped from saying that he did not sign the check for £350." In *Swan v. North British Australasian Co.*, 2 Hurlst. & C. 175, Lord Chief Justice Cockburn said: "The case of *Young v. Grote*, on which so much reliance has been placed, and which is supposed to have established this doctrine of estoppel by reason of negligence, when it comes to be more closely examined, turns out to have been decided without reference to estoppel at all. Neither the counsel, in arguing that case, nor the judges, in deciding it, refer once to the doctrine of estoppel." Lord Cockburn thought that the case really rested upon the principle of avoiding a circuity of action; that the banker, who was the depositary of his customer, while having no right to retain the fund, having no proper voucher for it, would be entitled to recover against the customer for the loss sustained through his negligence, and that this right to a cross action might be availed of in defense.

It seems to be clear that, if an action may be maintained against the maker on the instrument, it must rest upon the theory that it is his instrument, or, though not his in fact, may be so treated by the holder. The mere fact that the holder has been deceived, and sustained injury by the alteration of the instrument, which alteration was made possible by the negligence of the maker, could not give a right of action *ex contractu* on the instrument. The action would be in tort, or on the case, for the negligence. To make the instrument, as altered, that of the maker, it must be held that the payee, or other party by whom the alteration is made, is his agent,—a proposition which has sometime

been advanced or suggested, but which has found but little support in adjudicated cases. *Roberts v. Tucker*, 16 Q. B. 560.

There is certainly no expectation or intention on the part of the maker of a completed instrument that the person to whom it is delivered shall make any alteration thereof, nor does it ever occur that third persons act with reference to the supposed authority of such person to act as agent of the maker. It certainly would not be held that a negligently drawn instrument constituted the payee the agent of the maker, to change its terms in favor of one to whom such person should exhibit the instrument as the grant of his power, and should profess to act under it. The agency, in these cases, if one exists at all, must be a concealed one unknown and unsuspected by the world. The writing which creates the agency, if exhibited, shows that none exists. It is a valid agency only so long as it is unknown. The ground of the decision of *Young v. Grote*, given by Lord Cockburn in *Swan v. North British Australasian Co.*, has been accepted by the English courts as the correct one. *Halifax Union v. Wheelwright*, L. R. 10 Exch. 188, and *Swan v. North British Australasian Co.*, and *Bank of Ireland v. Evans' Charities Trustees*, have been considered as shaking the authority of *Young v. Grote* and *Bacendale v. Bennett*, L. R. 8 Q. B. Div. 525. But, upon whatever ground the liabil-

ity of the maker is sought to be rested, we are of opinion that none can exist. The maker of a bill of exchange is not bound to act upon the supposition that forgery will be committed merely because an opportunity is afforded by the character of the paper he puts out. In no relation of life do men conduct their affairs as though crime will be committed whenever it may be. It cannot be negligence to do that which can injure no one unless some one else shall commit a felony, and under circumstances in which no duty is imposed not to do the act. A bailee of goods, who negligently exposes them so that they may be stolen, would be liable to the bailor if they are stolen, but this is because he is under duty to the owner not to expose them. But if one negligently keeps his own property, and it is stolen, he does not forfeit his right to reclaim it from a purchaser from the thief, because, as to such person, he is under no duty. So one who issues negotiable paper is under liability only to those who take the contract he has made. He assumes no obligation of another contract, though it may be written on the same paper, and is equally free from liability if the agreement he has made is materially changed; for the agreement, as changed, is no more his than if all its terms were forged.

The judgment is reversed, the demurrer to the replication sustained, and cause remanded.

NEW YORK COURT OF APPEALS.

John H. RICHARDS, *Appt.*,

v.

Samuel H. DAY, *Exr.*, etc., of Elizabeth Davis, Deceased, *Respt.*

(137 N. Y. 182.)

1. The signer of a blank bond which is filled up thereafter with terms different from those authorized by him is not bound thereby unless he has become estopped as to the holder of the bond to deny that he authorized it to be filled up in that form.
2. Parol evidence that a bond sued on was executed in blank and was filled up contrary to direction may be given under a simple denial of execution and delivery.

(February 7, 1893.)

APPEAL by plaintiff from a judgment of the General Term of the Supreme Court, Fifth Department, reversing a judgment of the Monroe County Circuit in plaintiff's favor on the counterclaim and granting a new trial

as to such claim in an action brought to recover for services alleged to have been rendered to defendant's testatrix in which defendant set up as a counterclaim a demand on a bond which had been given by plaintiff to said testatrix. *Reversed.*

Statement by *Earl, J.*:

The plaintiff commenced this action to recover for services rendered and for money paid for the defendant's testatrix, Elizabeth Davis. The defendant put in issue the allegations of the complaint, and set up as a counterclaim that the plaintiff and his wife executed to Mrs. Davis their joint and several bond in the penal sum of \$3,500, conditioned to pay her the sum of \$210 on the 6th day of April, 1881, and \$175 "each year thereafter during the natural life of Elizabeth Davis," but no part of the principal to be paid, and that the interest falling due on April 6th in each of the years 1885, 1887, 1888, and 1889, had not been paid, and he demanded judgment against the plaintiff for these sums, with interest. The plaintiff re-

NOTE.—The effect of filling blanks when authority therefor is given is illustrated in the case of *Reed v. Morton* (Neb.) 1 L. R. A. 736, where a blank for the name of the grantee was left in a deed delivered to the grantor's husband in order that he might convey the premises to any purchaser whom he might find.

The present case is a somewhat unusual one if it is not indeed entirely novel, although there are 26 L. R. A.

numerous cases as to deeds in which is involved the power to authorize by parol the filling of the blanks by an agent, and others as to the filling of blanks in commercial paper considered with respect to the peculiar character of such paper.

See also the case preceding, *Simmons v. Atkinson & L. Co.* (Miss.) ante. 599, as to material alteration by filling blanks where this is done not by an agent but by the payee.

plied to the counterclaim, and, among other defenses, denied "that he sealed, executed, and delivered the bond as set forth in the counterclaim." Mrs. Davis died April 10, 1889, and plaintiff's wife died before the commencement of this action. At the close of the evidence the defendant's counsel asked the court to direct a verdict in his favor for the amount due on the bond, and that motion was denied. Plaintiff's counsel then asked the court to direct a nonsuit in reference to the counterclaim, and that was granted. Thereafter judgment was entered dismissing the plaintiff's complaint and dismissing the counterclaim. From so much of the judgment as dismissed his counterclaim, the defendant appealed to the general term, and there that portion of the judgment was reversed, and a new trial as to the counterclaim was granted. From the order of the general term the plaintiff appealed to this court.

Mr. George F. Yeoman, with Messrs. Smith & Davis, for appellant:

The evidence introduced to show that the alleged bond did not contain what it was agreed that it should contain was competent.

Chauncey v. Arnold, 24 N. Y. 330; *Dutchess & C. County R. Co. v. Mabbett*, 53 N. Y. 397.

Mr. Cassius C. Davy, for respondent:

Plaintiff became liable upon the bond by his signature to it although his name does not appear in the body of it.

Ex parte Fulton, 7 Cow. 484; *Perkins v. Goodman*, 21 Barb. 318; *Decker v. Judson*, 16 N. Y. 439; 1 Wait. Act. & Def. 676, citing, *Smith v. Crooker*, 5 Mass. 538; *Pournier v. Cyr*, 64 Me. 35; *Blakey v. Blakey*, 2 Dana, 463; *Martin v. Dortch*, 1 Stew. (Ala.) 479; *Partridge v. Jones*, 26 Alb. L. J. 455, 38 Ohio St. 375, 27 Alb. L. J. 249.

Where a bond is joint and several an action lies against one or more of the obligors at the option of the plaintiff.

Field v. Van Cott, 15 Abb. Pr. N. S. 349; Code Civ. Proc. § 454; *Carman v. Plass*, 23 N. Y. 236.

Parol authority was sufficient to authorize Justice Willard to fill in the blanks in the printed form after it had been signed and sealed.

Mechem, Ag. p. 70, note 1; *Knapp v. Malby*, 13 Wend. 587; *Drury v. Foster*, 69 U. S. 2 Wall, 24, 17 L. ed. 780; *Commercial Bank of Buffalo v. Kortright*, 22 Wend. 348, 34 Am. Dec. 817; *Woolley v. Constant*, 4 Johns 54, 4 Am. Dec. 246; *Ex parte Decker*, 6 Cow. 60; *Ex parte Kervin*, 8 Cow. 118.

No equitable relief is asked for by the pleadings, nor has any fraud or mistake been alleged; and in the absence of such allegations no equitable relief can be granted.

Gould v. Cuyuga County Nat. Bank, 86 N. Y. 33; *Govilet v. Asseler*, 22 N. Y. 225; *Reubens v. Joel*, 13 N. Y. 488.

The plaintiff is estopped by his own negligence from questioning the bond.

2 Beach, Modern Equity Jurisp. § 1100; *Thomas v. Barstow*, 48 N. Y. 193. See cases cited 1 Beach, Modern Equity Jurisp. p. 53; *Beauford v. Need*, 12 Clark & F. 248; *Glenn v. Staller*, 42 Iowa, 110; *Thomas v. Barstow*, *supra*.

23 L. R. A.

Parol evidence was not admissible to contradict the bond.

Marsh v. McNair, 99 N. Y. 178; *Southwick v. First Nat. Bank of Memphis*, 84 N. Y. 429.

Earl, J., delivered the opinion of the court:

Neither party upon the trial asked to have the evidence as to the counterclaim submitted to the jury, and there is really no dispute about it. Mrs. Richards, the wife of the plaintiff, was the daughter of the Mrs. Davis, the testatrix, and a paper now appearing as the bond set up in the counterclaim was signed by her and the plaintiff in pursuance of a family arrangement by which Mrs. Davis distributed property among her children, and agreed to take from them bonds to secure her support. The plaintiff and his wife and the testatrix went to a justice of the peace for the purpose of having a bond prepared and executed. It was agreed between them that the testatrix should have the interest on the amount of the bond if she needed it; that if she did not need it, it was not to be called for, and that nothing should be due or payable upon the bond after her death; and that such an agreement should be inserted in the conditions of the bond. When the parties called upon the justice, he was not prepared to write the bond, and he produced a blank bond, and told the plaintiff and his wife to sign it, and that he would subsequently fill it up according to the agreement, which was stated to him in the presence of all the parties, and he would deliver the bond. With that understanding, the plaintiff and his wife signed the blank bond, and left it with the justice of the peace. He thereafter filled it up as it now appears, binding the obligors absolutely to make the payments on the bond as therein specified during the life of Mrs. Davis. The claim of the defendant is that the plaintiff could not, under his reply simply denying that he sealed, executed, and delivered the bond, show by parol evidence what the true agreement between the parties was, nor what instructions were given to the justice of the peace in reference to filling up and completing the bond, and that the only remedy of the plaintiff, if the bond was not filled up as agreed, was to have it reformed so as to make it conform to the agreement; and the general term upheld this claim, holding that, under the issue formed by the reply, the parol evidence was inadmissible to contradict or vary the bond, and that, if it did not express the true agreement between the parties, the plaintiff should have interposed a reply asking for its reformation.

We think the learned general term fell into error. If this had been a complete bond when the plaintiff signed it, although by mistake or fraud it did not express the true agreement between the parties, his sole remedy would have been to procure its reformation, and, when an effort was made to enforce the bond against him, he could not contradict the terms thereof by parol evidence, except by proper allegations in his pleading asking for its reformation. But here the plaintiff did not sign any bond. He signed a blank piece of paper, and it would have been sufficient for him on

the trial to prove that he simply signed a blank piece of paper, and then it would have been necessary for the defendant to show that he authorized the blank to be filled up, and how and under what circumstances the authority was given, and what the authority was. A party who signs a blank piece of paper cannot be bound to the obligation written therein, unless it can be shown that he gave the person who wrote it authority. *Chauncey v. Arnold*, 24 N. Y. 830; *Dutchess & C. County R. Co. v. Mabbett*, 58 N. Y. 397; *Drury v. Foster*, 69 U. S. 2 Wall. 24, 17 L. ed. 780.

There might be cases of an estoppel where one who signed a paper in that way would be bound by it. But in this case no estoppel arises, as the action is between one of the original parties and the representative of the other party; so the defendant is not in a position to complain if the bond is given effect according to the true agreement between the parties. Suppose the justice of the peace, instead of inserting payments in this bond, as agreed, had inserted therein a conveyance of real estate, or a bond for the absolute pay-

ment of the principal of a large sum of money; or suppose he had signed this blank bond without authorizing any one to fill it up, and some unauthorized person had afterward filled it up as it now appears,—in either of these cases would the bond thus filled up and completed in form have been the bond of the plaintiff? Certainly in neither case could it have been said that the plaintiff executed such a bond. Here so far as the bond departed from the agreement of the parties it was not the bond of the plaintiff. The only authority the justice of the peace had was to insert in this bond the precise agreement of the parties, as directed. As he did not do that, this is not, in the form it now appears, the bond of the plaintiff, and, under a denial that he executed the bond, he may show the circumstances under which he signed his name, and what the agreement at the time he signed it was.

We are therefore of opinion that the *order of the general term should be reversed, and the judgment of the trial term affirmed, with costs.*
All concur.

KANSAS SUPREME COURT.

Re Henry Edward SANDERS, by His Next Friend.

(.....Kan.....)

*1. Chapter 129, Sess. Laws 1881, (paragraphs 6513-6529, Gen. Stat. 1889), is not unconstitutional by reason of conflict with section 16, article 2, of the Constitution; and the title of the Act providing "for the organization and management of the state reform school," is broad enough to include the provisions of the act permitting boys under the age of sixteen to be placed in or committed to the school by courts of record, including probate courts.

2. The words, "who may be liable to punishment by imprisonment," in the first subdivision of section 4, chapter 129, Sess. Laws 1881, may be construed as "who may be subject to punishment by imprisonment." With this construction, that provision of the act is also constitutional.

3. A probate judge has no authority, under the first subdivision of section 4, chapter 129, Sess. Laws 1881, to commit a boy under sixteen years of age, without his consent, and against the objections of his parents, to the reform school, who is charged only upon a complaint filed with him with the specific crime of burglary, when such boy has not been previously

convicted of the offense by some court having jurisdiction to hear and try the same.

(April 7, 1894.)

PETITION on behalf of Henry Edward Sanders by W. F. Sanders, his next friend, for a writ of habeas corpus to procure his release from the custody of J. W. Freeborn, sheriff of McPherson county to which he had been committed to be conveyed to the Reform School. *Petitioner discharged.*

Statement by Horton, Ch. J.:

On November 29, 1893, the following complaint, duly verified, was filed with the probate judge of McPherson county:

"State of Kansas, McPherson County—ss.: In the Probate Court. E. F. Haberlein, being duly sworn, on oath says that Robert Hunt and Edward Sanders are boys under the age of sixteen (16) years; that said Robert Hunt and Edward Sanders are liable to punishment by imprisonment, under the laws of this state, for the offense of burglary. That is to say, that on the 28th day of November, 1893, and in the night-time of said day, in the county of McPherson, and state of Kansas, said Robert Hunt and Edward Sanders did then and there unlawfully, feloniously, and burglariously break into and enter the store of the said E. F. Haberlein, in which store

*Headnotes by HOBSON, Ch. J.

NOTE.—The commitment of minors to a reform school without conviction of crime is the subject of a note to the case of *State v. Brown* (Minn.) 16 L. R. A. 601. Since the subject is of the highest importance and the law concerning it is not fully developed, decisions like the one above reported must be regarded with interest. This decision seems to represent the general tendency of the courts to regard such commitment as a criminal 23 L. R. A.

proceeding when it is based upon the commission of a criminal offense, and therefore subject to all constitutional restrictions on criminal prosecutions.

See, on the same subject, the recent Illinois decision in the case of *People v. Illinois State Reformatory Managers*, ante, 189.

As to state guardianship of children, see *Whalen v. Olmstead* (Conn.) 15 L. R. A. 593, and note.

certain goods, wares, merchandise, and other valuable things were then and there kept and deposited, with the intent the said goods, wares, merchandise, and other valuable things in said store then and there being to steal, take, and carry away. Ed F. Haberlein.

"Subscribed and sworn to before me this 29th day of November, 1898. [Seal.] J. W. Walker, Probate Judge."

A warrant was issued, the boys were arrested, and five days' notice of the time of hearing the complaint was given to the parents. At such date the boys appeared, as did the county attorney; the father and mother of Robert Hunt, and their private counsel, Messrs. Grattan & Grattan; the father of Henry E. Sanders, and his counsel, Milliken & Galle. The parents of Robert Hunt consented that the court should commit him to the reform school, and, through their private counsel and the county attorney, vigorously urged that both boys should be so committed. The father of Henry E. Sanders, personally and by counsel, so far as he was concerned, objected thereto, and insisted that inasmuch as there was no other accusation against him than that of burglary, and that as his father not only refused to consent, but objected, to the court considering the charge, and as he had never been tried or convicted of the offense charged, the court had no power or jurisdiction to try him therefor. The court overruled such objections and proceeded to inquire into the case, when a jury trial was demanded by the Sanderses (father and son), which was refused; and the court, after hearing the evidence, found the charge of the complaint to be true, and that Robert Hunt was fourteen, and Henry E. Sanders thirteen, years of age, and that they were both proper subjects for commitment to the reform school, and accordingly so committed both of them until their majority, unless sooner discharged as permitted by law. A warrant was placed in the hands of J. W. Freeborn, sheriff of McPherson county, to convey them to the school; but, before it was executed as to Henry E. Sanders, a writ of habeas corpus was sued out by him in this court, returnable on the 8d day of January, 1894, at which time the sheriff produced the child in court, justifying his detention and restraint by reason of the complaint, warrant, and proceedings. The case was submitted upon the record.

Messrs. Milliken & Galle for petitioner.
Mr. Charles W. Webster, for respondent:

If under the statute in question, the boy is not liable to punishment until after conviction then we find these two curious facts to exist:

First, a conflict of jurisdiction between a court of record, a probate court and a justice's court.

Second, any boy under sixteen who had committed an offense could not be committed to the reform school until he had been first proceeded against as a criminal.

The legislature intended to prevent the very thing that the father of Henry Edward Sanders demands should be done in this case. That is, that his boy be arrested for burglary, 28 L. R. A.

treated as a common criminal, and upon conviction in the district court, be branded as a felon and be sentenced both to the reform school and to the penitentiary, leaving the choice with the boy as to which place he will go.

The proceedings had by the probate court in this case were not a trial within the meaning of sections 5 and 10 of the Bill of Rights.

State v. Topeka, 86 Kan. 86, 59 Am. Rep. 529; *State v. Durein*, 46 Kan. 695.

An act of the legislature providing for the committing to an industrial school of dependent infant girls found begging, etc., is not unconstitutional as being in the restraint of personal liberty, nor because a trial by jury is not accorded.

Ferrier's Petition, 103 Ill. 387, 42 Am. Rep. 10; *Ross v. Irving*, 14 Ill. 171.

A statute which provides for the detention of a minor child, who is incorrigible and beyond parental control, in the "house of refuge," a reformatory institution, under the authority of a commitment by a justice of the peace, is not unconstitutional because it authorizes the imprisonment of a minor without trial by jury as guaranteed by the bill of rights of Pennsylvania.

Ex parte Crouse, 4 Whart. 9.

The institution to which they are committed is a school, not a prison; nor is the character of their detention affected by the fact that it is also a place where juvenile convicts may be sent who would otherwise be condemned to confinement.

Prescott v. State, 19 Ohio St. 188, 2 Am. Rep. 888.

A statute enacted that children under a certain age, who were inmates of poor houses, or who were abandoned by their parents, or who were without means of subsistence, should be committed to industrial schools during minority. It was held, not unconstitutional as authorizing imprisonment without due process of law.

Milwaukee Industrial School v. Milwaukee County Suprs. 40 Wis. 328, 23 Am. Rep. 702.

A reform school is not a penal institution, and in case of conviction for crime sentence is only suspended, and the offender committed for the purpose of being reformed.

Re Mason, 3 Wash. 609.

The mode of procedure pointed out in this legislation is not in violation of the fundamental law of the state which provides that the right of trial by jury shall remain inviolate.

State v. Brown, 16 L. R. A. 691, 50 Minn. 853; *Farnham v. Pierce*, 141 Mass. 203, 55 Am. Rep. 452.

The commitment to the reform school in this case is not conclusive upon the parent as to his right to the custody of the child.

Milwaukee Industrial School v. Milwaukee County Suprs. and *Farnham v. Pierce*, *supra*.

The title is: "An Act to Provide for the Organization and Management of the State Reform School."

The one object of the act was to determine what boys needed reforming, and to provide a place for their reformation.

Judge Cooley, in treating of this constitutional question says: "The general purpose

of these provisions is accomplished when a law has but one general object which is fairly indicated in its title. To require every end and means necessary or convenient for the accomplishment of this general object to be provided for by a separate act relating to that alone, would not only be unreasonable, but would actually render legislation impossible."

Cooley, Const. Law, p. 144. See also *State v. Barrett*, 27 Kan. 218; *State v. Bush*, 45 Kan. 140; *Cherokee County Comrs. v. State*, 86 Kan. 337.

While the provision of the constitution might limit and restrict the legislature in conferring the jurisdiction upon the probate court yet it did not prevent the legislature from giving to the probate judge such powers and duties as were not inconsistent with those given to the probate court by the constitution.

Re Johnson, 12 Kan. 102.

In *State v. Dennis*, 89 Kan. 509, this court held that the probate court is invested with jurisdiction to hear and determine whether a settler upon school land is qualified and entitled to purchase the land at the appraised value, and that its decision is final unless appealed from. Now it cannot be contended that jurisdiction in such a case is conferred upon the probate court by the constitution.

In *Mendenhall v. Burton*, 42 Kan. 570, this court held that the probate court was authorized under section 1, chapter 108, General Statutes of 1868, to declare a town then existing to be incorporated as a village and designate the metes and bounds thereof.

See also as to authority conferred upon probate courts and probate judges, *Kirkpatrick v. State*, 5 Kan. 678; *Re Johnson, supra*; *Intoxicating Liquor Cases*, 25 Kan. 760, 37 Am. Rep. 224; *Re Latta*, 43 Kan. 534.

Horton, Ch. J., delivered the opinion of the court:

The petitioner alleges that he has been illegally committed to the state reform school by the probate court of McPherson county, and seeks by this proceeding to be discharged. The contention is that chapter 129, Sess. Laws 1881, is in violation of section 16, article 2, of the Constitution; at least, that the title of the act is not sufficiently comprehensive to include everything contained therein,—particularly, that it is not broad enough to include the provision of the fourth section of the act, giving courts of record, including probate courts, power to commit boys under sixteen years of age to the reform school. Gen. Stat. 1889, par. 6516. "Organization" is defined as "an arrangement of parties;" "the act of organizing," as "the organization of a government, or of flocks, or of a railroad or other corporation, or of an army, or of an expedition;" "the connection of parts in and for a whole, so that each part is, at once, end and means." "Socially as well as individually, organization is indispensable to growth." "Management" is defined as "government; control; superintendence; physical or manual handling or guidance; the act of managing by direction or regulation; administration,—as the management of a family, or of a household, or of servants, or of great enterprises, or of great affairs." A "school"

is defined as "an institution for learning; an educational establishment; a place for acquiring knowledge and mental training;" "an assemblage of scholars, those who attend upon the instruction in a school of any kind;" "a body of pupils, collectively, in any place of instruction, and under instruction of one or more teachers;" "the disciples or followers of a teacher;" and "any place or means of discipline, improvement, instruction, or training." When we speak of "organizing a corporation," we mean the filing of its character, the designation of its shares of stock; the selection of its directors; everything necessary to organize, or bring into existence, or create a corporate body. The authority to organize and manage or govern an army, unless otherwise restricted, gives power to the commander in chief, or those in authority, to bring together, to collect, to assemble, to recruit persons for military service, and thereby to bring into existence or create a military force, and to increase, decrease, or change the same, or any part thereof, as well as to command, direct, and regulate the force or army after it is organized or brought into existence. We do not intend to say that "the organization of a school" is broad enough, in its strict sense, to literally create or make boys or girls. But these words, construed together, are sufficiently broad, within their usual and ordinary meaning, to signify the bringing in, the bringing together, the collecting, the placing in, the committing of boys or other inmates to, a school; that is, the organizing, or bringing into existence, or creating a school. Section 4, which is criticised as not within the title of the act, provides, in connection with other sections of the act, the way in which boys are collected, brought in, or committed to the school; that is, the manner in which the school is organized, or brought into existence, kept in existence, and operated, with boys or inmates. The organization and management of a school relate to one subject. Construing all of the words of the title of chapter 129, we think there is sufficient therein to authorize something more than provisions to merely systematize and regulate an existing school, or an existing place of discipline, instruction, or training. Evidently, the legislature intended by the title one whose scope was broad enough to embrace the bringing together, the collecting, and the furnishing of pupils or inmates to or for a reform school. Not only that, but the title is broad enough to include provisions in the act for bringing in or bringing together, for collecting and furnishing, whatever is necessary to complete and carry on a reform school. The general rule is that, in determining whether an act of the legislature is constitutional, it is the duty of the courts to give such construction to it, if possible, as will uphold all of its provisions. Then, again, it is not necessary that the title to an act should be a synopsis or abstract of the entire act, in all its details. It is sufficient if the title indicates clearly, though in general terms, the scope of the act. With our construction of the title of the act and the provisions thereof, we think, within the prior

decisions of this court, that the constitutionality of the act may be upheld. *Woodruff v. Baldwin*, 28 Kan. 491; *State v. Barrett*, 27 Kan. 218; *Oberokee County Comrs. v. State*, 36 Kan. 337; *State v. Bush*, 45 Kan. 140; *Cooley, Const. Law*, 144.

The other contention of the petitioner against the commitment is more serious. In the act the legislature has provided for commitments to the school of boys under sixteen years of age, in the following manner: Under section 3, any boy who shall have been convicted of an offense punishable by imprisonment; under the first subdivision of section 4, any boy who may be liable to punishment by imprisonment under any existing law of the state; under the second subdivision of section 4, any boy, with the consent of his parents or guardian, against whom the charge of any crime or misdemeanor shall have been made, the punishment of which, on conviction, would be confinement in a jail or prison; under the third subdivision of section 4, any boy who is incorrigible, etc.; and, under section 5, any boy, with his consent, who shall be arraigned for trial, in any court competent to try the case, on any charge under the criminal code for violation of any law of the state, which, upon conviction, would subject him to imprisonment. Gen. Stat. 1889, pars. 6515-6517. If the petitioner in this case had been duly convicted of any offense known to the laws of the state, punishable by imprisonment, we think he could have been sentenced and confined to the reform school, under section 3 of the Act. Or if he had been committed to the reform school by the probate court of McPherson county, or any other court of that county, under the second and third subdivisions of section 4, or if he had been committed, with his consent, under section 5, we would have no hesitation in enforcing the order. "The tendency of the courts, in construing the powers of committing magistrates and other officials empowered by statutes to place minors in juvenile institutions for care and guardianship, and in passing upon their proceedings, is to disregard mere technicalities, and to give such interpretation to the statutes as to carry out their benevolent design, and sustain the proceeding in pursuance thereof, when such course is evidently to the advantage of the minor." 30 Cent. L. J. 53, and cases cited; *Re Mason*, 3 Wash. 609; *Ex parte Crouse*, 4 Whart. 9; *State v. Brown*, 50 Minn. 858, 16 L. R. A. 691; *Ferrier's Petition*, 103

Ill. 367, 42 Am. Rep. 10; *McLean County v. Humphreys*, 104 Ill. 373; *Milwaukee Industrial School v. Milwaukee County Suprs.* 40 Wis. 328; *Farnham v. Pierce*, 141 Mass. 203, 50 Am. Rep. 452; *Roth v. House of Refuge*, 31 Md. 329.

The petitioner was tried upon a complaint before the probate judge, charging him with the specific offense of burglary. It is not alleged in the complaint that he is incorrigible, or otherwise a fit person to be sent to the reform school. The probate judge found that the complaint charging him with burglary was true. The petitioner has not consented to his commitment, and his parents strenuously object. We do not think the order can be enforced. If the first subdivision of section 4 must be construed as authorizing courts of record, including probate courts, to commit any boy under sixteen years of age, without his consent, and against the objections of his parents, to the reform school, who is charged only with a specific criminal offense, like burglary, punishable by imprisonment, without a trial or hearing according to due process of law, then it is doubtful if that part of the statute is constitutional. *State v. Ray*, 63 N. H. 406, 56 Am. Rep. 529; *Com. v. Horregan*, 127 Mass. 450.

The proceedings in this case are in the nature of a conviction for a specific crime by a court having no criminal jurisdiction. Such a conviction ought not to be had in an irregular and improper way, even if not followed by any sentence of imprisonment, or other punishment. If, however, the boys "who may be liable to punishment by imprisonment" do not incur such liability until they are convicted in the usual form, the first subdivision of section 4 may have some operation. We think that the words "may be liable to punishment" should be construed as meaning "subject to punishment." "Liable" has, also, that meaning. Courts of record, including probate courts, may possibly have the authority, where a boy under sixteen years of age has been convicted of a criminal offense punishable by imprisonment, and sentenced to a prison by a justice of the peace, or a court, afterwards to commit him to the reform school. The provisions of the act, however, should be given such a construction as to keep them within the limits of the constitution.

The petitioner will be discharged.

All the Justices concur.

PENNSYLVANIA SUPREME COURT.

Norah S. GRAEFF
v.

PHILADELPHIA & READING R. CO.,
Appt.

(161 Pa. 230.)

1. The unusual, rude, and hasty act of a

stranger in rushing through a door while hurrying to take a train, thereby violently striking a person on the other side, does not render the carrier liable.

2. A door such as are in common use does not show negligence of a railroad company because it is not all made of glass above the middle, so persons on opposite

NOTE.—The circumstances of the above case require a new application of the law as to negligence
23 L. R. A.

of a carrier in respect to depots and approaches to trains.

sides can see each other, nor because a screw-eye 4 feet 10 inches from the bottom projects 9-16 of an inch beyond the surface and causes injury to a person against whom it is violently pushed by another hurrying to a train.

(April 23, 1894.)

A PPEAL by defendant from a judgment of the court of Common Pleas, No. 1, for Philadelphia County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Reversed.*

Outside the door of one of defendant's stations was a storm-house, having doors which swung both ways. Each swing door was 42 inches wide, of which 8 inches in the center, from the lock-rail up was of glass. The rest was of wood 4 feet 10 inches above the pavement. A screw-eye was inserted in the door, to hold it back when the weather was sufficiently warm to warrant it. On the day of the accident for which this suit was brought, the plaintiff passed through the station door into the storm-house, when one of the swing doors was pushed violently in by a person coming from without, and the screw-eye struck plaintiff on the forehead, causing the injury complained of.

Further facts appear in the opinion.

Mr. Gavin W. Hart, for appellant:

The railroad company is not bound to protect its passengers from such rudeness as made the ground of action in this case.

Ellinger v. Philadelphia, W. & B. R. Co., 153 Pa. 215.

The cause of the accident was the improper act of a passenger and the plaintiff cannot recover.

Kies v. Erie, 185 Pa. 144; *Eisenbrey v. Pennsylvania Co. for Insurance*, 141 Pa. 566.

Ordinarily the question of proximate and remote cause is for the jury; but where facts are not in dispute, the determination is for the court.

Hoag v. Lake Shore & M. S. R. Co., 85 Pa. 293, 27 Am. Rep. 653; *West Mahonoy Twp. v. Watson*, 112 Pa. 575, 116 Pa. 344; *Bunting v. Hoggsett*, 12 L. R. A. 268, 139 Pa. 363; *Herr v. Lebanon*, 16 L. R. A. 106, 149 Pa. 226.

Messrs. William C. Gross and Thomas F. Gross, for appellee:

This accident happened by reason of the improper construction of the storm door. It was not a properly constructed door for the place or manner in which it was used.

Hayman v. Pennsylvania R. Co., 118 Pa. 508.

Green, J., delivered the opinion of the court:

The act which caused the plaintiff's injury was not the act of the defendant, nor of any of its agents or employes. It was exclusively the act of a total stranger, over whom, or whose actions, the defendant had not the slightest control. Moreover, his ac-

tion was not the usual, customary conduct of an intending passenger, about to pass through the door in question; but it was rude, impatient, and unusual. The plaintiff herself thus describes the manner of her injury: Having said she was just about going out of the door, and had her hand up at the door, and her left foot on the pavement, she was asked: "Q. Where was the right foot? A. On the step; and going out there was a gentleman walked in, or came running, to make the train, and as he ran in he knocked the door against my head. Q. Where did he hit your head? A. He struck me right there on the forehead." The plaintiff's witness Emma Bettker, being the only other witness who described the manner of the injury, testified as follows upon the same subject: "As we were going out of the door, Norah put her hands up to the door, to go out, while two gentlemen came a rushing in, and threw the door on Norah, and we were still going to pass out, when there was a gentleman, coming from the depot, says: 'Why, Miss, he has broke the skin. You had better go in.'" The foregoing is the whole of the testimony descriptive of the injury, except the plaintiff's cross-examination, which is substantially similar to the testimony in chief. It is manifest therefore, that the plaintiff's injury was exclusively the result of the unusual, rude, and hasty act of a stranger. Dealing with just such a question as this, in the case of *Ellinger v. Philadelphia, W. & B. R. Co.*, 153 Pa. 215, we held that a common carrier is not bound to protect its passengers from rudeness or bad manners on the part of strangers or other passengers, unless such conduct amounts to a breach of the peace. A woman is not entitled to recover damages from a railroad company for personal injuries, where it appears from her own testimony that, when she was about to descend from the lower step of a car to the ground, she was jostled off by another passenger rudely pushing by her to enter the car. Our Brother Williams, delivering the opinion, said: "She had reached the lowest step, and was in the act of stepping from it to the platform, when an impatient man, desiring to take the train at that station, stepped upon the step she was leaving, and in so doing crowded or jostled her, and she fell. The immediate cause of her fall was the act of the impatient man, in his efforts to get upon the car. . . . But protection against bad manners is not, so far as I am aware, one of the duties owing by a carrier to its passengers. Rudeness is a breach of no positive law. The ordinary cars are, and must be, open to the masses, among whom there will be different degrees of intelligence and politeness; differences in physical vigor and temperament. There is therefore, necessarily a certain amount of rudeness, of haste, of selfish disregard of the nerves and of the comfort of others, to be

As to measure of care necessary in respect to platforms and approaches, see *note* to *Johns v. Charlotte, C. & A. R. Co.* (S. C.) 20 L. R. A. 520.

As to duty to maintain safe approaches beyond carrier's own premises, see *note* to *Skottowe v.* 23 L. R. A.

Oregon Short Line & U. N. R. Co. (Or.) 16 L. R. A. 593.

As to the persons for whom platforms must be kept safe, see *note* to *Dowd v. Chicago, M. & St. P. R. Co.* (Wm.) 20 L. R. A. 537.

met with wherever men and women congregate,—whether upon railroad trains, in places of amusement, or upon the streets of a city. Unless such conduct amounts to a breach of the peace, the officers of the law can take no cognizance of it; and carriers are not bound to prevent it, or liable in damages for its appearance about their stations or trains. The plaintiff was the victim of an act of rudeness." All of this language is precisely applicable to the present case. An impatient traveler, in a hurry to make a train, rushes ahead heedlessly, pushes the door open violently, and causes the door to strike the plaintiff with force, and injures the plaintiff. It was an act of rudeness, of which the plaintiff was the victim. That the stranger was responsible for his act there can be no doubt, but that the defendant shall be made to suffer in damages for such an act is intolerable and unjust, to the last degree. It is subject to no duty to guard against such acts, and therefore is not negligent in that regard.

But, says the plaintiff, the defendant is negligent in the construction of the door, and therefore should be liable. A couple of carpenters are examined, who, after the event, say the door was defective because it was not all glass above the middle rail, so that persons could see each other coming to the door. It is not at all certain that the same accident would have been avoided if this door had been built in that way, because the same spirit of impatience and rudeness would have prompted the same act of haste in opening the door to get through quickly, although another person was visible on the other side. But the best illustration of the fallacy of the attempt to establish negligence in this way is afforded by one of our own cases *Hayman v. Pennsylvania R. Co.* 118 Pa. 508. There the door for the transit of the passengers from the wharf to the boat was constructed precisely as the carpenters said this one should have been, viz. all glass above the middle rail. But it happened that a passenger going through it, just behind another passenger, put up his hand to push it open, and he struck the glass with force enough to break it; and, his hand having been cut severely by the broken glass, he brought an action against the company, and sought to recover upon the presumption of negligence arising from the mere fact of the accident. But we refused to sanction that proposition, and held that the door was no part of the machinery used for the carriage of passengers, and that the plaintiff, in order to recover, must prove negligence affirmatively. In that case the accident resulted from the presence of too much glass in the door, and in this case it was contended there was too little. But both contentions were untenable. The doors were both such as are in common use, and the mere construction of neither of them justified an inference of negligence. The present case is much stronger than the *Hayman Case*, because in that the injury was the result of the mere ordinary use of the door, while here it was the result of the violent act of a stranger.

Again, it is contended that the presence of

a small screw-eye on the inner surface of the door was the immediate means by which the injury was inflicted, and therefore it was negligence to have it in a position where it could strike the plaintiff's head. There was no proof that such an appliance was not a usual and suitable device for holding the door open when the weather did not require it to be closed, but it was contended that it should have been at the top or the bottom of the door, so that it could not have hurt the plaintiff. It was a very small screw-eye, and only projected nine-sixteenths of an inch beyond the surface. It was located four feet and ten inches from the bottom of the door, and it happened that the plaintiff was of a sufficiently short stature to bring her head on the level with this little appliance. It is a sufficient reply to the argument derived from this source to say that, if the eye had been at the bottom of the door, it might have struck her ankle, and injured her, as was the fact in the case of *Kies v. Erie*, 185 Pa. 144. There the plaintiff—who was a woman, also—was passing along the street in front of an engine house, when the door, which projected, when open, six feet over the pavement, was suddenly thrown open, and struck the plaintiff on the ankle, and injured her seriously. She brought an action against the city for the injury, but the court below granted a nonsuit, which this court sustained. It was claimed that the building was negligently constructed, as to the doors, and therefore the city was liable, but we held otherwise. *Mr. Chief Justice Paxson* said, in the opinion: "It is true the doors of the engine house opened outwards, and were operated by springs, which, when certain bolts were pulled, opened, or assisted in opening, the doors. The case was argued upon the theory that when the bolts were pulled the springs opened the doors suddenly, and with great violence. In such case, as they swept across a considerable portion of the pavement, in opening, it can readily be seen that they might be a dangerous trap to injure persons passing along the said pavement. The only testimony on the part of the plaintiff upon this subject was substantially as follows: 'When the bolts are pulled you have to start the doors a little bit, and then the spring takes hold, and helps swing the door open. Sometimes they are opened quick, and sometimes not so quick. If the wind is blowing, it is difficult, and you have to follow the door and push it along; and when there is no wind they swing freely.' As the plaintiff was nonsuited, she is entitled to all the deductions which can fairly be drawn from this evidence. Tested by this rule, however, it is not sufficient to justify a jury in finding that the doors of the engine house were defectively constructed, and dangerous to citizens using the pavement. It is evident that the only object and effect of the springs were to aid the firemen in swinging open the heavy doors. It is not only possible, but probable, that on the occasion referred to, if the door was opened rapidly and violently, as contended by the plaintiff, it was the result of a push by the person who opened it. For

his carelessness or negligence the city, under all the authorities, is not liable, and we have already said there was not sufficient evidence of the faulty construction of the building to submit to the jury." Just so in the present case. The defendant is not responsible for the act of the stranger in pushing open the door in a rude and violent manner. If it had been opened in the ordinary and usual manner, the plaintiff would not have been hurt. But the defendant is not bound to take precautions against the unusual and negligent use of its appliances by strangers or others. If they are reasonably safe, when used with ordinary care, and in the manner that prevails with the mass of mankind, the duty of the party who supplies them is performed. A very apt illustration of this doctrine is found in the case of *Eisenbrey v. Pennsylvania Co. for Insurance*, 141 Pa. 566. There a fence was erected, inclosing the front steps of a residence, and having a door therein extending, when wide open, ten inches beyond the limit within which obstructions were permitted by a city ordinance. The plaintiff, an old man, sixty-nine years of age, was passing along the footwalk in front of the house, when suddenly the door or gate in the fence was thrown open, and struck him, causing him to fall, and suffer a fracture of his thigh. A verdict was recovered in the court below, but we reversed the judgment without a venire. We said: "The accident did not result from the erection of the fence. That was harmless enough, and, if in violation of the city ordinance,—

which does not clearly appear,—was not necessarily dangerous, or likely to injure any one. The proximate cause of the injury to the plaintiff was the throwing open of the door suddenly. It was not contended that this was done by the company, or by any agent, employé, or servant thereof. There is no room, therefore, to apply the doctrine of *respondet superior*." All of this is exactly pertinent to the present contention. For the rude and hasty act of the stranger, the defendant is not responsible. The screw eye was a perfectly proper appliance to be upon the door, to fasten it back. In itself, it was entirely innocent, and was not by any means so prominent as the knob of a door, or an outside lock, or a key projecting therefrom. In all the ordinary uses of the door, there was not the least liability to inflict injury, resulting from its presence. It is not possible to regard it as any more, or even as much, a source of danger, as a projecting knob or lock or key, or even a piece of carving, or an old-fashioned knocker. We are perfectly clear that the mere presence of such an appliance on the surface of a door is not the least evidence of negligence in the construction of the door, and the same is true of the glass plate. Upon the whole testimony, we are of opinion that the case should have been withdrawn from the jury, with a binding instruction to find a verdict for the defendant. We sustain the 5th, 6th, 7th, and 8th assignments of error. The others are immaterial.

Judgment reversed.

OHIO SUPREME COURT.

George E. GOBRECHT, *Pff. in Err.*,

City of CINCINNATI.

(51 Ohio St. —)

*1. Compensation of a public officer fixed by a provision that "each member of the board who is present during the entire session of any regular meeting, and not otherwise, shall be entitled to receive \$5 for his attendance," is not "salary" within the meaning of section 20 of article 2 of the Constitution, which provides that "The general assembly, in cases not provided for in this Constitution, shall fix the term of office, and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished."

*Headnotes by the COURT.

cer during his existing term, unless the office be abolished."

2. An increase in the compensation of such officer during his term is not prohibited by the Constitution.

3. An action at law against the city is a proper form of remedy to determine plaintiff's right to the increased pay.

(February 27, 1894.)

ERROR to the Circuit Court for Hamilton County to review a judgment affirming a judgment of the Court of Common Pleas in favor of defendant in an action brought to compel payment by defendant to plaintiff of certain extra compensation to which he alleged he was entitled under the state statute. *Reversed.*

NOTE.—Constitutional prohibition against change of salary during term as affecting fees.

We have not found that any cases other than the present one and that of *Thompson v. Phillips*, 12 Ohio St. 617, which is discussed in the present case, have construed a constitutional provision against change of "salary" during an officer's term, and the decision of the Ohio court in the two cases referred to is clearly in accordance with the ordinary meaning of the word "salary."

In Wisconsin a constitutional provision against the change of the "compensation" of an officer during his term of office was held not to prevent a

change in specific fees or commissions of an officer such as a county treasurer paid for doing particular acts. *Milwaukee County Supra. v. Hackett*, 21 Wis. 618.

And in Alabama a similar provision against change of "compensation" was held not to apply to *per diem* fees of a sheriff for victualling prisoners. *Dane v. Smith*, 64 Ala. 47.

These are the only cases which we have discovered that construe provisions of this kind as affecting a change of compensation of an officer who is paid in the form of specific fees or commissions.

B. A. R.

Statement by **Spear, J.:**

The plaintiff's petition, filed in the court of common pleas of Hamilton county, August 6, 1892, set forth that he then was, and since prior to February 19, 1892, had been, a member of the board of legislation of the city of Cincinnati; that he had attended all regular meetings of the board on and subsequent to the above date, being present during the entire session of each meeting; that he had been compensated for each of said attendances, at the rate of \$5 per meeting; that defendant had refused to pay plaintiff any greater compensation, and asking judgment for \$125.

A demurrer to the petition was sustained, and a judgment for defendant rendered, which, upon error to the circuit court, was affirmed.

Mr. William H. Pope, for plaintiff in error:

An action of debt is generally conceded to be the proper remedy to recover compensation for official services rendered to a municipal corporation.

People v. Thompson, 25 Barb. 78; *Steubenville v. Culp*, 38 Ohio St. 18, 48 Am. Rep. 417; *O'Leary v. New York Board of Education*, 98 N. Y. 1, 45 Am. Rep. 156.

Acceptance of a less sum does not estop to claim amount actually due.

Montague v. Massey, 76 Va. 307.

The act in question was the exercise of legislative power, and the legislative power of the state is vested by the constitution in the general assembly.

The presumption is that the legislative power is not restricted and the burden is on the party asserting the existence of a limitation to establish the fact.

Lehman v. McBride, 15 Ohio St. 578.

In *Thompson v. Phillips*, 12 Ohio St. 617, the supreme court, considering the meaning of the word "salary" as used in the section of the constitution under consideration, held that it was used in a limited sense, and that a percentage compensation allowed by law to a public treasurer for official duties could be altered at pleasure by the legislature because not salary. The percentage compensation paid to the treasurer was, however, "a reward paid to a public officer for the performance of his official duties."

We must give to the language employed in the constitution its plain and natural import as understood by its framers and the people who adopted the instrument. And we may look to the debates as aids to ascertain that meaning.

Cass v. Dillon, 2 Ohio St. 621; *State v. Kenyon*, 7 Ohio St. 563.

In the constitutional convention, the original section reported by the committee having in charge the bill relating to the legislative department, read as follows: "Section 18. The general assembly shall, by law, fix the term of office of all officers not otherwise fixed in the constitution, and determine upon and regulate the compensation of all such officers, provided that no change therein shall affect the incumbent then in office for the term for which he shall have been elected or appointed."

1 Debates, 233.

23 L. R. A.

After considerable discussion, however, there being great objection to the application of the inhibition to minor offices, the convention decided to limit it to officers receiving a salary.

2 Debates, 561.

Salary is defined to be "the recompense or consideration stipulated to be paid to a person for periodical services, usually a fixed sum to be paid by the year, half year, or quarter."

5 Century Dict. 5810.

In Indiana a *per diem* allowance would be termed fees or wages.

Cowdin v. Huff, 10 Ind. 85.

Mr. Theodore Horstman, for defendant in error:

The general assembly in cases not provided for in this constitution, shall fix the term of office, and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office is abolished."

Const. art. 2, § 20.

We do not think that the language of any single member of the convention can be taken as an authoritative exposition of the construction to be placed upon any words in the constitution. It is the final conclusion reached by the whole body after mature deliberation which is to govern and not the opinions of individual members.

The following are the definitions of the word "salary," as given in the leading lexicons:

"The recompense or consideration stipulated to be paid to a person for services; annual or periodical wages or pay; hire."

Webster.

"An annual or periodical payment for services;—a stipulated periodical recompense."

Worcester.

"The recompense or consideration stipulated to be paid to a person periodically for services." Century. Dict.

"The reward paid to a public officer for the performance of his official duties."

Bouvier, Law Dict. 492; *State v. Raine*, 49 Ohio St. 580.

The court said: "Constitutional guaranties would afford but slight barriers to encroachments by any of the departments of the government, if the forbidden object could be accomplished by simply using a form of words that did not name it in express terms. . . . The one thousand dollars allowed by the section under consideration as well as the two thousand dollars allowed by the former law, is a 'reward paid to a public officer for the performance of his official duties,' and is therefore 'salary.'"

2 Bouvier, Law Dict. 492; *Cowdin v. Huff*, 10 Ind. 85; 2 Abbott, Law Dict. 440.

The remedy of plaintiff in error, if any, was mandamus.

Merrill, Mandamus, § 186, citing *Huff v. Knapp*, 5 N. Y. 65; *McBride v. Grand Rapids*, 47 Mich. 236; *State v. Cleveland*, 23 Week. L. Bull. 113.

Spear, J., delivered the opinion of the court:

Two questions arise upon the record: (a) Can the compensation of members of the board of legislation be increased during the existing term? (b) Is an action at law the proper form

or remedy to recover compensation, where payment is refused by the city, or must resort be had to a proceeding in mandamus?

At the commencement of the term of plaintiff as a member of the board of legislation the compensation provided by statute was \$5 for attendance during the entire session of any regular meeting. By the Act of February 19, 1892, it was provided that "each member of the board who is present during the entire session of any regular meeting, and not otherwise, shall be entitled to receive ten dollars for his attendance, and shall receive no other compensation whatever."

1. It is contended that section 20 of article 2 of the Constitution prohibits an increase of compensation during the existing term. That section is as follows: "The general assembly, in cases not provided for in this constitution, shall fix the term of office, and the compensation of all officers: but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished."

The question, therefore, is, whether or not the pay of a member of the board is "salary" within the meaning of the above section?

We think it is not. A general definition of salary includes compensation. General definitions do not, however, cover all cases. Salary is compensation, but, under the section quoted, compensation is not, in every instance, salary. The point is emphasized by this court in the case of *Thompson v. Phillips*, 12 Ohio St. 617, where it is said that "it is manifest from the change of expression in the two clauses of the section that the word 'salary' was not used in a general sense, embracing any compensation fixed for an officer, but in its limited sense, of an annual or periodical payment for services—a payment dependent on the time and not on the amount of the service rendered." And it was there held that a percentage compensation allowed by the law to a public treasurer for official duties, could be altered during his term. It is the "salary" which shall not be changed during the term, not necessarily, the compensation.

We think the compensation in the case at bar comes within the principle of the case cited, although a *per diem* compensation. It is not, within the meaning of the section quoted, "salary." Hence, an increase in the pay of a member during his term is not prohibited by the constitution.

Nor is this conclusion inconsistent with the holding in *State v. Raine*, 49 Ohio St. 580. The Act of April 8, 1886, gave to the commissioners of Hamilton county a salary of \$2,000 per year each, and necessary traveling expenses when traveling outside the county on official business. The amendment under review undertook to give them, for expenses, \$1,000 per annum additional. The holding is that the addition, though in terms for expenses, was in effect an increase of salary, which was unauthorized as applied to the existing term of a commissioner in office when the increase was made.

2. We see no reason why an action at law was not proper. A real question as to the right of the plaintiff to the increased pay existed. It is not important to determine whether or not plaintiff would have been entitled to a writ of mandamus against the officer of the city charged with the duty of issuing warrants for the pay of the city officers. It is enough to know that the plaintiff has a clear legal right to pursue the ordinary and approved remedy of an action at law against the city. Ordinarily, where such right exists, and the remedy by its enforcement is adequate, mandamus will not lie. And it is not difficult to imagine a case where, by reason of the existence of a real question as to plaintiff's right to additional compensation, it would be the duty of the accounting officer to refuse to take upon himself the responsibility of issuing a warrant until the question of plaintiff's right to it had been determined in the ordinary way.

The judgment will be reversed and the cause remanded with direction to overrule the demurrer to the petition and for further proceedings.

ILLINOIS SUPREME COURT.

BANK OF ANTIGO, *Appt.*,

v.

UNION TRUST CO.

(.....III.....)

1. One who pays the debt of another voluntarily, without any constraint growing out of the necessity to protect his own interest or rights, cannot be subrogated to the rights of the debtor.
2. The discounting of three notes, amounting to more than \$11,000, under a promise

to "use say \$10,000 of the paper," does not constitute an entire transaction which will prevent a rescission of the contract as to one of the notes only, after learning of the insolvency of the maker.

3. A bank receiving a note for collection, which accepts in payment a check on the owner of the note, does so at its own risk, in case the check is not good.
4. A check, although it constitutes an assignment of a fund on deposit, as between the drawer and drawee, does not charge the bank in favor of the payee, if the deposit is

NOTE.—The divisibility or apportionment of a contract is a question presented in a somewhat unusual way in the present case respecting the discount of several notes under an indefinite agreement.

As to payment by check, see *notes to Born v. First Nat. Bank of Indianapolis* (Ind.) 7 L. R. A. 442, 23 L. R. A.

and *National Bank of Commerce v. Chicago, B. & N. R. Co.* (Minn.) 9 L. R. A. 263.

As to acceptance of check in payment of claim held for collection, see *Fifth Nat. Bank of Pittsburgh v. Ashworth* (Pa.) 2 L. R. A. 491, and *note*; *State Bank of Midland v. Byrne* (Mich.) 21 L. R. A. 753.

otherwise lawfully appropriated before the presentment of the check, or act done equivalent thereto.

(March 31, 1894.)

APPEAL by plaintiff from a judgment of the Appellate Court, First Department, affirming a judgment of the Circuit Court for Cook County in favor of defendant in an action brought to compel payment of a check. *Affirmed.*

Statement by **Shope, J.:**

On and prior to September 2, 1890, A. Weed & Co. were doing business at Ashland, Wis., and that day delivered their check for \$3,000, drawn upon appellee bank, to appellant, and took up a note owned by appellee, then due, against Hoxie & Mellor, theretofore sent to appellant by appellee for collection, and on which A. Weed & Co. were indorsers. The check was as follows: "Chicago, September 2d, 1890. The Union Trust Company: Pay to the order of Amos Baum, cashier, three thousand dollars. A. Weed & Co." The said Baum, cashier of appellant bank, accepted the check as so much cash, canceled the note, delivered it to A. Weed & Co., and remitted the amount, less \$3 charges, to appellee by draft on appellant's correspondent, the Merchants' Bank of Chicago, which draft was duly paid, etc. The check was also sent to the Merchants' Bank of Chicago by appellant for collection, and presented to appellee for payment on September 4, 1890, and dishonored; whereupon due protest was made, etc. On August 25, 1890, upon certain representations made by A. Weed & Co., appellee was to, and did on September 3d following, discount for them \$11,249.65 of Hoxie & Mellor paper, the same being three notes of \$3,000, \$3,000, and \$5,430, respectively. On September 2d, A. Weed & Co. had to their credit on the books of appellee \$809.25, and on that day and the following, prior to crediting their account with the proceeds of the discounted paper, had overdrawn their account to the amount of \$5,760.57; so that, after deducting overdrafts, a balance was left to their credit on appellee's books, at the close of business on September 3d, of \$5,439.08. On the evening of this day, appellee became aware of the failure of Hoxie & Mellor, and, at the opening of business on the morning of September 4th, charged back to A. Weed & Co. the \$5,430 note, less discount (\$85.69), and returned it to them with the following letter: "Chicago, September 4, 1890. Messrs. A. Weed & Co., Ashland, Wis.—Dear Sirs: Upon being informed yesterday that Messrs. Hoxie & Mellor had failed, we deducted the amount of the note of \$5,430, less discount, \$85.69—\$5,344.31—from your account, and herewith return the note. Yours, respectfully, G. M. Wilson, Cashier,"—thus leaving a balance to the credit of A. Weed & Co. of \$144.77 at the time of the presentation of the check for payment on that day. An action was brought by appellant against appellee on the check in the circuit court of Cook county, and resulted in verdict and

judgment for appellee. On appeal to the appellate court, this judgment was affirmed, and plaintiff below prosecutes this further appeal.

Messrs. Flower, Smith & Musgrave, for appellant:

One cannot rescind a contract and at the same time retain the consideration in whole or in part which he has received under it. He must rescind the contract *in toto*, or not at all.

Harsfeld v. Converse, 105 Ill. 534; *Converse v. Harsfeld*, 11 Ill. App. 173; *Jennings v. Gage*, 13 Ill. 610, 56 Am. Dec. 476; *Bowen v. Schuler*, 41 Ill. 192; *Lovingslon v. Short*, 77 Ill. 587; *Kellogg v. Turpie*, 93 Ill. 265, 84 Am. Rep. 163; *More v. Brackett*, 98 Mass. 205; *Manfield v. Trigg*, 118 Mass. 350.

Even where a party defrauded may rescind as against the defrauding party, yet the rights of innocent third persons acquired for value cannot be affected thereby. If such rights have attached, it is too late to rescind.

Bishop, Cont. § 679.

A check is a negotiable instrument, and subject to the same rules that govern ordinary bills of exchange in respect to the rights of the holder.

Bull v. First Nat. Bank of Kasson, 128 U. S. 105, 31 L. ed. 97; 2 Dan. Neg. Inst. § 1652.

A bank check in this state transfers the money of the drawer in the bank to the payee the moment the check is delivered, and from that moment it ceases to be the property of the drawer and belongs to the payee or his assignee.

Munn v. Burch, 25 Ill. 85; *Chicago Marine & F. Ins. Co. v. Stanford*, 23 Ill. 163, 31 Am. Dec. 270; *Marine Bank of Chicago v. Ogden*, 29 Ill. 248; *Bickford v. First Nat. Bank of Chicago*, 42 Ill. 238, 39 Am. Dec. 436; *Brown v. Leckie*, 43 Ill. 497; *Fourth Nat. Bank of Chicago v. City Nat. Bank of Grand Rapids*, 63 Ill. 396; *Union Nat. Bank v. Oceana County Bank*, 30 Ill. 212, 23 Am. Rep. 185; *Ridgely Nat. Bank v. Patton*, 109 Ill. 479; *National Bank of America v. Indiana Bkg. Co.* 114 Ill. 483; *Shaffner v. Edgerton*, 13 Ill. App. 182; *Merchants Nat. Bank v. Bittinger*, 20 Ill. App. 27; *McAllister v. Oberne*, 42 Ill. App. 267.

A bank cannot set off against a check-holder a claim against the drawer, its depositor, which is not due, or which is contingent.

Fourth Nat. Bank of Chicago v. City Nat. Bank of Grand Rapids and Merchants Nat. Bank v. Bittinger, *supra*; *Commercial Nat. Bank v. Proctor*, 98 Ill. 558; *National Bank of America v. Indiana Bkg. Co. supra*.

In determining when a credit was given by the bank to its depositor, the time of the entry on the bank books is not conclusive, but all the facts and circumstances in reference to the acceptance of the deposit should be considered.

American Exch. Nat. Bank v. Gregg, 133 Ill. 596; *American Exch. Nat. Bank of Chicago v. Chicago Nat. Bank*, 27 Ill. App. 538, 131 Ill. 547.

The admissions or declarations of a maker of a check after the delivery of the same are not competent evidence against the payee, to show that the credit or deposit against which the check was drawn, was obtained fraudulently, or under such circumstances as to

give the drawee bank a right to refuse payment of the check.

Smith v. Bangs, 15 Ill. 399; *Wheeler v. McCorristen*, 24 Ill. 40; *Hessing v. McCloskey*, 37 Ill. 341; *Miner v. Phillips*, 42 Ill. 123; *Bunker v. Green*, 48 Ill. 248; *Randegger v. Ehrhardt*, 51 Ill. 101; *Bell v. Prewitt*, 62 Ill. 361; *Jewett v. Cook*, 81 Ill. 280; *Thorpe v. Goovey*, 85 Ill. 611; *Bennett v. Stout*, 98 Ill. 47; *Brower v. Callender*, 105 Ill. 88; *Sawyer v. Bradshaw*, 125 Ill. 440; *Marine Bank of Chicago v. Ogden*, 29 Ill. 248.

Messrs. Green, Willits & Robbins, for appellee:

When a consideration is divisible and the price can be apportioned, then if a distinct divisible portion of the consideration fails, the price paid for such portion may be recovered back.

Whart. Cont. § 748; Hill v. Reeves, 11 Met. 268; *Cushing v. Rice*, 46 Me. 302, 71 Am. Dec. 579; *Wooten v. Walters*, 110 N. C. 251.

Even assuming that the discount of the three notes was an entire contract, and that the authorities in relation to the rescission of an entire contract for the sale of chattels has application thereto, there is a qualification of this rule.

In *Preston v. Spaulding*, 120 Ill. 208, the court says: "If the vendee retained all the purchased property, the rule of law would apply—the rescission must be complete; but to the extent the fraudulent vendee had disposed of or incumbered the purchased property to third parties without notice, the vendor claiming rescission would be excused from refunding or offering to refund that part of the consideration received, representing or equaling the portion of the property disposed of or incumbered by the vendee."

See *Mount Morgan Gold Mine, Limited; Ex parte West*, 2 Ry. & Corp. L. J. 181.

A person making a deposit of funds in a bank becomes a creditor of the bank to the extent of the funds deposited. When he draws a check in favor of a third person upon the bank, as between the drawer and the payee, there is an equitable assignment of the funds in the bank to the amount of the check. No relations, however, are yet created between the bank and the payee; but when the check is presented to the bank for payment, then if there are funds to the credit of the drawer sufficient to pay the check, the bank is bound to pay it.

Dan. Neg. Inst. § 1638; Munn v. Burch, 25 Ill. 35; *Fourth Nat. Bank of Chicago v. City Nat. Bank of Grand Rapids*, 68 Ill. 898; *Metropolitan Nat. Bank of Chicago v. Jones*, 12 L. R. A. 492, 187 Ill. 684.

A bank has a right to apply the funds standing to the credit of the depositor in payment of a matured note of the depositor. If the drawing of a check was an appropriation of the deposit, then the bank would have no right to appropriate the deposit to the payment of paper held by itself.

Myers v. Union Nat. Bank, 27 Ill. App. 254.

Shope, J., delivered the opinion of the court:

It is contended that the contract between appellee and Weed & Co. under which the 28 L. R. A.

three notes of Mellor & Hoxie were discounted was an entire contract, and that appellee had no right to rescind as to the \$5,430 note, and retain the proceeds of the two \$3,000 notes. It is true, as stated by counsel for appellee, that the general rule is that, when a party wishes to rescind an entire contract, he must rescind it *in toto* or not at all. *Hartzfeld v. Converse*, 105 Ill. 534. But it is not to be overlooked that this is a rule of construction, based upon the intention of the parties to the contract, and not a rule of law controlling that intention. 2 *Parsons, Cont.* 521. Conceding that the discounting of the notes in question constituted a contract between appellee and Weed & Co., it does not appear from the record, nor is it claimed, that Weed & Co. have treated or sought to treat the contract as entire and indivisible. On the other hand, it does appear that the \$5,430 note was returned to them by appellee, with a letter informing them that, having heard of the failure of Hoxie & Mellor, the makers of the notes, the amount thereof had been deducted from their account, etc. Weed & Co. on September 6, 1890, sent this note back to appellee, who, on the 8th, again returned it to Weed & Co., who, it seems, retained it. The letter of Weed & Co. of the 6th, or their purpose in returning the note, is not shown. Nor does it appear that they then or afterwards asserted or undertook to assert under the contract any right against appellee. In the absence of any proof to the contrary, it may, we think, be said that Weed & Co. by their silence have themselves elected to treat the contract as rescinded as to the \$5,430 note. If A. Weed & Co. have acquiesced in the rescission of the contract as to the \$5,430 note by appellee, it cannot be in the logic of things that appellant can succeed to any greater rights under the contract than A. Weed & Co., who, as we have seen, in the absence of countervailing proof on that question, have elected to acquiesce in the rescission. Appellant being under no constraint, in order to protect its own interest or rights, to pay the debt of A. Weed & Co. to appellee, but having, as will be seen, paid the same voluntarily, could not be subrogated to the rights of A. Weed & Co. in the premises. *Hough v. Aetna F. Ins. Co.* 57 Ill. 818, 11 Am. Rep. 18; *Young v. Morgan*, 89 Ill. 199; *Beaver v. Slanker*, 94 Ill. 175.

But were the foregoing considerations not warranted by this record, we think, under the facts in this case, that the discounting of the notes constituted an apportionable contract. The record shows that in its letter of September 1, 1890 (in reply to one from A. Weed & Co. containing the proposition for discounting \$15,000 of Hoxie-Mellor paper), appellee said that it could "use, say, \$10,000 of the paper" referred to "from September 1st to 4th," and that, under this arrangement, the three separate notes above mentioned were discounted by appellee. It is not contended that appellee had not the right, had the integrity of the notes at the time been questionable, to have refused to discount any or all of them. Each note constituted, in and of itself, a separate and independent contract, upon a distinct consideration, and the books

of the bank show that they were discounted as separate and distinct entries. The rule as laid down by Mr. Parsons (vol. 2, *517) is: "If the part to be performed by one party consists of several distinct and separate items, and the price to be paid by the other is apportioned to each item to be performed, or is left to be implied by law, such a contract will generally be held to be severable." And Mr. Wharton (Cont. § 748) says: "When a consideration is divisible, and the price can be apportioned, then, if a distinct divisible portion of the consideration fails, the price paid for such portion can be recovered back;" and that, "in cases . . . in which the consideration is divisible, the purchaser may elect to take what can be delivered to him, and in such case, if the purchase money has been paid, he can recover back the excess, or, if there has been no payment, defend *pro tanto*." See cases in notes. In *A. K. Young & C. Mfg. Co. v. Wakefield*, 121 Mass. 91, where the action was an account for certain India-rubber goods sold, and the price of each article, and discount from the gross sum, were stated in account, the court, in passing upon the question of whether the contract was entire or divisible, said: "We do not deem this contract to have been an entire one. That a contract should be of that character, it is not sufficient merely that the subjects of purchase are included in the same instrument of conveyance. If but one consideration is paid for all the articles so that it is not possible to determine the amount of consideration paid for each, the contract is entire." *Minor v. Bradley*, 22 Pick. 457.

When many different articles are bought at the same time for distinct prices, even if they are articles of the same general description, so that a warranty that they are all of a particular quality would apply to each, the contract is not entire, but is in effect a separate contract for each article sold. *Johnson v. Johnson*, 8 Bos. & P. 162; *Minor v. Bradley*, *supra*."

To the same effect is the doctrine stated in *Wooten v. Walters*, 110 N. C. 251, where the sale was of a stock of merchandise and land. It was there said that, "though a number of things be bought together without fixing an entire price for the whole, but the price of each article is to be ascertained by a rate or measure as to the several articles, or when the things are of different kinds, though a total price is named, but a certain price is affixed to each thing, the contract in such cases may be treated as a separate contract for each article, although they all be included in one instrument of conveyance, or by one contract;" citing *Johnson v. Johnson* and *Minor v. Bradley*, *supra*. See also *Hill v. Rewee*, 11 Met. 268; *Cushing v. Rice*, 46 Me. 302, 71 Am. Dec. 579; *Preston v. Spaulding*, 120 Ill. 208.

We are, however, referred by counsel for appellant to the case of *Harefeld v. Converse*, *supra*, as maintaining a contrary view. This is a misapprehension. That case falls clearly within the rule, announced in the Massachusetts and other cases, that where "the purchase is of goods as a particular lot, . . . or the number of barrels in which the goods

are packed, the contract is held to be entire." *A. K. Young & C. Mfg. Co. v. Wakefield*, *supra*, and cases therein collated. Moreover, at the time of the discounting of said notes, Weed & Co. had overdrawn their account with appellee \$5,760.57. By the judgments of the circuit and appellate courts, the controverted question of fact as to fraud on the part of Weed & Co. in the transaction is conclusively settled, and that such fraud was consummated before the payment of Weed & Co's overdrafts. This being so, appellee would be excused from surrendering up to Weed & Co. the two \$3,000 notes. *Preston v. Spaulding*, *supra*, and cases cited. We are therefore of opinion that appellee had the right to rescind the contract, as it did, by returning to Weed & Co. the \$5,430 note, and charging the same back to their account.

It is also insisted that, although appellee had the right to partially rescind the contract as against Weed & Co. it could not legally exercise such right as against appellant, it being a bona fide holder of the \$3,000 check in question, drawn by Weed & Co. on appellee. It appears that about September 2, 1890, appellee sent to appellant for collection and returns a \$3,000 note, then due, against Hoxie & Mellor, owned by appellee, and upon which Weed & Co. were indorsers. On that day Weed & Co. gave appellant the check in question, drawn on appellee for the amount of the note, which was at once canceled by appellant and surrendered to Weed & Co. Appellant received the check as cash, and remitted the proceeds, less charges, to appellee, by draft on the Merchants' Bank of Chicago. This remittance was received by appellee on September 3d, and paid. On the next day, about noon, the check sued on was presented to appellee for payment, which was refused. Appellee, in the mean time, between the receipt of the remittance and presentation of the check for payment, having become apprised of the business failure of Hoxie & Mellor and the fraud of Weed & Co., had charged back to Weed & Co's account, and returned to them, the said \$5,430 note, less discount (\$85.69), leaving a balance to the credit of Weed & Co. of \$144.77, only, when the check was presented. It is not shown or pretended that appellant, in making collection of said note, was authorized by appellee to receive in payment thereof anything but money. When appellant received the note from appellee for collection, it then and thereby became the agent of appellee for that purpose; and the law is well settled that, unless such agent is specially authorized so to do, he has no right to accept in payment of his principal's debt anything in lieu of money. *Mathews v. Hamilton*, 23 Ill. 470; *Ward v. Smith*, 74 U. S. 7 Wall. 447, 19 L. ed 207; *Howard v. Chapman*, 4 Car. & P. 508; Story, Prom. Notes, 7th ed. §§ 115-389, and notes. Being authorized to receive money only, the agent has no implied power to receive a check in payment (*Hall v. Storrs*, 7 Wis. 253); and where the collection agent, not being thereunto authorized, accepts in payment of his principal's demand a check, or depreciated currency, and loss ensues thereby, he must

bear it. *Ward v. Smith, supra*; *Morse, Banks & Banking*, 431, 432; *Harlan v. Ely*, 68 Cal. 522.

But it is claimed that the drawing of the check by Weed & Co. on appellee operated as an assignment to appellant of so much of the fund on deposit, against which it was drawn, as was necessary to pay it. As between the drawer and drawee, this is doubtless correct. *Union Nat. Bank v. Oceana County Bank*, 80 Ill. 212, 23 Am. Rep. 185. But, in order to charge the bank with the amount, it is indispensable that the check be first presented to it for payment, or some other act done equivalent thereto. This rule was announced in the early case of *Munn v. Burch*, 25 Ill. 85, where it was held that the check of a depositor on his banker, delivered to another for value, transfers to the payee therein, and his assigns, so much of the deposit as the check calls for, and that, when presented to the bank for payment, the banker becomes liable to the holder for the amount thereof, provided the drawer has at the time sufficient funds on deposit to pay it. And this doctrine has been subsequently reaffirmed in numerous decided cases in this court, among which see *Chicago Marine &*

F. Ins. Co. v. Stanford, 28 Ill. 168, 81 Am. Dec. 270; *Bickford v. First Nat. Bank of Chicago*, 42 Ill. 238, 89 Am. Dec. 436; *Fourth Nat. Bank of Chicago v. City Nat. Bank of Grand Rapids*, 68 Ill. 398; *Metropolitan Nat. Bank of Chicago v. Jones*, 187 Ill. 634, 12 L. R. A. 492.

That appellee had, between the time of making the check and its presentation for payment, on deposit to the credit of Weed & Co., funds sufficient to meet the check, can have no bearing on the question. Appellee had no notice of the existence of the check until presented for payment, and the deposit against which it was drawn having been, as we have seen, depleted by proper charges and deductions until only a meager sum remained, there was no sufficient fund left on deposit out of which it could be paid, and the check was therefore rightfully dishonored. Other errors are assigned, which have been carefully considered, but, in view of what has been said, no useful purpose would be served by a discussion of them.

The judgment of the appellate court will be affirmed.

Affirmed.

PENNSYLVANIA SUPREME COURT

IRON CITY NATIONAL BANK

v.

FORT PITT NATIONAL BANK, *Appt.*

(159 Pa. 46.)

1. A payor of forged paper is not exempted from the consequences of his act by the Act of 1849, § 10, providing for the recovery of money paid on forged signatures, if the result of a recovery would be that his own negligence would occasion loss to the payee. That act only applies in cases of due care on his part, and where his recovery will not cause loss to the payee.

2. Recovery by the payor of a forged check will not be permitted under Act of 1849, § 10, providing for recovery of money paid on forged signatures, if the check was paid and apparently dismissed from further attention until five days later, when the payee, after parting with the funds, started an investigation which disclosed the forgery.

(December 30, 1892.)

APPPEAL by defendant from a judgment of the Court of Common Pleas, No. 8, for Allegheny County in favor of plaintiff in an action brought to recover back the amount which plaintiff had paid to defendant on a forged check. *Reversed.*

Plaintiff's statement set out that

"On December, 19, 1892, the defendant was the holder of a certain check or bill of exchange, dated December 17, 1892, purporting to be drawn by the firm of G. Dice & Co., on the Iron City National Bank of Pittsburgh, for the sum of \$852, of which a true copy is hereto attached and made part of this statement. This check, on December 17, 1892, was deposited by the payees thereof, Messrs. Gutman & Howard, with the defendant bank. Said defendant was not then a member of the Pittsburgh Clearing House Association of Banks, but it cleared through the Citizens' National Bank of Pittsburgh. The said defendant then and there indorsed said check and delivered it to the Citizens' National Bank as its agent, and said Citizens' National Bank, acting as the agent of the said defendant bank, presented the said check on December 19, 1892, to the Iron City National Bank of Pittsburgh for payment, and said Iron City National Bank then and there paid the said check to the said Citizens' National Bank acting for and as agent of the said defendant bank, and the said sum so paid (\$852) was placed to the credit of the defendant bank by its said agent.

"On December 24, 1892, the president of the defendant bank called upon the plaintiff bank and inquired as to said check and when it was paid and whether it was good, and thereupon the cashier of the plaintiff bank produced said

NOTE.—The above decision is clearly in harmony with general doctrine and noticeable chiefly for the claim as to the effect of the Pennsylvania statute. As to the general doctrine in respect to payment of forged checks, see *Shipman v. Bank of*

the State of New York (N. Y.) 12 L. R. A. 791, and note; *Deposit Bank v. Fayette Nat. Bank* (Ky.) 7 L. R. A. 849, and note; *Atlanta Nat. Bank v. Burke* (Ga.) 2 L. R. A. 96, and note. Also *Janin v. London & S. F. Bank* (Cal.) 14 L. R. A. 320.

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check and said cashier and the president of the defendant bank called on that day upon G. Dice & Co., the alleged drawers of the check, and were informed by them that the signature of the drawers of the check was forged, and plaintiff now avers said signature was a forgery. This was the first information or knowledge the plaintiff had of the forgery and immediately and on December 24, 1892, the plaintiff demanded the repayment of said money from said defendant bank and offered to return to it said check. This demand and offer was renewed December 27, 1892, and to each the defendant bank made no definite reply, saying it would answer later. On Thursday, January 5, 1893, defendant bank refused to repay said money or any part thereof."

In defense it was alleged that the indorsees of the check in suit were depositors in the defendant bank, having been there introduced by a reputable person. On December 17, 1892, they deposited three checks, which were carried to their account. These checks were duly presented to the clearing house and paid, and on Monday the depositors drew a check, which was duly paid, and which withdrew substantially all of the deposit. On December 24, the Masonic Bank, upon which one of the three checks was drawn, notified defendant that that check was a forgery. Acting on this information, the president of defendant made inquiry of plaintiff as to whether or not the check in suit was genuine, and upon inquiry it was discovered that it, also, was a forgery. In the meantime, the depositors of the checks had disappeared.

The affidavit of defense continued as follows:

"The defendant avers that the said plaintiff bank was negligent in making payment of said check, when, as alleged, the signature of the drawer thereof, a depositor in plaintiff bank, was forged and counterfeited; and that said plaintiff bank was further negligent in not giving due and timely notice of the forgery of said check, and that said notice, so as aforesaid given, was not within a reasonable and proper time; and that by reason of the said negligence and laches on the part of said plaintiff bank, the said plaintiff is not entitled to recover the amount of said check or any part thereof from the defendant bank."

Further facts appear in the opinion.

Messrs. Knox & Reed and Patterson & Smith, for appellant:

The Act of 1849, allowing the bank of the depositor to ignore precautions as to verification of his signature, should be strictly construed, and if the bank so paying desires to avail itself of that act, it should show prompt notice of the dishonor of the bill or check.

Smith v. Mercer, 6 Taunt. 78; *Cocks v. Masterman*, 9 Barn. & C. 903; *Mather v. Maidstone*, 18 C. B. 295; *United States v. Clinton Nat. Bank*, 28 Fed. Rep. 357; 2 Dan. Neg. Inst. 1371; *Cocks v. United States*, 91 U. S. 859, 23 L. ed. 237; *United States v. Central Nat. Bank of Philadelphia*, 6 Fed. Rep. 134; *Wood's Byles*, Bills, §498; *Rick v. Kelly*, 30 Pa. 527; *First Nat. Bank of Northumberland v. McMichael*, 106 Pa. 460, 51 Am. Rep. 529.

Messrs. Watson & McCleave for appellee.

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Mitchell, J., delivered the opinion of the court:

The argument of the learned counsel for the plaintiff meets the exigency of his case courageously, and stands squarely on the proposition that "the effect of the Act [of 5th April 1849, Pub. Laws, 426] is undoubtedly to declare that there is no legal duty imposed upon the payor towards the holder of the check to know the genuineness of the signature,—whether it be the signature of the depositor, or of some other party; and, there being no such legal duty, of course, the payor cannot be guilty of negligence vesting any right against him in the holder." There can be no question that this is the necessary result of the construction contended for,—that the act abrogates all the rules of the common law relative to the payment of forged commercial paper. There is no logical stopping place short of such proposition. A bank, therefore, may pay a check, or certify it as good, no matter how negligently, and the holder may, on the faith of such action, part with his goods or his land, and yet have no claim on the bank, or, if he has been paid, may be liable to refund the money. Still more, any man may, no matter how carelessly, pay a note purporting to bear his own signature, lay it away, and yet, at any time within six years, bring suit, and recover back the money, on the ground that the signature was a forgery. The disastrous consequences of the introduction of such a rule into the law of commercial paper—a law founded throughout the civilized world on the utmost promptness, diligence, and good faith—should warn us to look closely into the true intent of a statute before pronouncing that the legislature meant it to have such effect. The Act of 1849 is an omnibus act, made up of the most heterogeneous materials. Sections 7 to 11, inclusive, are the only ones having any relation to the present subject, and they provide that no defense for want of proper and timely demand of payment or acceptance, or proper and timely protest for, or notice of, nonacceptance or nonpayment, shall avail, unless the proper place shall be distinctly set forth in the instrument; that, when such place is omitted, demand and notice may be made at any time before suit, and the instrument shall be held payable, protestable, etc., at the place where they are dated; and that all bills, drafts, etc., drawn in the state, but payable out of it, with added exchange, or with "in current funds," or such like qualifications, superadded," shall be negotiable. Section 10, with which we are particularly concerned, provides for the recovery of money paid on forged signatures, whether of drawers, acceptors, or indorsers. In these sections, thus briefly summarized, there is nothing indicative of an intent to revolutionize the law-merchant with regard to negotiable paper, but rather to relieve against some hardships in practice which that law gave rise to. The strictness of demand and notice, which was easily complied with when transactions by bills and checks were comparatively few, and the parties known to each other, became often of great difficulty in the extended business of modern times. So undesirable, however, was even this departure from the general commercial law found to be, that

sections 7, 8, and 9 as to demand and notice, were repealed, after only two years' experience, by the Act of April 8, 1851, Pub. Laws, 898. At common law, acceptance of a bill was an admission of the drawer's signature, and the acceptor having thus given it currency, could not set up that it was a forgery (Byles, Bills, 199); and payment of a forged check or bill could only be recovered back by giving notice on the same day. *Id.* 230. But, even with prompt notice, any fault or negligence of the party paying would prevent his recovery; and it has been held, from *Lord Mansfield* down, that an acceptor is bound to know the handwriting of the drawer, and that it is rather by his fault or negligence, than by a mistake, if he pays on a forged signature. *Id.* 334. So strictly was this rule held with regard to a bank, that in our own case of *Levy v. Bank of United States*, 1 Binn. 27, the mere entry of the check as cash in a depositor's book was held to be equivalent to payment, and to make the bank liable to the depositor for the amount, though the forgery was discovered, and notice given the depositor, the same day, and there was no proof that the depositor had, in the mean time, lost anything, or been prejudiced in any way by the bank's action. Shippen, *Ch. J.*, said: "The acceptor is presumed to know the drawer's handwriting, and, by his acceptance, to take this knowledge upon himself." The act of paying was thus held to be a conclusive estoppel, without reference to any question of negligence or delay, or consequent loss to the other party. This was the kind of hardship which the Act of 1849 was intended to remedy, and this is the extent of its operation in regard to a bank or other drawee, paying on a forged signature of the drawer. The mere fact of payment is no longer, *eo instanti* and of itself, a bar to the recovery of the money; but the principles of the commercial law are still applicable, and there is still the same necessity as before for care, diligence, and proper notice, under the settled rules of the law of negotiable paper. Such has been the construction of the act heretofore. Thus in *Roth v. Crissy*, 80 Pa. 145, and *Rick v. Kelly*, *Id.* 527, it was held that notice of the forgery within reasonable time, and an offer to return the note, are necessary to enable the party paying it to recover. In the former case, the court below charged the jury that the plaintiff was bound to pursue his remedy with due diligence, and this was affirmed. In *Rick v. Kelly* it is said that the Act of 1849 really accomplished little, as, for the most part, it was only declaratory of the former law; and, in *Chambers v. Union Nat. Bank*, 78 Pa. 205, the necessity of diligence was admitted, though a delay of sixteen days in the discovery of the forgery was held to be excused by the circumstances, notice having been given immediately on the discovery.

The two cases specially relied on by appellees are not in conflict with this view of the statute. They are entirely sound on their own facts, and what is said in them must be read with reference to the facts. In *Tradesmen's Nat. Bank v. Third Nat. Bank*, 66 Pa. 435, the defendant had collected the money as agent for another bank, and had credited it in

the other's account. Under *Levy v. Bank of United States* this would have been equivalent to actual payment, and would have fixed the defendant's liability to its principal; but it was held that the Act of 1849 now prevented the mere book entry from being conclusive, and, as the defendant could pay the money back to the plaintiff without loss to itself, it was bound to do so. But in so holding this court said: "The money received is in the hands of the defendants, and we are not called upon to decide what would have been their situation if it had been actually paid over by them." In *Corn Exch. Nat. Bank v. National Bank of The Republic*, 78 Pa. 233, the court below had charged that, "under the Act of 1849, the plaintiff is entitled to recover, unless there has been negligence on its part, and through that negligence the defendant has been put in a position to lose by paying this money to plaintiff." The judgment was reversed, not because this charge was wrong, but because the evidence of negligence was not sufficient; Paxson, *J.*, saying that it was "not necessary to express an opinion as to how far negligence is a defense under the act, for the reason that there was not sufficient evidence upon this point to justify submitting it to the jury." It is always a good defense that the loss complained of was the result of the complainant's own fault or neglect, and it would require a statute in very explicit terms to do away with so universal a rule of law, founded on so incontestable a principle of justice.

The result of the Act of 1849, and the cases upon this subject, is that the mere acceptance or payment of forged paper is no longer of itself, a bar to the recovery of the money by the party paying even though it be a bank or other drawee. Nor is such party absolutely bound, as at common law, to discover and give notice of the forgery on the very day of payment. All that he need do, in any case, is to give notice promptly, according to the circumstances and the usage of the business, and, unless the position of the party receiving the money has been altered for the worse in the mean time, it would seem that the date of notice is not material. But, on the other hand, the statute does not dispense with the necessity of care and diligence on the part of the payor, nor exempt him from the consequences of his own negligence, if thereby loss would accrue to the other party. In the present case the plaintiff received the check on December 19, paid it, entered it on the books, and then apparently dismissed it from further attention. In all probability the forgery would not have been discovered until the deposit book of the supposed drawers, Dice & Co., came in for settlement, had not the defendant's officer, on December 24, called, and started the investigation which resulted in the discovery. This must be pronounced a want of due diligence. The drawee is still presumed to know the drawer's signature, and, in the language of *Chief Justice Shippen*, *supra*, "to take this knowledge upon himself," though the first slip is no longer conclusive against him. But, having finished his examination, dismissed the subject from further attention, and allowed five days to elapse, during which

the party receiving the money has paid it out in reliance upon the plaintiff's act, the latter cannot be allowed to say that he acted with due diligence and absence of negligence. As

the facts are all clearly set out in the statement, there is nothing to go to a jury.
Judgment reversed.

ALABAMA SUPREME COURT.

Lorenzo COREY *et al.*, Appts.,

v.

W. W. WADSWORTH.

(.....Ala.....)

1. One of the governing body of an insolvent corporation cannot be made a preferred creditor for an unsecured debt.
2. A corporation is insolvent within the rule as to preferring creditors where its assets are insufficient to pay its debts and it has ceased to do business or is in the act of taking a step which will practically incapacitate it for conducting the corporate enterprise with reasonable prospect of success or its embarrassments are such that early suspension and failure must ensue.

(June 14, 1892.)

A PPEAL by defendants from an order of the City Court of Decatur overruling a demurrer to the bill in a suit to set aside a pretended sale of the stock in trade of the Decatur Building Supply Company to defendant Corey, its president, as a preference in fraud of creditors. *Affirmed.*

The facts are stated in the opinion.

Messrs. Brickell, Harris & Eyster for appellants.

Mr. E. W. Godbey, for appellee:

Corey's position as director and president imposed upon him the obligations of a trustee to the corporation and its stockholders. But when the corporation's insolvency supervened, neither the corporation nor its stockholders, as such, could have any pecuniary interest whatever in its property. The officers now became trustees for the creditors, who are the only class who can honestly have any actual interest in its assets. If the officer holds a debt against the company, he is forbidden by all the laws of trust and by every consideration of public policy and sound reason from preferring himself.

Bank of St. Mary's v. St. John, 25 Ala. 566; *Wait, Insolvent Corp.* 507; 2 *Morawetz, Priv. Corp.* § 787; *Olney v. Conanicut Land Co.* 5 L. R. A. 361, 16 R. I. 597; 2 *Waterman, Corp.* 188, 189; *Drury v. Milwaukee & S. R. Co.* 74 U. S. 7 Wall. 299, 19 L. ed. 40; *Howe v. Sanford Fork & Tool Co.* 44 Fed. Rep. 281; *Lippincott v. Shaw Carriage Co.* 25 Fed. Rep. 577; *Consolidated Tank Line Co. v. Kansas City Varnish Co.* 45 Fed. Rep. 7; *Sweeney v. Wheeling Grapes Sugar & Refining Co.* 30 W. Va. 443; *Richards v. New Hampshire Ins. Co.* 48 N. H. 263; *Haywood v. Lincoln Lumber Co.* 64 Wis. 639; *Beach v. Miller*, 130 Ill. 162, 23 Am. Law Rev. 1011; *Roseboom v. Whittaker*,

182 Ill. 81; *Sicardi v. Keystone Oil Co.* 149 Pa. 148.

The pretended liability ostensibly extinguishing the sale by the insolvent corporation to its president, Corey, was not, strictly speaking, a contingent one; but when the corporation became hopelessly insolvent, the contingent liability of Corey as a surety became, to a great extent, fixed and absolute. A large number of the adjudged cases denying the director's right to a preference arose upon a state of facts similar to the present—the director being only a surety.

Olney v. Conanicut Land Co., *Drury v. Milwaukee & S. R. Co.*, *Howe v. Sanford Fork & Tool Co.*, *Consolidated Tank Line Co. v. Kansas City Varnish Co.* and *Roseboom v. Whittaker*, *supra*.

In addition to being surety of the supply company, with respect to the debt it pretended to be owing the bank, and president and director of the supply company, Corey was also a heavy stockholder, and a director in the creditor bank; and when Corey took the goods in payment of the debt due the bank, he not only secured a preference to himself individually but also at the same time and by the same act, secured the preference and the payment of an otherwise almost worthless debt to the fiscal institution, in which he was very largely interested.

If the right of preference be accorded, no outside dealer would extend credit to a corporation, since the very wares he might sell could and would be used to pay the director, whose debt was kept secret, or simulated, to the total exclusion of the general outside creditors, who may be kept in ignorance of the claims of directors.

Stone, Ch. J., delivered the opinion of the court:

The present case is an appeal from an interlocutory order of the city court, sitting in equity, by which Corey's demurrer to Wadsworth's bill was overruled. The case presents a question of very grave importance to the commercial world. The substantial facts of the case made by the bill are as follows: At a time anterior to the latter part of the year 1887 the "Decatur Building Supply Company" was incorporated under the general laws of Alabama, Decatur being the place of its business habitation. Wadsworth, the complainant, at various times between the latter part of the year 1887 and May 19, 1888, sold and shipped to the Decatur Building Supply Company lumber and shingles, and at various dates drew on the corporation

NOTE.—The above case is clearly in accord with the weight of authority on the question of the validity of preferences to directors by the insolvent corporation. For the conflict of decisions and the 23 L. R. A.

balance of authority as to preferences by insolvent corporations, see *note* to *Lyons-Thomas Hardware Co. v. Perry Stove Mfg. Co.* (Tex.) 23 L. R. A. 802.

for payment at ninety and one hundred and twenty days. The several drafts were accepted, but have not been paid. The aggregate sum of the several accepted drafts is \$1,400, all of which was long past due when this bill was filed, in January, 1891. The bill then charges that Lorenzo Corey, one of the defendants, became a stockholder in said Decatur Building Supply Company, "in the early part of February, 1888, and thereafter he became a member of the board of directors, and president of said company, which position he held at the time of the occurrence of the matters and transactions hereinafter complained of, and has never resigned or been removed therefrom; and that at the time he so became connected with the said Decatur Building Supply Company the same was prosperous, and in a solvent condition." The bill then avers that about the 15th of May, 1888, the said Corey, together with others, officers and stockholders of said corporation, entered into an agreement with the Exchange Bank, by which they bound themselves, as sureties or guarantors of said Decatur Building Supply Company, for the payment to the bank of such indebtedness as the building supply company might incur, not exceeding \$6,000. It was then charged that before the end of June, 1888, it was "pretended" that the bank had lent to the building supply company said sum of \$6,000, and had taken its notes therefor, due at sixty and ninety days.

The remaining charges of the bill, material to the case in hand, may be summarized as follows: One Hay, brother-in-law of Corey, was general manager of the building supply company, and was its vice-president. From 19th to 23d of July, 1888, said company, through Corey and Hay, sold ("pretended to make sale of") a large part of its stock in trade to Corey, in consideration that he would and did assume and pay the said debt of \$6,000 to the Exchange Bank, of which Corey and other officers and stockholders of the building supply company had become guarantors. The said debt was presently paid by Corey, and he took possession of the stock in trade so purchased, and removed it to a building of his own. This was done long before the maturity of the debt to the bank, of which Corey and other officers of the supply company were guarantors. The bill then charges that "at the time of the aforesaid pretended purchase by Corey of Decatur Building Supply Company it [the corporation] was hopelessly insolvent, its liabilities due and past due being greater by far than its assets; and within three or four days after the consummation of the transfer to Corey, on, to wit, 26th day of July, 1888, the said Decatur Building Supply Company, acting through said Corey as its president, assigned all its remaining assets to a trustee, for the benefit of its general creditors, whose just claims and demands against said company amounted to more than twenty-two thousand dollars; to pay which property was assigned of value not sufficient to pay more than fifteen per cent." Corey and the Decatur Building Supply Company are made defendants to the bill.

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Before the demurrer was filed to the bill it was amended so as to make it a "bill in behalf of complainant and all other creditors, of the building supply company who may come in and make themselves parties complainant hereto, and assume their proportionate share of the costs." Under this amendment, S. Truscott came in by petition, and united in the prayer for relief.

The bill in a general way charges that Corey took overpay in the matter of the guaranty for which he, with others, was bound. It also charges that the money advanced or paid by the bank "was paid not to the Decatur Building Supply Company, but to the officers, making the guaranty of the loan, for their own emolument." These questions need no extended mention here. If the supply company did not get the benefit of the money advanced by the bank, of course it was under no obligation to indemnify the guarantors of the loan; and in taking pay from the supply company on that account Corey misappropriated the assets, and rendered himself liable to the creditors of the insolvent corporation, to the extent of the misappropriation. So, if he overpaid himself for the liability he was under as guarantor to the bank, the same rule will apply to the excess. It is against the policy of the law to permit the president or any director of a corporation to realize a personal profit, or side speculation, in any dealing he may have with the corporation. 1 Waterman, Corp. § 163. These matters, however, are not pressed in argument, and we will not consider them further.

The question for our consideration, briefly stated, is this: Can a member of the governing body of an insolvent corporation, of which corporation he is a nonsecured creditor, be made a preferred creditor in the administration or disposition of the corporate assets, or must the assets be distributed *pro rata* among all the nonsecured creditors? Of course, if valid liens have been created, supervening insolvency cannot destroy or impair them. The question in this case has been industriously and ably argued on both sides. It is the settled law of this state that a debtor,—a natural person,—though insolvent, may, of his effects whether money or property, pay one or more creditors in full, although he thereby disables himself to pay his other debts. There are conditions or limitations to this right. The paying debtor must not by the transaction secure any benefit to himself, other than the discharge of the obligation he rested under to pay the debt. If paid in property, it must be at its reasonably fair market value. If the property be in value, so much in excess of the debt paid with it as to necessitate a substantial payment to the insolvent debtor therefor, and such substantial excess is so paid, this is treated as securing a benefit to the debtor, by enabling him to shuffle such excess out of the reach of his other creditors; and the transaction is fraudulent. If the preference of one or more creditors by an insolvent debtor can withstand these tests, the motive or purpose of the debtor in giving the preference becomes an immaterial inquiry. 8 Brickell,

Dig. p. 517, §§ 187, 188; *Hodges v. Coleman*, 76 Ala. 103; *Meyer v. Sulebacher*, Id. 120; *Shealy v. Edwards*, 78 Ala. 176, 49 Am. Rep. 48; *Levy v. Williams*, 79 Ala. 171; *Leinkauff v. Freukle*, 80 Ala. 136; *Tyron v. Flournoy*, Id. 331; *Montgomery v. Bayliss*, 96 Ala. 342; *Ellison v. Moses*, 95 Ala. 221; *Tiffany v. Boatman's Sav. Inst.* 85 U. S. 18 Wall. 875, 21 L. ed. 868; *Grant v. First Nat. Bank of Monmouth*, 97 U. S. 80, 21 L. ed. 271.

There are many authorities which hold that a solvent and going corporation can secure a member of the governing board in the payment of a debt due him; and the fact that the corporation becomes insolvent afterwards does not impair the validity of his security. We are not inclined to question the correctness of this principle, but we will explain hereafter more fully what we mean by a solvent corporation. *O'Conner Min. & Mfg. Co. v. Coosa Furnace Co.* 95 Ala. 614; *Lexington, L. F. & M. Ins. Co. v. Page*, 17 B. Mon. 412, 66 Am. Dec. 165; *Reichwald v. Commercial Hotel Co.* 106 Ill. 439; *Paulding v. Chrome Steel Co.* 94 N. Y. 384; *Twin Lick Oil Co. of West Virginia v. Marbury*, 91 U. S. 587, 23 L. ed. 328.

There are some authorities which hold that an insolvent corporation may make an assignment, preferring even its own directors, or members of its governing body, if they be creditors of the corporation; that the directors have the same rights as creditors of natural persons have, and that the relation they sustain to the corporation and to its assets does not impair that right, if in fact their claims be bona fide debts of the corporation. *Whitwell v. Warner*, 20 Vt. 425; *Buell v. Buckingham*, 16 Iowa, 284, 85 Am. Dec. 516; *Garrett v. Burlington Plow Co.* 70 Iowa, 697, 59 Am. Rep. 461; *Planters Bank of Farmville v. Whittle*, 78 Va. 787; *Burr v. McDonald*, 8 Gratt. 215.

The governing body or directory of a corporation holds the capital stock of a corporation in the confidence that it will be preserved and administered primarily for the benefit of creditors and secondarily for the benefit of the stockholders. *Friend v. Powers*, 93 Ala. 114. As long ago as 1824, *Justice Story*, in *Wood v. Dummer*, 3 Mason, 308, said: "It appears to me very clear upon general principles as well as the legislative intention, that the capital stock of banks is to be deemed a pledge or trust fund for the payment of the debts contracted by the bank." In *Bank of St. Marys v. St. John*, 25 Ala. 566-612, this court, in 1854, used this language: "The capital stock of the bank, with all its property and assets, is to be regarded as a trust fund for the payment of creditors; and the stockholders, directors, and agents of the bank are trustees for their benefit, and, as such may be made to discover and account in chancery." So, in *Bradley v. Farwell*, 1 Holmes, C. O. 438, the court said: "The relation between the directors of a corporation and its stockholders is that of trustee and cestui que trust." See *Wait*, Insolvent Corp. p. 507, note 1, and citations; *Elyton Land Co. v. Birmingham Warehouse & Elevator Co.* 92 Ala. 407, 12 L. R. A. 307.

In *Smith v. St. Louis Mut. L. Ins. Co.* 3 33 L. R. A.

Tenn. Ch. 502, that able chancellor, Cooper, said: "Nor is it denied that our decisions have settled that the assets of an insolvent corporation constitute, under our laws, a trust fund for the payment of creditors of the corporation, in the order of priority fixed by law, and, if there be no priority, then *pro rata*; and that no amount of diligence on the part of one or more of the creditors can defeat the right of others to such distribution. . . . The object is, in certain contingencies, to prevent unseemly scrambles, and to secure, what equity delights in,—equality of rights among all who are equally meritorious."

We have cited authorities which affirm the right of a director of an insolvent corporation to have himself made a preferred creditor in a case such as we have in hand. There are authorities the other way. In 2 Morawetz, Priv. Corp. § 787, it is said: "The equitable interests of the shareholders and creditors are altered by the insolvency; and the directors or managing agents, who originally stood in the fiduciary relation to the company, become placed in a fiduciary relation to its creditors. The powers of management vested in the directors of an insolvent corporation which has ceased to carry on business are solely powers to manage the assets in trust for its creditors and for their benefit. It has been held, therefore, that the directors of an insolvent corporation are bound to manage the remaining assets with strict regard for the interests of its creditors. . . . Directors of an insolvent corporation, who have claims against the company as creditors, must share ratably with the other creditors in a distribution of the company's assets. They cannot secure to themselves any advantage or preference over other creditors by using their powers as directors for that purpose. These powers are held by them in trust for all the creditors, and cannot be used for their own benefit." In *Richards v. New Hampshire Ins. Co.*, 48 N. H. 268, the headnote expresses the principle decided in the following language: "Directors and managers of insolvent corporations are trustees of the funds, as well for the creditors as for the corporation, and are bound to apply them *pro rata*, and cannot use them to exonerate themselves to the injury of other creditors." In the case of *Haywood v. Lincoln Lumber Co.*, 64 Wis. 689, the court decided that "the directors and officers of an insolvent corporation are trustees for the creditors, and must manage its property and assets with strict regard to their interests; and, if they are themselves creditors, while the insolvent corporation is under their management they cannot secure to themselves any preference or advantage over other creditors." In *Sweeney v. Wheeling Grapes Sugar & Refining Co.*, 30 W. Va. 448, it was held that "directors of a corporation are trustees for the corporation, and within the rule that one holding a fiduciary relation to trust property cannot, either directly or indirectly, become the purchaser of such property, or transfer it to his own use, or for his own benefit, and, if he does, the sale or transfer is voidable, and will be set aside at the mere pleasure of the beneficiaries, though such fiduciary may

have paid full price and gained no advantage." In *Beach v. Miller*, 180 Ill. 162, it was said: "The directors of an insolvent corporation are trustees of its assets for its creditors, and cannot give the funds away, or sell them at a sacrifice in the interest of others, even with the consent of the stockholders; and, if themselves creditors, they cannot receive any advantage or preference in the payment of their claims at the expense of the other creditors." To the same effect, and by the same court, is the case of *Roseboom v. Whittaker*, 182 Ill. 81. In *Olney v. Connecticut Land Co.*, 16 R. I. 597, 5 L. R. A. 361, it was held that "the directors of an insolvent corporation are trustees for the creditors of the corporation, and they cannot obtain priority over a creditor by taking mortgages to themselves to secure them for advances and for their indorsement of the notes of the corporation, after the creditor has brought suit, and when the company is insolvent." In *Hovey v. Sanford Fork & Tool Co.*, 44 Fed. Rep. 231, it was decided that "where a corporation, while still a going concern, is insolvent, a mortgage on its property, executed to secure the directors, who are liable as indorsers for it to a large amount, is invalid as to general creditors, and that though the mortgage was procured by the directors without any actual fraudulent intent." In *Consolidated Tank Line Co. v. Kansas City Varnish Co.*, 45 Fed. Rep. 7, the "directors of an embarrassed corporation, holding claims against it which they wished to protect, had the notes of the company payable to themselves drawn and antedated, and procured them to be discounted by defendant bank. They then caused to be executed a deed of trust conveying all the assets of the company as security for these notes among others. Held, in a proceeding by unsecured creditors to set it aside, that, being a security for debts upon which the directors were themselves liable as indorsers, it was, in effect, a preference to themselves, and fraudulent and void." In 28 American Law Review No. 6, p. 1009, there is a strong article maintaining the same doctrine announced in the cases cited above, with a reference to many adjudged cases. See also, *Jackson v. Ludeling*, 88 U. S. 21 Wall. 616, 23 L. ed. 492; *Dabney v. Bank of State of South Carolina*, 8 S. C. N. S. 124; *Drury v. Milwaukee & S. R. Co.* 74 U. S. 7 Wall. 299, 19 L. ed. 40; *Thorington v. Gould*, 59 Ala. 461; *Goodwin v. McGhee*, 15 Ala. 282.

The question we have been considering is one of grave and growing importance in this state, and we have therefore felt it our duty to collate the authorities. It will be seen that the modern authorities, almost without exception, utter the same strong condemnatory language of any and all attempts by directors of an insolvent corporation to have themselves indemnified and preferred over the other creditors of the company. The assets are, in a sense, a trust fund in their hands

for the payment of the corporation's debts, and it is both their moral and legal duty to maintain perfect equality in their administration and disbursement, at least to the extent that they cannot prefer themselves. We need go no further in this case. In looking into the authorities it will be seen that the right of the directors of an insolvent corporation to prefer themselves as creditors is withheld from them, not alone on the ground that the assets are a trust fund, of which they are trustees for the creditors. Notice is taken of the superior knowledge they necessarily have, and the great advantage this would and does give them in a race of diligence. But the principle extends further. In a conveyance by which they attempt to pay or secure themselves, that necessary element of all valid contracts—opposing interest in the seller and buyer—is wanting. They are both seller and buyer. Such transactions by a trustee are always voidable on the ground of public policy.

At what stage of a corporation's affairs must it be pronounced insolvent, so as to bring it within the principle we have declared? It is not enough that its assets are insufficient to meet all its liabilities if it be still prosecuting its line of business, with the prospect and expectation of continuing to do so; in other words, if it be, in good faith, what is sometimes called a "going" business or establishment. Many successful corporate enterprises, it is believed, have passed through crises, when their property and effects, if brought to present sale, would not have discharged all their liabilities in full. We feel safe in declaring that when a corporation's assets are insufficient for the payment of its debts, and it has ceased to do business, or has taken, or is in the act of taking, a step which will practically incapacitate it for conducting the corporate enterprise with reasonable prospects of success, or its embarrassments are such that early suspension and failure must ensue, then such corporation must be pronounced insolvent.

Under the definition we have given we hold that the sale charged in the bill to have been made by the Decatur Building Supply Company to Corey was, if the averments be true, an attempted preference by an insolvent corporation of a member of its governing board, and that he is chargeable as a trustee with the property and effects so received, or their value, for the equal benefit of all the creditors. The question we have been considering may possibly have been remotely touched in the case of *Globe Iron Roofing & Corrugating Co. v. Thacher*, 87 Ala. 458.

To the extent of the conflict, if there be such, the present opinion must prevail.

The decretal order of the chancellor overruling the demurrer to the bill must be affirmed.

McClellan, J., dissents.

Rehearing denied.

Estra STROUSE, *Appt.*,

v.

Elizabeth LEIFF.

(.....Ala.....)

1. That a woman made sole defendant in an action for tort was living with her husband is no ground for abatement of the action under a statute relieving the husband from liability for torts of his wife in which he does not participate, and making her suable therefor as if she were sole.
2. Error in sustaining a demurrer to a special plea is cured, if, under the general issue, proof is introduced and the jury passes upon the identical question sought to be raised by such plea.
3. Special negligence in permitting a vicious dog to escape from an enclosure is not necessary to create a liability for keeping such a dog with knowledge of its propensities, when he escapes and inflicts injuries.
4. A wife is not liable for harboring a vicious dog on her own premises where her husband lives with her, although the statutes secure to married women their separate estates and relieve the husband from all liability for his wife's torts "in the commission of which he does not participate," since the dog cannot be kept

without his consent and participation, and must be charged to his account as the head of the family.

(February 7, 1894.)

APPEAL by defendant from a judgment of the Circuit Court for Mobile County in favor of plaintiff in an action brought to recover damages for injuries inflicted by a dog, for the safe keeping of which defendant was alleged to be responsible. *Reversed.*

The facts sufficiently appear in the opinion. *Messrs. Overall, Bestor & Gray*, for appellant:

The evidence shows that the appellant was not the keeper of the dog, and therefore not liable.

Whittemore v. Thomas, 158 Mass. 847.

There is no evidence showing neglect or want of care by appellant or any servant or other person connected with the household in the keeping of the dog. At the time of the biting and injury to appellee sued for, appellant was a married woman, and if there was any wrongful act in the keeping of the dog, the husband was the party liable, and not appellant.

Code of 1886, § 2845; *Bibb v. State*, 94 Ala. 33; *Williamson v. State*, 16 Ala. 481; *Douge v. Pearce*, 13 Ala. 128; *Seibert v. State*, 40 Ala. 60;

NOTE.—Responsibility of a married woman for the use and safety of premises owned by her.

Upon the precise question involved in the principal case, the authorities do not seem to be harmonious, that case holding the wife not liable, while in the New York case of *Quilty v. Battie* *infra*, the court declared the contrary.

In a recent case decided in the court of appeals of Colorado, the court held they were properly joined as defendants upon a question of a like nature. *Hornbein v. Blanchard*, *infra*.

And in a late Massachusetts case the question was stated to be one for the jury as to the ownership of the animal. *McLaughlin v. Kemp*, *infra*.

Upon the point of ownership, however, there would seem to be a conflict of opinion as to its pertinency, as shown in the Colorado case. *Hornbein v. Blanchard*, *infra*; *McLaughlin v. Kemp*, *infra*.

The New York cases place her responsibility purely upon the question of her right to act independently of her husband in all matters connected with her separate estate and as though she were husbandless. *Quilty v. Battie*, *infra*.

L. *Illegal use of premises.*

Where the wife was indicted under section 4800 of the Penal Code of Georgia, for keeping a place for gambling, it was held that she could not be found guilty, it appearing that the husband and wife resided together upon the premises, the court stating that where the husband and wife resided together in the house, no matter which of them owned or had rented the house, he was the head of the family and it was his duty, not hers, to prevent it, and that in order to render her criminally liable for permitting such act while he was present, it must appear affirmatively that she was active in granting permission, that if she were merely passive in the matter, although taking no measures to hinder or prevent the crime, she could not be convicted. *Bell v. State* (Ga.) April 10, 1893.

By § 4800 of the Penal Code of Georgia it is provided a *feme covert* or married woman acting under the threats, command, or coercion of her husband, shall not be found guilty of any crime or 23 L. R. A.

misdemeanor not punishable by death or perpetual imprisonment, but with this exception, the husband shall be prosecuted as principal and if convicted, shall receive the punishment which would otherwise have been inflicted on the wife if she had been found guilty, provided it appears from all the facts and circumstances of the case that violent threats, command, and coercion were used.

In *Com. v. Wood*, 97 Mass. 225, the husband was indicted for keeping a house of ill fame, and contended that he was not liable because the house was owned by his wife as her separate property and the business was carried on by her and she took the profits in which he did not participate. The court held that his liability depended upon the relations which he sustained to the household while he lived with the wife as her husband.

The doctrine of the common law is that by marriage the husband and wife become one person in law, that she is under his protection, influence, power, and authority, and that he is the head of the household. *Com. v. Wood*, *supra*.

How far he may exercise force in restraining her does not seem to be precisely settled, but he may exercise as much power as may be reasonably necessary to prevent her as well as other inmates of the house from making it a brothel. *Ibid*.

With regard to the recent legislature upon the position of married women, it was stated that the fact that the family lived in a house owned by the wife had never been regarded as affecting the rights and powers of the husband as head of the family, even though she might carry on a separate trade on her own account. *Ibid*.

The provisions of the statute relate to legitimate business and do not take away the husband's power to regulate his household, so far as to prevent the wife from carrying on an illegal trade. *Ibid*.

The above principles were followed by the court in *Com. v. Carroll*, 124 Mass. 30, where the husband was indicted for keeping and maintaining a tenement, used for the illegal sale and illegal keeping of intoxicating liquors.

The statutes which have been passed to enlarge the rights and privileges of married women, have

Mulvey v. State, 43 Ala. 318; *Lawson v. Lay*, 24 Ala. 184; *Quintan v. People*, 6 Park. Crim. Rep. 9.

The court should not have admitted evidence against the objection of defendant to show who was the owner of the premises on which the dog was kept.

Williamson v. State, *supra*.

The court should have given the charge requested by defendant, announcing the legal proposition that to render her liable the defendant should have had knowledge of the vicious propensity of the dog.

Smith v. Causey, 23 Ala. 571; *Durden v. Barnett*, 7 Ala. 169; *Woolf v. Chalker*, 81 Conn. 121, 81 Am. Rep. 175; *Cooley, Torts*, pp. 842, 844, 845.

The general principle is that when a wife acts under the coercion of her husband in misdemeanors she is not to be held responsible for her acts.

Mulvey v. State, *supra*.

And it is not necessary that he should be present at the time of the act, if the jury are satisfied from the evidence that the act was done by his authority.

Seibert v. State, *supra*.

It is held in *Douge v. Pierce*, 18 Ala. 129, in

an action of slander, that if the slander was uttered by the wife in the presence of the husband or by his coercion, and they are sued together, that the suit would abate on the death of the husband.

In detinue the husband was held liable for the wife's illegal detention of a slave. But he having died before recovery it was held that his personal representative was not liable for the wife's detention.

Lawson v. Lay, *supra*.

Messrs. Gregory L. Smith and H. T. Smith for appellee.

Stone, Ch. J., delivered the opinion of the court:

This suit was brought by appellee to recover damages for alleged injuries suffered from the bite of a dog. The suit is against Ezra Strouse, and the complaint charges that "the defendant kept, and for a long time prior thereto had kept, a dog of savage and ferocious nature, and on, to wit, the 21st day of February, 1891, the defendant so negligently kept said dog that it escaped from the premises and attacked the plaintiff, and bit and tore and lacerated her, to her damage in the sum of . . . The plaintiff avers that

made no change in the law with regard to the husband's right to control his own household. *Com. v. Carroll*, *supra*.

Prima facie the husband is able to prevent the wife from making an illegal use of the family dwelling-house. *Ibid*.

So again in *Com. v. Pratt*, 126 Mass. 462, where the wife kept intoxicating liquors for sale in a hotel hired by her, the court states that if at the time the liquors were kept for sale by the defendants the defendant husband actually aided or assisted her in such keeping, he should be convicted; that if the defendant without actually and actively aiding his wife in such keeping, was personally present and knew that his wife was so keeping the liquors, the presumption of law was that the wife acted under the coercion of her husband and that he was guilty and she was not; that this was true, although the place where the liquors were kept was her hotel and not merely a private dwelling house, but that the presumption might be rebutted by showing that the wife acted without the interference or control of the husband, and further that if the defendant directed or advised his wife to keep liquors for sale and he was living with her in her hotel and knew of the facts, the presumption was that she was acting under his coercion, and that he was guilty and she not.

So in *Com. v. Barry*, 115 Mass. 146, a case of illegal sale of liquor, the court sustained the same doctrine.

II. Safety of premises.

Where husband and wife were sued to recover damages, caused by the bite of a vicious dog, judgment was recovered against both from which the husband appealed, contending that the dog was the individual property of the wife and not his or theirs jointly, and that under the laws of the state the husband could not be held liable. The court held, it not being proved to whom the dog belonged, the judgment was properly rendered against them both; their liability was not alone dependent upon the ownership; the facts might render them or one of them liable regardless of the ownership; the keeping of the dog upon the premises exercising rights of ownership, knowing his ferocity, was sufficient to fix the liability. *Hornbain v. Blanch-* 23 L. R. A.

ard (Colo. App.) Nov. 27, 1893. See also Quilty v. Battle, and McLaughlin v. Kemp, infra.

Married women are now liable by statute, and an action may be prosecuted against them for torts committed, as if unmarried. *Mayhew v. Burns*, 103 Ind. 528.

Having been relieved of their disabilities, and empowered to own and control separate estates as *femes sole*, they take the right with all its incidents, and must therefore, like all other persons, use the property with due regard for the rights of others. *Ibid*.

Where the wife was sued to recover damages for wrongfully causing the death of the plaintiff's infant child, occasioned by falling into an excavation made upon the wife's premises in such a manner as to remove the lateral support from adjoining premises, it was held that the wife was liable in damages to the father. *Ibid*.

In *Austin v. Cox*, 118 Mass. 58, it was held in an action for obstructing the plaintiff in the use of a well upon the wife's premises, in respect of which the plaintiff claimed an easement, that since the passing of the statute of that state, a husband could not be held liable for a tort committed by his wife, unless he aided, abetted, advised, or otherwise encouraged the act.

Where the husband and wife were sued for forcibly ejecting the defendant from property leased by them to plaintiffs, the court held that evidence might be given of the wife's actions in the husband's presence at the time of such ejectment, although her actions during the husband's absence from the premises had no binding effect upon him in the absence of proof that she acted by his direction and advice. *Baumier v. Antiau*, 95 Mich. 31.

In *Burt v. McBain*, 29 Mich. 260, it was held that a husband was no longer liable for his wife's torts.

In *Fiske v. Bailey*, 51 N. Y. 158, where the husband and wife were domiciled on premises the separate and exclusive property of the wife, it was held that he was not, in legal presumption, so in control of the premises as to make him responsible to a party who enters thereon by permission of the wife, for injuries sustained by the careless leaving of a pit thereon uncovered. *Rowe v. Smith*, 45 N. Y. 230, followed.

Where a married woman acts and speaks by her-

the defendant had notice of the savage and ferocious nature of said dog prior to the matters hereinbefore complained." The complainant then claims special damages for being thereby disabled to perform customary work, for expense of medical treatment, and for necessary nursing. There is a claim of a specified sum as damages sufficiently large to cover the recovery. There was a demurrer to the complaint, which the circuit court rightly overruled. The defendant interposed a plea, sworn to, which is styled a "plea in abatement." This plea was demurred to, the demurrer sustained, and this ruling is the subject of one of the errors assigned. The plea avers that when the act was done which gave rise to the suit "she was a married woman, the wife of Simon Strouse, who is now living in the city and county of Mobile, state of Alabama; that she was not at said time separated or living apart from the said husband, but they were living together in conjugal and marital relations." This clause of the plea does not negative the idea that the act complained of was solely the act of the wife. At common law this would have been a good ground of abatement. Under that system a suit could not have been maintained against the wife alone, on the facts charged in the complaint in this case. It would have been necessary to sue the husband jointly with the wife. *Pinkston v. Greene*, 9 Ala. 19.

Our statute has changed the common law on this subject. Section 2345 of the Code

declares that the husband is not liable for the torts of the wife, "in the commission of which he does not participate; but the wife is liable . . . for her torts, and is suable therefor as if she were sole." This has changed the entire law as to the manner of suing a married woman, and has rendered it improper to join the husband when the charge is that the wife herself committed the tort. 14 Am. & Eng. Encyclop. Law, p. 647, and, note 1, on pages 648, 649. The effect of our statute has been to render in large degree, if not entirely, the matter set up in the first part of this plea nonavailing as a defense in abatement. Its whole scope, if available in any conditions, would seem to be confined to its effect as a bar to the action. This plea has another averment, namely: "That the said husband was at said time, prior thereto, and ever since the head of the family and the household, and had control of the said dog, and of the premises where the said dog was kept, and where said occurrence is said to have taken place." This averment is in no sense matter in abatement. If true, it is equivalent to the general issue, is a denial that the defendant kept the dog, and is a perfect bar to the action if made good. Pleas in abatement and pleas in bar cannot be pleaded together, and it may be that the latter averment would be construed as a waiver of the matter relied on in abatement; but we need not decide this. Defendant interposed the plea of the general issue, and under that plea was not only entitled to make all de-

husband, his declarations and acts are hers and she must see to it, especially when he acts and speaks in her presence on her behalf. *Lindner v. Sahler*, 51 Barb. 322. So held, where the wife was sued for trover for the conversion of sheep found upon her premises, and demand was made of her husband in her presence.

Where the wife set fire to a house owned by her and let to a tenant, it was held that the husband was not liable with the wife, the tort being such as was committed by her in the control and management of her personal estate, she holding such property as though husbandless. *Lansing v. Holdridge*, 58 How. Pr. 449.

Where land belonged to the wife, who was active in the business and leased the same for cultivation, and subsequently disputes arose between the tenant and the landlord as to the cultivation of the crop, and the husband took possession and plowed the field his wife walking behind him with a gun, it was held they were properly joined in the action, the tort being committed in the presence of the husband, the wife acting deliberately and freely. *Henderson v. Wendler* (S. C.) July 19, 1898.

In *Quilty v. Battie*, 17 L. R. A. 521, 135 N. Y. 201, the husband and wife were sued for injuries resulting from the bite of a vicious dog, the liability of the wife being disputed upon the ground that she was a married woman and the dog belonged to her husband, and that she was not responsible for the trespasses committed by it, but the court held her liable upon the ground that she harbored the dog on her own premises with full knowledge of its vicious propensities and that the husband who had no knowledge of such propensities was not liable.

Commenting upon the Married Woman's Act of 1848, chap. 200, amended by the Act of 1849, chap. 375, the court stated that full and absolute ownership of all property which the wife might have or acquire, with all its incidents, privileges, and bur-

dens, was conferred upon her by the statutes, that in the acquisition and indictment thereof she should be deemed to be an unmarried woman; and further that marital control of it was completely abrogated, not a trace of it was permitted to remain, the husband being placed upon the same footing as a stranger, with no greater authority to impose a burden upon her separate estate or to restrict or embarrass her in the exercise of exclusive dominion over it. *Quilty v. Battie*, *supra*.

With regard to the Act of 1880, chap. 90, amended by the Act of 1882, chap. 172, the court stated that she had the same remedies to prevent or restrain her husband from unlawfully interfering with her property, as she had against any other person; that if he kept upon her premises a ferocious animal, she had the same authority of law to protect herself against this infringement of her property rights as against a like trespass by a neighbor,—the husband is required to respond for the personal torts of the wife but for a trespass committed by her in the care and management of her separate estate he was not a proper party to defend. *Ibid*.

In *McLaughlin v. Kemp*, 152 Mass. 7, where the husband and wife were sued for damages for the bite of the husband's dog kept upon her separate premises, the court held that the wife was not necessarily a keeper of dogs which her husband owned and kept on premises which she owned, and which both occupied as husband and wife, although she carried on a separate business upon the premises.

It is a question for the jury whether the wife was the keeper of the dogs, and a ruling that "if they were her husband's dogs and he kept them there against her consent and contrary to her consent, and she did nothing to maintain or keep them, did not give them food or protect them, or provide for them in any way, she would not be in the sense of the law a keeper of the dogs," is correct. *Ibid*.

E. W.

fense she could have made under the plea to which the demurrer was sustained, but she actually introduced proof, and had the jury pass on the identical question she had sought to present by the special plea. This, under all the authorities, cured the error, if any had been committed, in sustaining the demurrer to the latter clause of the special plea.

The doctrine is well settled that the owner or keeper of a domestic animal which is vicious, and prone or accustomed to do violence, having knowledge of such violent disposition or habit, must safely and securely keep such animal, so that it cannot inflict injury. Whether or not there was special negligence in permitting the dog's escape from the premises is not the inquiry. The keeper must, at his peril, safely keep such animal. Such is the condition on which the ownership or custody of known vicious animals is tolerated. Ownership or custody of such vicious animal is not one of the natural, inherent rights of property. It is a qualified or restricted right,—qualified by the condition that the animal can be, and is, safely confined and kept. *Cooley, Torts, 848 et seq.*; *1 Addison, Torts, § 261*; *Whittaker's Smith, Neg. 99*; *2 Shearm. & Redf. Neg. §§ 628-631*; *The Lord Derby, 17 Fed. Rep. 265*; *1 Am. & Eng. Encyclop. Law, p. 581*; *Garlick v. Dorsey, 48 Ala. 220*; *Nolan v. Traber, 49 Md. 460, 38 Am. Rep. 277*.

Previous knowledge of the animal's vicious habits must be alleged and proved. But positive proof is not always necessary. It may be inferred from circumstances. But the knowledge of the vicious habits of an animal need not refer to circumstances of exactly the same kind. All that the law requires to make the owner or keeper liable is knowledge of facts from which he can infer that the animal is likely to commit an act of the kind complained of. *1 Am. & Eng. Encyclop. Law, p. 582, and note*.

The pivotal question in this case is whether Mrs. Strouse, the wife of Simon Strouse, living in the same house and in marital relations with him, can, under the facts of this case, be adjudged guilty of the tort complained of. Let us first ascertain precisely what was done which led to plaintiff's alleged injury, or sheds light on the circumstances attending it. We premise that what is here stated is proved by all the testimony bearing on the question or questions, without a shade or semblance of conflict: The house and premises in which Mr. and Mrs. Strouse lived together as husband and wife was the property of Mrs. Estra Strouse, the defendant in this suit. They lived there as husband and wife, having their children around them, and had lived at the same place for many years. A dog had for years been on the premises, not otherwise confined than by the inclosure of the lot. In the daytime, when neither Mrs. Strouse nor her husband was at home, the dog escaped through the back gate of the lot, and inflicted the injury complained of, in an open, public alleyway which extended across, from street to street, at the rear of the premises. No special act of negligence—in fact, no direct agency—is charged

either against Simon or Estra Strouse in immediate connection with the escape of the dog at the time it took place. The immediate cause, according to the testimony, was the act of a visiting stranger. But, as we have shown above, negligence in permitting the dog to escape from the inclosure was not essential to the maintenance of this action. The fault and liability for the injury which ensues are established according to legal requirements, when it is shown that a vicious animal, prone, and known to be prone, to inflict personal injuries, is kept, and such animal escapes from confinement and inflicts injury. This constitutes an actionable tort, perpetrated by the keeper of such animal. That there was testimony tending to prove the vicious, if not dangerous, nature and temper of the dog, and tending to charge his keeper with a knowledge of such his evil disposition, cannot be gainsaid. A verdict finding such to be the fact could not be set aside, as unsupported by testimony. The testimony as to the ownership, custody, or keep of the dog was as follows: Plaintiff testified: "It was Mrs. Strouse's dog. She would go to the butcher wagon, and ask for meat for the dog. She got the dog from Mr. Hayes, who is now dead. I heard Mrs. Strouse say that Mr. Hayes gave her the dog when it was a small puppy. Mr. Strouse's cook fed the dog. I do not know who took care of him." This was the entire testimony for plaintiff on this question. For defendant, Strouse and his wife testified that Hayes or Haas gave the puppy to Mr. Strouse; that he had always owned him, and gave directions as to his being fed. Their two children and the cook confirmed them in this testimony. It is not our intention to compare the relative weight of this conflicting testimony.

The authorities are uniform that the husband is the head of the family, so long as the marital relation is maintained. He determines where the home shall be, is entitled to the wife's labor and services, has the right to have her society, controls the home and the household, and, with limited exceptions, she must obey his commands. In domestic management she is not presumed to have an independent will of her own. And our statutes securing to married women their separate estates have wrought no change in these relative rights and duties that affect the questions presented in this case. In *Hanberry v. Hanberry, 29 Ala. 719*, it was said: "It is settled law that the domicile of the wife follows that of the husband." In *Firebrace v. Firebrace, L. R. 4 Prob. Div. 63, 67*, it is said: "The domicile of the wife is that of the husband." This was said in 1878, after the enactment of the married woman's act in England. In *Re Cochran, 8 Dowl. P. C. 630, 635, Coleridge, J.*, replying to the contention "that the wife, as to her residence and manner of passing her time, was independent of her husband," said: "But our law has not so limited his rights, nor rested them on so narrow a foundation. Although expressed in terms simple almost to rudeness, the principle on which it proceeds is broad and comprehensive. It has respect to the terms of the marriage contract, and the infirmity of the

sex. For the happiness and honor of both parties it places the wife under the guardianship of the husband, and entitles him, for the sake of both, to protect her from the danger of unrestrained intercourse with the world, by enforcing cohabitation and a common residence." In the same opinion he quoted *Lord Mansfield* as saying: "The husband has, in consequence of his marriage, a right to the custody of his wife; and whoever detains her from him violates that right, and he has a right to seize her wherever he finds her." In *Ashbaugh v. Ashbaugh*, 17 Ill. 476, the court said: "In contemplation of law, the husband and wife are one person, and her residence follows that of the husband." This principle was reaffirmed in *Davis v. Davis*, 80 Ill. 180, and in *Kennedy v. Kennedy*, 87 Ill. 250. In *Elijah v. Taylor*, 87 Ill. 247,—a case controlled by their statute securing to married women the ownership of their property,—the court employed this language: "We desire to proceed cautiously in the construction of that act, because, although passed without much consideration, it involves interests of great magnitude, and questions of no little difficulty. All that we deem it necessary to say in regard to the case before us is this: That where the husband, as the head of the family, occupies and cultivates the land of the wife, he must be considered as occupying it with her consent, for the common benefit of the family: and the products of his toil upon such land are as much his property, notwithstanding the Act of 1861, as if he had occupied, as a tenant, land rented from some third person. Any other rule would plainly lead to great confusion, and open a wide door to fraud." In *Boyce v. Boyce*, 28 N. J. Eq. 887, 848, the principle is thus expressed: "The wife is bound to follow her husband when he changes his residence, even without her consent, provided the change is made by him in the bona fide exercise of his power, as head of the family, of determining what is the best for it." In California the right of the wife to the ownership and control of her property were never framed after the common-law model. They partook more of the civil-law system. In *Hardenbergh v. Hardenbergh*, 14 Cal. 654, is this language: "The husband, being the head of the family, and bound for its support and maintenance, may change the matrimonial domicile at pleasure, and it is the duty of the wife to submit to the reasonable exercise of this right." The case of *Glover v. Alcott*, 11 Mich. 470, arose after the enactment of their statute securing to married women the ownership and control of their property. The wife had permitted the husband to conduct a large business, styling himself "W. W. Alcott, Agent." Indebtedness was incurred in the conduct of the business, and some barrels of flour, the product of the enterprise, were seized and sold in payment thereof. The wife brought an action of trover for their conversion. In discussing the question of her right to maintain the action the court (Christiancy, J.) said: "We see nothing in the statute to satisfy us that the legislature contemplated so radical a change in the legal relations of husband and wife while they continue to live

together, and he is competent to the transaction of business, and guilty of no gross neglect of his duties to her and his family. But the husband must, as a general rule, still be regarded as the head of the family, and as the only one of the two authorized to carry on such general trade and business."

In Massachusetts they have legislation somewhat analogous to ours, relating to the rights of married women in their separate property. In *Com. v. Wood*, 97 Mass. 325, the husband was indicted for keeping a house of ill fame. The house was the separate property of the wife. The defense relied on and ruled upon is shown in the following extract from the opinion of the court: "The defendant contends that he is not liable, because the house was owned by his wife, as her separate property, and the business of keeping a house of ill fame therein, which was resorted to for prostitution and lewdness, was carried on by her, and she took the profits thereof, and he did not participate in them. Whether he is liable in such a case must depend upon the relations which he sustained to the household, while he lived with his wife as her husband. The doctrine of the common law is that, by marriage, the husband and wife become one person in law; that she is under his protection, influence, power, and authority, and that he is the head of the household. This condition of the wife is designated by the expressive term 'coverture.' One effect of it is, as a general rule, though subject to many exceptions, to excuse her from punishment for many crimes committed by her in the presence of her husband, on the ground that she acted under his compulsion. He alone is held responsible for such crimes. [Citing many authorities]. How far he may exercise force in restraining her is not precisely settled; but there can be no doubt that he may exercise as much power as may be reasonably necessary to prevent her, as well as other inmates of the house, from making it a brothel. It is said in Dalton's Justice that he is liable if she keep an alehouse, without license, against his will. But it is contended that the recent legislation of this commonwealth has made married women so far independent of their husbands as to release the defendant, in such a case as the present, from all responsibility for the conduct of his wife. It is true that the house they lived in appears to have been owned by her to her sole and separate use, free from the control of her husband. But, ever since the law of equitable trusts existed, married women have been able to hold property thus independent of the husband's control; and the fact that the family lived in a house they owned has never been regarded as affecting the rights and power of the husband as head of the family. . . . These provisions of the statute relate to legitimate business, and not to the keeping of brothels. They do not take away his power to regulate his household, so far as to prevent his wife from committing this offense, or relieve him from responsibility if it is committed." See also *Com. v. Flaherty*, 140 Mass. 454. A misdemeanor or tort committed by a married woman conjointly, with, or in presence of, her husband, is presumed to be his act, be-

cause the law raises the presumption that she acts in obedience to his will or under his coercion. The same rule applies as to crimes, except a few of the higher grades. *Douge v. Pearce*, 18 Ala. 127; *Williamson v. State*, 16 Ala. 431; *Lauson v. Lay*, 24 Ala. 184; *Mulvey v. State*, 43 Ala. 316; *Quinlin v. People*, 6 Park. Crim. Rep. 9; *Cooley, Torts*, 115.

"There is a presumption," says *Judge Cooley*, "corresponding to that which is made in the criminal law,—that, if a wrong is committed by the wife in the presence of the husband, it must have been committed by his consent and under his influence, and consequently is his wrong, rather than that of the wife, and should be redressed in a suit against him alone; but any such presumption is liable to be overthrown by evidence." See also *Carleton v. Haywood*, 49 N. H. 814. This same learned author (*Judge Cooley*; page 118) says: "It is not very clear how far the law of torts has been modified." He was speaking of the influence exerted by the statutes by which married women have been given independent power to make contracts and to control property. Continuing, he says: "We should probably be safe in saying that, so far as they give validity to a married woman's contracts, they put her on the same footing with other persons and, when a failure to perform a duty under a contract is in itself a tort, it may doubtless be treated as such in a suit against a married woman. The same would probably be true of any breach of duty imposed upon a married woman as owner of property which she possesses and controls the same as if sole and unmarried."

We have referred to our statute which authorizes suits to be brought against the wife alone,—section 2345 of the Code of 1886. That section, in its entirety, reads as follows: "The husband is not liable for the debts or engagements of the wife, contracted or entered into after the marriage, or for her torts, in the commission of which he does not participate; but the wife is liable for such debts or engagements entered into with the consent of the husband in writing, or for her torts, and is suable therefor, as if she were sole." All who are familiar with the principles of the common law will readily perceive and take in a large field for the operation of this statute. Under that system a wife could make no contract or agreement which, as such, would authorize an action and recovery against her. Under the statute, if she enter into a contract or agreement with the written consent of her husband, an action for its breach may be maintained against her alone. Nor could she be sued alone, under common-law rules, for any tort committed by her, no matter how wrongful, violent, or independent of presumed marital restraint her conduct may have been. Under that system, if the tort was committed in the presence of her husband, *prima facie* it was not her tort, but was presumed to have been the work of her husband's coercion. For such act, unless it was affirmatively shown that she acted independently of her husband's will, she could not be sued, even conjointly with her husband. It was his tort, and his alone, and he alone was suable for it. If she committed

a tort in the absence of her husband, or, if present, if it was affirmatively shown that she acted of her own will and independently of his, then she could be sued, but the suit could only be maintained against her and her husband jointly. In this last class of cases the statute has changed the law to this extent: It is now neither proper nor permissible to join the husband as a defendant in an action for a tort committed by a married woman, "in the commission of which the husband does not participate;" that is, in those cases of tort by the wife in which, at common-law, the husband and wife could be jointly sued, the wife, under the statute, may and must now be sued alone. There was no intention to change the domestic relations between husband and wife, or to revolutionize the economy which pertains to that domestic relation. The statute relates to remedies. It confers a remedy for the enforcement or breach of a contract or agreement which itself had authorized a married woman to enter into, and a new remedy for an actionable tort committed by her. For either of these she must be sued alone. There is not a word or syllable in the statute which gives intimation of an intention to declare and fasten an enlarged liability for torts. It compasses all its ends, and gives effect to its every provision, when it transfers the burden from the joint shoulders of husband and wife, and places it on the wife alone. We repeat, so far as it relates to torts, it deals with the remedy, not the liability. We do not doubt that a married woman may commit a tort, even in the presence of her husband, for which an action may be maintained against her individually and separately. Personal violence, or any other active wrong showing that it was prompted by her personal will, passion, wantonness, or recklessness, would fall within this class. Proof of such self prompted action would overcome the presumption of marital restraint or coercion. *Carleton v. Haywood*, 49 N. H. 814.

Let us recur to the facts of this case. The dog had been on the premises for several years. No present act of negligence is charged against husband or wife which led to the escape of the dog and the consequent injury of the plaintiff. The fault charged was and is that a dog with known vicious propensity was kept on the premises, and that, escaping therefrom, he inflicted the injury complained of. The wrongful act was the keep of the dog. This pertained to the government of the household and premises,—the economy and administration of the domestic affairs. It was not the act of a moment, or the work of an hour or a day. It was continuous in its nature, and must be charged to the account of the head—the governing head—of the family. For this injury no suit could have been maintained at common law against the husband and wife jointly. It would have been adjudged to be his act, his wife, at most, acting conjointly with him, and under his presumed control. Nor has the statute wrought any change in this bearing of the question. If the wife had any part or lot in the keep of the dog, it cannot be classed as her tort, "in the com-

mission of which he did not participate." She could not keep the dog without his consent and participation. Hence, the case is not brought within the provisions of the statute.

A further argument: Let us suppose the husband had been sued, and he had pleaded in bar that the wife owned and kept the dog. Every one will say such defense would be frivolous. The husband, the head and governor of the family, must be held accountable for the economy and administration of the household. This power and right have not been taken away or impaired by the statutes securing to married women their separate estates. We are aware that we have given to this subject a somewhat extended consideration. We have done so because it brings be-

fore us, for the first time, the inquiry to what extent, if any, our married women's laws have changed the relations of the husband to the household and its government. We have felt that so grave a question should not be slurred over, but should be clearly and definitely settled; and, notwithstanding our statutes have revolutionized the property rights of the wife, they have effected no change in the headship—the dominion and control—of the husband over the household, or in the government of the home and its appurtenances. Charges 6 and 7 asked by defendant are in strict accord with the principles we have declared, and each of them should have been given. We need not consider any other rulings.

Reversed and remanded.

OHIO SUPREME COURT.

Aaron McNEILL, Assignee of Metcalfe & Mackey Co., *Pf. in Err.*,

v.

John HAGERTY, Auditor of Hamilton County.

Herman P. GOEBEL, Trustee, etc., *Pf. in Err.*,

v.

Leo SCHOTT, Treasurer of Hamilton County.

(*El Ohio St. —*)

"Personal property, whether in the form of moneys, bills receivable, bonds, certificates of stock, or otherwise, held by an assignee of an insolvent debtor whose estate is being settled in the probate court, is not subject to taxation, and it is not the duty of such assignee to make return of the assets of such estate to the county auditor for taxation.

(April 24, 1894.)

WRITS of error to the Circuit Court for Hamilton County to review judgments reversing judgments of the Court of Common Pleas in favor of complainants in suits brought to enjoin the assessing and taxation of assets in the hands of the complainants. *Reversed.*

Statement by Spear, J.:

The case of McNeill, assignee, was commenced by the filing in the court of common pleas of Hamilton county, of a petition of which the following is a copy, viz.:

"The said plaintiff, Aaron McNeill, says that he is the assignee of the Metcalfe & Mackey Company, a corporation duly organized under the laws of Ohio, for manufacturing purposes, but which is now insolvent, and duly assigned all its property and assets

*Headnote by the Court.

to this plaintiff, in trust, for the benefit of creditors; that the amount of property and assets in the hands of this plaintiff, as such assignee, on the 10th day of April, 1893, being the day preceding the second Monday in April, in said year, was as follows:

"Notes received for property sold by this plaintiff, as such assignee, amounting to \$16,290; other notes and accounts, probably collectable, amounting to \$2,620, making a total amount of notes and accounts in the hands of this plaintiff, as such assignee, as aforesaid, at the time aforesaid, of \$18,910; this plaintiff also had in bank, to his credit, as such assignee, the sum of \$7,000.90, making a total of cash, notes, and accounts, comprising the entire assets in the hands of this plaintiff, as such assignee, of \$25,910.90; that claims have been presented to this plaintiff, as such assignee, by creditors of said, the Metcalfe & Mackey Company, duly proven, aggregating the sum of \$65,000; that the assets in the hands of this plaintiff, as such assignee, after paying the necessary costs and expenses of such assignment, will only pay a dividend of between thirty and thirty-five per cent upon the claims so proven and allowed, as valid claims, against the said assignor, by this plaintiff; that the said defendant, John Hagerty, as auditor of Hamilton county, Ohio, has duly made demand upon this plaintiff, as such assignee, to return said assets to him, as such auditor, to be placed upon the tax duplicate of Hamilton county, Ohio, for taxation; that this plaintiff refused to make such return until said auditor threatened to take legal steps against this plaintiff, for failing to make such return, and thereupon this plaintiff made a statement and return to the said auditor of the assets in his hands, as such assignee, as hereinbefore set forth, and also for the amount of the claims proven against said, the Metcalfe & Mackey Co., as hereinbefore set forth, and the said

NOTE—The question touched by the above decision seems to have arisen in but few instances and to have been noticed in none of the text-writings on the subjects of taxation or insolvent estates. The Connecticut case cited by the court was that 28 L. R. A.

of a receiver of an insolvent corporation, and it is evident that the question is much the same whether the property is in the hands of a receiver or of an insolvent's assignee, but the text-books on receivers seem to be also silent on the subject.

defendant as such auditor threatens and is about to place upon the tax duplicate of said county of Hamilton the amount of said assets for taxation against this plaintiff, as such assignee, and unless restrained from so doing will place on the tax duplicate of said county the sum of \$25,910.90 the taxes upon which will be charged to this plaintiff, as such assignee.

The said plaintiff denies that the said assets in the hands of plaintiff, as such assignee, are, under the laws of Ohio, taxable, and denies the right of defendant to place the same upon the tax duplicate as subject to taxation. The amount of said assets being far less than the amount of the liabilities of said assignor, and the said assets being in the hands of this plaintiff, as an officer of the probate court, subject to an order of distribution by said court, as soon as the same can be made, and to the extent of the value of the claims against said assignor of the creditors of said assignor are, under the laws of Ohio, required to be returned for taxation, by said creditors, and not by this plaintiff, as such assignee, and to charge the taxes upon said assets against this plaintiff, as assignee, would be a great and irreparable injury, for which this plaintiff has no adequate remedy at law.

"Said plaintiff therefore prays that a temporary injunction may be allowed herein, enjoining and restraining the said defendant, as such auditor of Hamilton county, Ohio, from placing upon the tax duplicate the said assets in the hands of this plaintiff, as such assignee, the taxes upon which to be charged against this plaintiff, as such assignee, and that upon the final hearing hereof that said injunction may be made perpetual, and for such other and further relief as may be just and equitable."

In Goebel, trustee, against the treasurer, the property was described as moneys subject to draft, and as moneys invested in bonds, stocks, joint stock companies and otherwise. In other respects the petition was substantially the same in its allegations as the one copied above, and as to relief desired.

A demurrer to the petition in each case was overruled by the court, and, defendant not desiring to plead, judgment allowing perpetual injunction was rendered against defendant, and for costs. On error to the circuit court the judgment in each case was reversed for error in overruling the demurrer, and giving judgment for plaintiff, that court holding that the common pleas erred in ruling that the money, and the bonds, certificates of stock, etc., were not subject to taxation as against the assignees. To reverse these judgments the present proceedings in error are prosecuted.

Messrs. Follett & Kelley, Goebel & Bettinger, and Archer & McNeill, for plaintiffs in error:

If the assignee is required to return the same for taxation the result would be double taxation, and, in the construction of statutes relating to taxation, courts will always avoid such construction as results in double taxation, if

possible, and will adopt such construction only when the legislative intent is clear.

Croley, *Taxn.* 2d ed. p. 225.

The assignee was not bound to list the property for taxation.

Lancaster School Directors v. Rathvon, 80 Pa. 538; *Brooks v. Hartford*, 61 Conn. 112.

Messrs. Spiegel, Bromwell & Foraker, for defendant in error:

Investments in bonds, stocks, etc., cannot be offset by debts.

Payne v. Watterson, 87 Ohio St. 121; *Fayette County v. People's & D. Bank*, 10 L. R. A. 196, 47 Ohio St. 508.

As to the bills receivable and accounts receivable it may be admitted that there is some question as to whether they do not fall within the class of credits against which the debts of the estate may be deducted.

Campbell v. Wiggins, 85 Tex. 424; *Campbell v. Riviere* (Tex.) May 11, 1898.

The right of a state to collect its tax against property in the hands of an assignee is sustained in two Illinois cases.

Jack v. Weinnett, 115 Ill. 105, 56 Am. Rep. 129; *Dunlap v. Gallatin County*, 15 Ill. 7.

Spear, J., delivered the opinion of the court:

It was the judgment of the circuit court that, by force of the statutes relating to taxation, it became the duty of an assignee for the benefit of creditors, acting under our insolvent laws, to return for taxation all moneys, the proceeds of the sale of assets of the assignor, which he might, as such assignee, have on hand, or on deposit in bank, on the day preceding the second Monday of April, and all investments in bonds, stocks, joint-stock companies, or otherwise, held by him as assignee, which, under the law, would be taxable if held by an individual, resident of the state.

That court was further of opinion that from the value of such property so to be returned the assignee could not legally deduct the sum of the legal bona fide debts owing by his assignor at the time of making such return.

The reasoning in support of these conclusions is, in substance, that it was the purpose of the statute, enacted conformably with section 2 of article 12 of the Constitution, that the assignee should represent the estate of his assignor, and that the return for taxation should be made by the assignee substantially in the same manner as if the property still stood as that of the assignor; and that this purpose is expressed by the statute itself, section 2781, that "all property whether real or personal in this state, and whether belonging to individuals or corporations; and all moneys, credits, etc., of persons residing in this state, shall be subject to taxation, except only such as may be expressly exempted therefrom." No exemption existing in favor of property so held, it must be regarded as included within the language quoted. Although the statute does not seem to make taxes on personal property a lien thereon, yet it does provide that "all personal property subject to taxation shall be liable to be seized and sold for taxes." And

if the tax levied by reason of the return made by the assignee is paid by him, he could, under the provisions of section 6357, be allowed for such payment as part of the legitimate expenses of the trust; and, in default of payment, that distraint might be made by the tax collector by force of the authority above quoted. The mere fact that the assignee or trustee of an insolvent estate is not specially mentioned in section 2784, which points out who shall list personal property, is not a legislative declaration that such trustee is not bound to return personal property in his hands for taxation, because the statute says it shall be returned by the trustee for every person for whose benefit property is held in trust, and this is not limited to cases where the trustee has the assets invested in some permanent form from which income or interest may be derived. The moneys so on hand receive the protection of the state and ought to pay their proportion of the taxes levied to furnish that protection. The fund does not belong to the individual creditors until the estate is settled and order of distribution made; nor does the mere fact of insolvency of the assignor put the fund in any different position with respect to the claims of creditors. If the fund represented credits, then debts might be deducted, and as the latter exceed the former there would be nothing to return; but the fund on hand is not a credit. Nor are the investments in bonds, stocks, etc., credits. Large amounts, in the aggregate, are at all times in the hands of assignees, and the legislature could not have contemplated the escape of so vast an amount of property from the burden of taxation; and, unless taxed in the hands of assignees, the property would escape, because, even if treated as belonging to the creditors, still it would not be practicable for even an honest creditor to make his return on such claims because he would have no means of knowing their value. These conclusions are supported directly by the opinion of the very able court whose judgment is here brought in review (*Sloans v. People's Electric R. Co.* 7 Ohio Ct. Ct. Rep. 888), and by *Dunlap v. Gallatin County*, 15 Ill. 7. And, as bearing upon the question, the following citations are given: *Campbell v. Wiggins*, 85 Tex. 424; *Campbell v. Rivières* (Tex.) 22 S. W. Rep. 993; *Jack v. Wrenneth*, 115 Ill. 105, 56 Am. Rep. 129.

While recognizing the cogency of the reasoning, we have been unable to agree with this view of the law as bearing upon these cases.

For the purpose of the inquiry it may be assumed that the money in bank is as much subject to taxation as though it were in the personal possession of the assignee. Whether such of the assets as are in the form of stocks or bonds are credits within the meaning of the decisions of this court giving construction to section 2780, Revised Statutes, we do not regard it necessary to discuss.

It may be further assumed that there is no specific exemption of property in the hands of assignees from taxation, either in the statute, or in the constitution.

It is to be noted that the question is not 23 L. R. A.

whether the assets of the insolvent may be subjected to payment of taxes owing by him. But the question is whether or not the fund itself in the hands of the assignee is subject to taxation.

The constitutional requirement (sec. 2, art. 12), is that "laws shall be passed, taxing by a uniform rule, all moneys, credits, investments in bonds, stocks," etc., and the law relating to the subject is embraced in section 2780, Revised Statutes, and following.

Looking at these sections alone, it is, we concede, natural to conclude that a duty would devolve on assignees to return for taxation, property in their hands, except perhaps that which might be in the form strictly of credits. But the purpose of the legislature is to be arrived at by a consideration of all the legislation bearing upon the subject, and not by a consideration of a portion only.

Our statutes, sections 6335 to 6358, place the disposition of insolvent estates within the control of the probate court, and direct the duties of the assignee, and the procedure in the administration of the trust. When once acquired, the jurisdiction is exclusive. *Saylor v. Simpson*, 45 Ohio St. 144; *Clapp v. Huron County Bkg. Co.* 50 Ohio St. 528. There is thus provided a convenient, expeditious, and inexpensive tribunal for the distribution of the assets of insolvents ratably among creditors. Necessarily that court, by operation of law, upon the filing of the instrument of assignment, acquires control of all the property and estate embraced therein, subject, of course, to all liens and just claims then existing upon the property, whether by the state or by creditors. Though the legal title is in the assignee, after his qualification, it is so only because he has qualified, and because his appointment has received the sanction of the court, and he, as well as all persons claiming an interest in or upon the fund, are subject to the summary jurisdiction of the court. The person named by the insolvent assignor may not qualify; or, having qualified, he may be removed and another, called a trustee, appointed; and, in either case, the legal title to the property follows the order of the court, and is lodged in such person or persons as may, by the court's order, be given its actual custody.

It is made the duty of the assignee to convert the assigned property into money, and, at the expiration of eight months, file an account, as a step preliminary to an order distributing the money to creditors, which is to be done without unnecessary delay, according to their respective claims and rights. The effect of the assignment is to devote the property absolutely to the satisfaction of the debts of the assignor, just as they existed at the time of the assignment, subject, necessarily, to be depleted by the expenses of the trust.

The assignee has no power to create any new lien, nor to divert the property from the purpose contemplated by the law.

Provision is made for the payment by the assignee of preferred liens upon the property, if any exist, and for the payment of taxes in

preference to any other claim against the assignor. The language in this regard is significant: "All taxes of every description assessed against the assignor upon any personal property held by him before his assignment, shall be paid by the assignee or trustee, out of the proceeds of the property assigned in preference to any other claims against the assignor." Nowhere is it in terms provided that the assignee shall list the property for taxation, nor is provision made for the payment of any taxes save those existing against the assignor. This omission seems to us significant when contrasted with the duty enjoined by other sections of the statute upon other trustees. By section 2784, returns must be made of the property of every ward by his guardian, "of every estate of a deceased person, by his executor or administrator; of corporations whose assets are in the hands of receivers, by such receivers." It is made the duty of every executor or administrator "to apply the assets to the payment of debts in the following order: . . . Fourth, public rates and taxes, and sums due the state for duties on sales at auction." For such payments of taxes the administrator or executor is allowed in the settlement of his accounts. The provision relating to the payment of taxes by assignees is that "all taxes of every description assessed against the assignor upon any personal property held by him before his assignment, shall be paid by the assignee," etc., and if we apply the familiar rule *expressio unius exclusio alterius*, it would seem that those are the only taxes, payment of which may properly be included in his accounts.

The omissions referred to would seem also to suggest a distinction between the relation of an assignee to creditors of the assignor and to the trust property held by him, and the relation sustained by a guardian, an administrator, or a receiver of a corporation, to beneficiaries interested in the trust property, as well as to the property itself; and we think a distinction is observable between the relation sustained by creditors of an insolvent assignor to the assigned property, and that of beneficiaries of property in charge of the other functionaries above named.

The relation of guardian to the ward is, while it lasts, a permanent one. He manages the estate for the benefit of the ward, and it is his duty to so manage as to make profit and interest for the ward. As to the property, the ward has no power over it, nor duty respecting it.

As to administrators, it is true that property in their hands is subject to the payment of the debts of the decedent, and that creditors are expected to list their claims as credits, and often it happens that the debts consume the entire assets. But usually there is in fact as well as in contemplation a residue going to widows and legatees or heirs, and they are not required to list for taxation any amount until it is actually received.

The duty enjoined upon receivers to list is confined to receivers of corporations. Such receivers are usually empowered to prosecute the business for the benefit of the parties interested. This carries the idea of a continuance of the business as by the corporation,

and its eventual surrender to the corporation again. Receivers for partnerships, concerns whose affairs are to be wound up and dissolved, are not named. Certainly this omission is also significant. Such receivers perform duties similar, in many ways, to the duties of assignees of insolvents, and had it been intended to enjoin upon them the duty of listing property in their hands for taxation, one would suppose that the discrimination found in the statute would not have been made.

It is, however, urged that the clause of section 2784 which requires that the property of every person for whose benefit property is held in trust must be listed by the trustee, furnishes authority for requiring such listing by an assignee of an insolvent. It is true that, in a general, broad sense, an assignee is a trustee, and, in other sections of the revised statutes, the terms "assignee" and "trustee" are coupled, as though the words mean the same.

But it does not follow that the term "trustee" is used in this broad sense in this clause of the statute, for equally, in the same sense, is a guardian, or administrator, or a receiver, a trustee, and if the term had been intended in so broad a sense as to include assignees of insolvents, it would also embrace the other trustees named, and the special provisions regarding them would be superfluous. We think the purpose of this clause is fully satisfied by confining its application to that large class of trusts where title and possession are placed in one for the benefit of others, in some permanent form, and from which, in general, interest, income, or profit is expected to be derived.

That portion of the estate which is described in the petition as being bonds and stocks can, we think, in fairness, hardly be included under the head of "investments in bonds, stocks," etc., because, as said by McIlvaine, J., in *Payne v. Watterson*, 37 Ohio St. 125, "the common understanding is, that money invested is withdrawn from ordinary trade and active business and placed at interest for the sake of interest." These securities are not held by the assignee as an investment for the sake of interest, but are in that form for temporary purposes only, being held subject to the order of the probate court, and may be required to be converted into money, and that money distributed, at any time.

To hold that property in possession of an assignee, as in these cases, must be listed and taxes paid on it is, in effect, to hold that the creditors must be taxed twice on the same value. While the legal title to the property is in the assignee, it is so only for the purpose of facilitating the settlement of the trust. Equitably, the property is vested in the creditors. Every dollar paid in taxes by the assignee reduces by that amount the dividend which the creditors will receive. That it is the duty of creditors, under the law, to list their claims as credits, admits, we suppose, of no doubt, and, we submit, that it is no answer to say that creditors cannot know the value of such credits. Such condition attaches to a very large proportion of credits held by the commercial, and espec-

ially the mercantile, world. Nor, is it any answer to say that, as matter of fact, they will not list the claims. No good reason why they should not exist, unless it would be furnished by a requirement compelling the assignee to do so. A statutory construction which, to use the language of *Judge Cooley*, "requires that one person, or any one subject of taxation, shall directly contribute twice to the same burden, while other subjects of taxation belonging to the same class are required to contribute but once," is to be avoided because, in the judgment of that author, it is duplicate taxation, and is not permissible under a constitution which requires equality and uniformity. This proposition seems to be applicable to the present cases, as our constitution requires both equality and uniformity. It is not necessary to hold that the legislature might not include assignees in the class of trustees who are required to list property in their hands, even though duplicate taxation results; it is enough, for the disposition of the present cases, if the purpose to do so has not been expressed.

The assignee is, in every essential particular, an officer of court. The fund is in his hands as such and he is bound to do with it just what the court directs. The fund, therefore, is really in the custody of the court, and, as before stated, the beneficial interest is in the creditors. They cannot, it is true, receive their own at once but that is because it requires some time to reduce the assets to money, and for the adjustment of the debts and claims. To require the listing of any of the property thus held by the assignee, and the payment of taxes on it, would manifestly interfere with the orderly execution of the trust. And if, as is claimed in argument, in case payment of taxes so levied is not voluntarily made by the assignee, distraint might be resorted to by the tax collector, and the property seized and taken forcibly from the possession of the assignee, thus taking it from the control of the court, so much the more apparent is it that the construction claimed by the defendant in error is inadmissible because it would result in unreasonable interference with the rightful exer-

cise of authority by the probate court. It cannot have been the purpose of the legislature, by one statute to lodge exclusive jurisdiction and dominion over property in a court, and, by another statute, authorize a taxing officer to cast contempt upon the court by ousting its jurisdiction, and overriding its powers.

If the clause of section 2784, relating to the listing of trust property by trustees, requires a listing of property by the assignee of an insolvent whose estate is being settled in the probate court, no reason can be given why the same duty would not devolve upon receivers of partnerships, clerks of courts, sheriffs, or master commissioners, as to funds which may chance to be in their hands on the day preceding the second Monday of April, subject to payment upon order of court. To state such a proposition is to refute it. And this because it is unreasonable to assume that, in the absence of express authority, the duty to list embraces property which the law has taken into its own hands simply to collect and distribute, and of which it has designated a temporary trustee for the better accomplishment of its work.

Our conclusion is that neither by the constitution, nor by the statute, when construction is given to all the sections bearing upon the subject, is it made the duty of an assignee of an insolvent whose estate is being settled in the probate court, to list the property so held by him for taxation.

Authorities bearing one way or the other upon the question are not abundant. But the conclusions here announced are fully supported by decisions in two well-considered cases, one by the supreme court of Pennsylvania and one by the supreme court of Connecticut. *Lancaster School Directors v. Rathvon*, 80 Pa. 533; *Brooks v. Hartford*, 61 Conn. 112. The Connecticut case is especially apt because their statute designating property subject to taxation, and the duty of trustees regarding the same, appears to be substantially similar to our own upon those subjects.

The judgment of the Circuit Court will be reversed and those of the Common Pleas affirmed.

MINNESOTA SUPREME COURT.

John J. RHODES, *Appt.*,
v.
Richard A. WALSH *et al.*, *Respds.*
(.....Minn.....)

*Article 4 of section 8 of the Constitution of the state of Minnesota provides

*Headnote by BUCK, J.

NOTE.—Privileges of members of congress and state legislature from suit.

Civil suits.

There is some conflict on the question as to immunity of members of congress and legislatures from suit on civil process. Some of the cases with the main case hold that the privilege from "arrest" 23 L. R. A.

as follows: "The members of each house shall in all cases except treason, felony, and breach of the peace, be privileged from arrest during the session of their respective houses and in going to and returning from the same." Held, that, under such constitutional provision, a member of the legislature is not privileged from the service upon him of a summons in a civil action during a session of said legislature.

(December 21, 1893.)

does not extend to a privilege from service of process in a civil suit. *Gentry v. Griffith*, 27 Tex. 461; *Merrick v. Giddings*, *MacArth. & M. 55*; *Cattlett v. Morton*, 4 Litt. (Ky.) 122; *Johnson v. Offutt*, 4 Met. (Ky.) 20.

The attendance upon congress by a member does not entitle him as a matter of right to have his suit postponed. *Nones v. Edsall*, 1 Wall. Jr. 139.

APPEAL by plaintiff from an order of the District Court for Ramsey County setting aside the service of summons on certain of the defendants in a proceeding to recover damages for alleged malicious conspiracy to secure plaintiff's private books and correspondence. *Reversed.*

The facts sufficiently appear in the opinion. *Messrs. C. D. O'Brien and Thomas D. O'Brien* for appellant.

Mr. H. W. Childs, Atty. Gen., with Messrs. Warner, Richardson & Lawrence, for respondents:

The members of each house shall in all cases, except reason, felony, and breach of the peace, be privileged from arrest during the session of their respective houses and in going to or returning from the same. For any speech or debate in either house they shall not be questioned in any other place.

Const. art. 4, § 8.

In *Doty v. Strong*, 1 Pinney, 84, the word "arrest" was construed and the court decided that it must be given a liberal rather than a literal meaning.

In *Anderson v. Rountree*, 1 Pinney, 115,

And an exemption from "all other process whatsoever" does not prohibit during the period prescribed, the issuing of process against them, during that time. *McPherson v. Nesmith*, 3 Gratt. 237.

But in *Bolton v. Martin*, 1 Dall. 226, it was held that a member of the state convention of Pennsylvania, met to consider the Constitution of the United States, was privileged from the service of summons during the session, and this on the ground of the privileges of parliament.

This was followed in Pennsylvania by a dictum in *Geyer v. Irwin*, 4 Dall. 107, stating, substantially, that a member of the general assembly was privileged from summons during his attendance on public business, but in that case the court held that the privilege would not be noticed unless claimed.

Since then it has been held in Pennsylvania, following these cases, that the privilege of a legislator from arrest extends to the service of process. *Gray v. Still*, 13 W. N. C. 59; *Ross v. Brown*, 7 Pa. Co. Ct. Rep. 142.

These cases were followed by *Doty v. Strong*, 1 Pinney, 84, which extended the privilege to a delegate from a territory, and in *Anderson v. Rountree*, 1 Pinney, 115, to a member of the legislature.

These cases were based upon the dictum in *Geyer v. Irwin*, supra.

In *Miner v. Markham*, 28 Fed. Rep. 387, which was a federal case in Wisconsin, the court followed the construction placed upon the term "arrest" by the Wisconsin courts and held that a member of congress was exempt from civil process, as well as arrest, on his journey to and from the session, and was entitled to reasonable time. This was on the ground "that it has been the law in this jurisdiction from territorial times, that the privilege in such a case as that at bar extends to exemption from civil process, with or without actual arrest."

And where a statute provides that he shall not be molested or troubled or compelled to answer to any suit, bill, plaint, declaration, before any other court, judge, or justice, the privilege of a member of the assembly during the session extends to a writ of error although not returnable until after the termination of the session. *King v. Colt*, 4 Day, 122.

And the Ohio Act of 1881, taken in connection with the Act of 1862, (S. & S. 18) privileges a legislator from being served with a summons to answer out of his county where the cause of action ac-

the defendant was a member of the legislative council of the territory. The day after the adjournment of the legislative assembly he was served with a summons in the case.

The court dismissed the cause.

The word "arrest" is broad enough to exempt the defendant from any action whether accompanied by actual seizure of his person or not.

When our constitution was adopted the word "arrest" had a fixed and definite meaning in the minds of those for whose benefit it was framed.

The will of the people and the intention of the law-giver as understood at the time of adoption must be carried out.

Osmun v. Reynolds, 11 Minn. 459; *Nicollet Nat. Bank of Minneapolis v. City Bank*, 33 Minn. 85; *Re St. Paul & N. P. R. Co.* 37 Minn. 164; *McNamara v. Minnesota Cent. R. Co.* 12 Minn. 388; *Drennan v. People*, 10 Mich. 169; *Daniels v. Clegg*, 28 Mich. 83; *Pangborn v. Westlake*, 36 Iowa, 546; *Cronan v. Cotting*, 104 Mass. 245, 6 Am. Rep. 232.

This interpretation was adopted in other jurisdictions, long prior to the Wisconsin de-

crued ten days prior to the session of the assembly. *Orth v. McCook* (Ohio Super. Ct.) 4 Week. L. Month. 215.

And a constitutional provision that "the members of both houses shall be protected in their persons and estates," means exemption from all suits, whether by arrest or summons. *Tillinghast v. Carr*, 4 McCord, L. 152.

Arrest.

The privilege from arrest of a member of congress is limited to a reasonable time for going and coming. *Hopkin v. Jenckes*, 8 R. L. 458, 5 Am. Rep. 597.

And in *Lewis v. Elmendorf*, 3 Johns. Cas. 222, it was held that the benefit of the privilege only applied while attending congress or actually on his journey going to or returning from the seat of government.

But one who goes to Washington to represent a state in congress is privileged from arrest though not entitled to a seat, and delay in returning through lack of funds will not affect the privilege. *Dunton v. Halstead*, 2 Clark (Pa.) 450.

And where a member of the legislature is entitled to fourteen days to reach home before he can be arrested, the motion to discharge from arrest must show where he was arrested. *Colvin v. Morgan*, 1 Johns. Cas. 415.

And cannot be claimed after he reaches home. *Corey v. Russell*, 4 Wend. 204.

In *Coze v. McClenachan*, 8 Dall. 478, where a member of congress was surrendered by his bail and demanded discharge as privileged, the matter was compromised by the bail agreeing to surrender him within four days after the session of congress and the privilege must be claimed at the proper time or if not claimed until after judgment it will be too late. *Prentiss v. Com.* 5 Rand. (Va.) 697, 16 Am. Dec. 732. See *Geyer v. Irwin*, 4 Dall. 107.

Under Pa. Const., art. 2, providing for privilege from arrest of members of the assembly, in all cases except treason, felony, and breach or surety of the peace, the privilege does not extend to crimes, but only applies to civil restraint. *Com. v. Keeper of the Jail*, 18 Phila. 573.

And a member of congress is not exempt from the service of a subpoena in a criminal case. *United States v. Cooper*, 4 Dall. 341; *Respublica v. Duane*, 4 Yeates, 247.

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cisions, and it has been repeatedly reaffirmed.

Bolton v. Martin, 1 Dall. 296; *Geyer v. Irwin*, 4 Dall. 107; *Gibbes v. Mitchell*, 2 Bay, 406; *King v. Coit*, 4 Day, 129; *Nones v. Edsall*, 1 Wall. Jr. 189; *Holmes v. Nelson*, 1 Phila. 217; *Huddeson v. Prizer*, 9 Phila. 65; *Miner v. Markham*, 28 Fed. Rep. 387.

On grounds of public policy, witnesses and others are treated as having the same right, and it is in such cases that the word "arrest" has been most frequently construed.

Bridges v. Sheldon, 7 Fed. Rep. 17; *Re Healey*, 53 Vt. 694, 88 Am. Rep. 713; *Pearson v. Grier*, 66 N. Y. 124, 23 Am. Rep. 85; *Sanford v. Chase*, 8 Cow. 382; *Larned v. Griffin*, 12 Fed. Rep. 590; *Sherman v. Gundlach*, 37 Minn. 118; *First Nat. Bank of St. Paul v. Ames*, 39 Minn. 179.

A witness called before a legislative body to give evidence cannot be annoyed and distracted by the service of civil process upon him while attending.

Thompson's Case, 122 Mass. 428, 23 Am. Rep. 370; *United States v. Edme*, 9 Serg. & R. 147; *Lyell v. Goodwin*, 4 McLean, 29.

The right for which we are contending was surrendered by statute in England in 1770, but it none the less existed there up to that time. There could be but little need for parliament to relinquish what it never had. It certainly claimed it again and again, and it was recognized by many decisions of the courts.

Cassidy v. Stuart, 3 Mann. & G. 437.

Meares. George B. Edgerton and John Day Smith also for respondents.

Buck, J., delivered the opinion of the court:

The plaintiff commenced a civil action in the district court of Ramsey county, in this state, against the defendants, on the 20th day of March, 1893, alleging in his complaint that prior to that time the defendants, except defendants Wells and Scheffer, had unlawfully and maliciously conspired to break and enter the plaintiff's office, to take and carry away his private books, papers, and correspondence, and that in pursuance of such conspiracy they unlawfully directed and required said Wells and Scheffer to proceed to plaintiff's said office, and forcibly break and enter the same, and take and carry away therefrom plaintiff's said books, papers, and correspondence, and that on the 14th day of March, 1893, in obedience to said instructions and orders, said Wells and Scheffer did so unlawfully break and enter plaintiff's said office, and carried away said books, papers, and correspondence, and demanded judgment in the sum of \$50,000. At the time of these transactions, several of the defendants, including Horton and Boggs, were members of the legislature, then in session. Subsequently to the service of the summons upon them, but before the expiration of the time for answering, Horton and Boggs filed a petition in the court below alleging that they were members of the legislature of the state of Minnesota at the time of the service of the summons upon them, and that as such members they were privileged from the service of civil process during the session of the leg-

islature, and that they were members of the house of representatives. Upon this petition an order to show cause was issued by the court below, requiring the plaintiff to appear and show cause why the service of the summons upon Horton and Boggs should not be set aside upon the ground that they were members of the house of representatives. Upon the hearing, April 7, 1893, the court set aside the service of the summons upon the two defendants, Horton and Boggs, upon the ground that, as such members of the legislature of the state of Minnesota, they were privileged from the service of any summons in a civil action during the term of such legislature.

The question involved here is whether such privilege existed, and whether the service of the summons was valid. In order that there shall not be any misunderstanding of this opinion, we state that in no way do we pass upon the merits of the plaintiff's complaint, or whether the defendants had the right to commit the acts which plaintiff, in his complaint, charges them with having done. That question is not before us. The question, however, involved, is one of very grave importance, and deserves, as it has received, the most careful and serious consideration. Even though, upon the first examination of the question, we may have had no doubts as to the law upon the subject, yet, when a large and intelligent body of men, representing a co-ordinate branch of the state government, claim certain privileges under a clause in the fundamental law, it becomes our imperative duty to examine the question with all the care, good faith, and ability which it is possible for us to do.

It is well understood that the powers of the state government are divided into three distinct departments,—legislative, executive, and judicial; and no person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others, except in the instances expressly provided in the constitution. Const. art. 3, § 1. Each of the departments, within its proper sphere, is supreme. Probably, it would be difficult to find a more harmonious system of governmental workings than exists in these three co-ordinate departments, by which the functions of our state government are carried on. Each having due respect and proper regard for the rights of the other, no conflict need arise, as none has arisen, during the entire history of the state. Nor is this a case arising between these co-ordinate departments of the state government, but a question arising between one or more members of the legislature and the individual citizen. It is therefore a judicial, and not a legislative, question; that is, the question is not one of legislation or legislative powers upon general legislative subjects, but one affecting the privileges of the individual member, and the individual rights of the citizen. The main question is over the meaning or interpretation of a constitutional provision, which, in this case, is for the judiciary to determine, and which it must determine, because it has been brought before us. How-

ever disagreeable or difficult the questions submitted for our consideration and determination are, there is but one course for us to pursue, and that is to abide by the law and the constitution. It may not be inappropriate to cite the opinion of *Chief Justice Marshall* upon this subject in the case of *Cohens v. Virginia*, 19 U. S. 6 Wheat. 404, 5 L. ed. 291, where he said: "The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass by a question because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if brought before us. We have no more right to decline the exercise of deciding than we have to usurp a power not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is to exercise our best judgment, and to conscientiously perform our duty."

Referring again to the main question, is there such inviolability surrounding a member of the legislature that service of a summons in a civil action cannot be made upon him while such legislature is in session? He has a right, during all such time, to bring a suit himself against the individual citizen, and individual rights should be equal and reciprocal; and they are so, unless there is an exemption or privilege paramount and superior in behalf of the legislator. All citizens should be deemed to stand equal in their rights before the law. This country recognizes no special privileged class, except those exempt by express provision of law or the constitution; and, when a citizen or officer claims such privilege, it is his duty to show affirmatively and conclusively that he is privileged above other of his fellow citizens.

We do not concede any such inherent right on the part of a member of the legislature as contended for by defendants' counsel. If it exists at all, it is because it is conferred by the constitutional provision in question. Before considering this provision more particularly, let us examine some of its other provisions, and see what are the rights of the people: "Government is instituted for the security, benefit, and protection of the people." Const. art. 1, § 1. "Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely and without purchase; completely and without denial; promptly and without delay, conformably to the laws." Id. § 8. These words were not inserted in the constitution as a matter of idle ceremony, or as "a string of glittering generalities." It is the pride of the American citizen, and one of the grandest attributes of citizenship, that these provisions of the fundamental law stand as a protection and unassailable bulwark against the enforcement of unjust and illegal power. The constitution did not create property, or the liberty of the citizen, but it does protect both; and its prohibitions and inhibitions stay the march of organized or individual power,

when it attempts the conversion of one or the destruction of the other. The exercise of official or individual power can only be enforced within the constitutional restrictions, and it should pause when the danger line is reached, and the life, liberty, or property of the citizen becomes thereby imperiled. The attempt sometimes made to exercise illegal power is the first warning which the people have of its assumed existence.

Turning now to the constitutional provision in question, we find it reads as follows: "The members of each house shall in all cases except treason, felony, and breach of the peace be privileged from arrest during the session of their respective houses and in going to and returning from the same; for any speech or debate in either house they shall not be questioned in any other place." Id. art. 4, § 8. The defendants contend that the word "arrest," in the above constitutional provision, is broad enough to exempt them from the service of process, whether accompanied by actual seizure of the person or not, and that courts cannot strip them of this right. If this right or privilege exists, they would be correct in their contention. This, however, is not an attempt to strip them of power, but a question of the very existence of the power itself. If it does not exist, then they are not stripped of any power whatever. An exemption or privilege cannot be created or lawfully exercised simply because it is claimed or asserted. The English parliament once asserted the legislative privilege of its members from arrest, and then, as an omnipotent judicial body, decided that such privilege existed, but that system of procedure is not a part of our governmental administration. And even there such proceedings became so odious and unpalatable, and such abuses were practiced under it, that the privilege was finally abolished by statute,—matters which we shall refer to hereafter in this opinion.

It is further contended by the defendants that the courts of the state of Wisconsin, prior to the date of our organic law, decided this question in accordance with their claims, and that when our constitution was adopted, October 18, 1857, the word "arrest" had a fixed and definite meaning in the minds of those who framed it, and that we should follow the decisions of the courts of that state; and in support of this view they cite the case of *Doty v. Strong*, 1 Pinney, 84, where a summons in a civil action was served on a delegate in congress from that state, and the court construed the clause in the constitution of the United States upon this question in accordance with the view of the defendants herein. The case of *Anderson v. Rountree*, Id. 115 (decided in 1841), is also cited. It was the case of service of a summons upon a member of the legislative assembly of that state one day after the adjournment of the assembly, and the court held that he was privileged from the service of such summons. These are all of the decisions of the courts of the state of Wisconsin that we are referred to, and they were made prior to the passage of the organic act creating a territorial government for Minnesota.

To further support this view of their case the defendants quote from our organic act (passed in 1849) a part of section 12, as follows: "That the inhabitants of said territory shall be entitled to all the rights, privileges, and immunities heretofore granted and secured to the territory of Wisconsin, and to its inhabitants; and the laws in force in the territory of Wisconsin at the date of the admission of the state of Wisconsin, shall continue to be valid and operative therein." This quotation is correct, so far as it goes; but, to understand the full meaning and legal effect of that section, we quote that portion omitted by defendants' counsel, and which follows the above extract, viz.: "So far as the same be not incompatible with the provisions of this act, subject however nevertheless, to be altered, modified, or repealed by the governor and legislative assembly of the said territory of Minnesota." Conceding, therefore, that the decisions of the courts of the state of Wisconsin are part of its laws, yet our organic act expressly reserves to Minnesota the right to alter, modify, or repeal such laws as were in force when the state of Wisconsin was admitted into the Union. We are not willing to concede that this right would not exist without the above provision in the organic act. On the contrary, we think that the territorial legislature of Minnesota, or its constitutional convention, had a right to pass, frame, or adopt such provisions of law as they saw fit, not inconsistent with the provisions of the Constitution of the United States. Nor are we bound by the decisions of the courts of the state of Wisconsin in the construction of their legislative laws similar in language to our constitutional provisions, however persuasive or able such decisions may be. And here it may be well to refer to the constitution of that state, adopted February 1, 1848, and in force when Minnesota was organized as a territory, and when our constitution was adopted, in 1857; it being well understood that the territory of Minnesota once formed a part of the territory and state of Wisconsin. The provision of the constitution of that state in regard to the privilege of members of the legislature differs materially from ours. It is as follows: "Members of the legislature shall in all cases except treason, felony, and breach of the peace, be privileged from arrest, nor shall they be subject to any civil process during the session of the legislature, nor for fifteen days next before the commencement and after the termination of each session." Article 4, § 15. If it was the settled law of the territory of Wisconsin that the word "arrest" had a fixed, definite, and settled meaning, and that it covered the service of a summons in a civil action, it seems strange that the latter phrase was inserted in the constitution of that state. Evidently, the members of that convention which framed the constitution had grave doubts about the soundness of the decisions of their court, or else they were guilty of tautology in framing their fundamental law; a transaction unheard of in any other instance, for constitutions are framed in the most concise language possible. If the phrase, "nor shall they be subject to any

civil process," be omitted, then the provision would be substantially like ours. Standing together, "arrest" means one thing, and "subject to civil process" means another, or else the latter phrase is utterly useless and unnecessary.

Now, assuming that the Minnesota legislature had the legal power to pass such laws as it deemed proper, not repugnant to the laws and constitution of the United States, we find that it passed a law defining the meaning of the word "arrest." Minn. Stat. 1851, chap. 118, § 1, is as follows: "Arrest is the taking of a person into custody, that he may be held for a public offense." Section 5 of the same chapter provides "that an arrest is made by an actual restraint of the person of the defendant, or by his submission to the custody of the officer." The same statute provides "that a civil action is commenced by the service of a summons delivered to the defendant personally, or by leaving a copy of the summons at his usual place of abode." All these provisions of the Statute of 1851 were in force at the time of the adoption of our constitution, and ever since have been the law of this state. The same definition and meaning of the word "arrest" is given by the lexicographers, and in our law dictionaries. We cite the following authorities in support of our statutory definition of the word "arrest": "An arrest is the taking, seizing, or detaining the person of another, touching or putting hands upon him in the execution of process, or any act indicating an intention to arrest." *United States v. Benner*, Baldw. 284. "An arrest signifies a restraint of the person; a restriction of the right of locomotion." *Hart v. Flynn*, 8 Dana, 191. "Arrest is the apprehension or detaining of the person in order to be forthcoming to answer an alleged or supposed crime." *Montgomery County v. Robinson*, 85 Ill. 176. "By 'arrest' is to be understood to take the party into custody. An arrest is the beginning of imprisonment, when a man is first taken and restrained of his liberty by power or color of warrant." *French v. Bancroft*, 1 Met. 504. The same meaning of the word "arrest" was well known and understood at the time of the adoption of our state constitution, and it was not questioned in either of the two conventions; and it is a significant fact that the words, "nor shall they be subject to any civil process during the session of the legislature," found in the Wisconsin constitution, were entirely omitted from our constitution. The meaning of the word "arrest," as defined above, has stood so long unchallenged that it will doubtless be a surprise to judges, lawyers, and the people of this state, that it is now for the first time, in any manner, questioned, and it will be a greater surprise if this court shall construe the law to be that, when an officer has served a summons upon a person in a civil action, he has thereby arrested him. Nor does public policy or public interest demand any such interpretation of the word as contended for by the defendants. The provision in question, even as we construe it, is a most extraordinary one. We do not find it discussed during the constitutional debates at the time

of the adoption of our constitution, being substantially the same as the provision in the constitution of the United States relating to members of congress, and seems to have been made a part of our constitution without debate or consideration by the conventions. As members can only be arrested, during a session of the legislature, for treason, felony, and breach of the peace, does it not necessarily follow that they could not be arrested during such time for the most serious misdemeanors, unless such ones as may be included in the term "breach of the peace?" If so, then we are fully justified in saying that such provision is a most extraordinary one; and we do not feel justified in enlarging or extending the power by any strained or tortured definition of the word "arrest," or giving it a meaning in violation of the statute, of the decisions of the courts, and of lexicographers. The right already yielded up by the people in this respect seems sufficient, without having their rights in civil actions abated, and possibly lost or destroyed; and we have not the will or authority, by any strained construction, to aid in placing a constitutional provision beyond a reasonable and safe foundation, upon which the people may stand and defend their rights as against any branch of the sovereign power.

But it may be asked, What is the danger if the word "arrest" is construed as contended for by the defendants' counsel? Suppose a member should imprison his wife, child, friend, or a stranger, for some fancied or imaginary cause, and the writ of habeas corpus could not be served upon him, by reason of this legislative privilege, what would become of our constitutional guaranty "that the writ of habeas corpus shall not be suspended." What would this birthright of every American citizen be worth, if his personal liberty can be thus abridged, and stand in abeyance, during a session of the legislature? This writ is not a criminal process. It can be served, and always is served, without arresting the defendant. Are the people ready to surrender up this great charter of human rights in obedience to this demand of legislative privilege? Important as are legislative duties, the advantage of exempting a member from the service of this writ upon him would be a poor compensation for its denial, even for the period of three months. Valuable property rights or interests might also be injured or destroyed if this theory of privilege is upheld. Take the subject of waste, which is legally defined to be whatever does lasting damage to the freehold, and, as ordinarily understood, implies taking of property without right, without sanction of law, in violation of right or liens thereon. The commission of waste might not only be a very serious injury to the individual citizen, but as between members of the legislature themselves. Suppose a senator residing in Dakota county owned a thousand acres of land, valuable principally for its timber, and he should sell the same to the senator from Otter Tail county, receiving back a purchase-money mortgage for nearly the full consideration of the land, and just at the commencement of a session of the legislature

the senator from Otter Tail county should, with a large number of employes, commence cutting and removing such timber, with intent to forthwith cut and remove the same, and thus impair, if not substantially destroy, the mortgage security. Would not the senator from Dakota county have a right to apply to the court for redress, and, by a proper writ issued therefrom, enjoin the senator from Otter Tail county from committing such lasting damage? To say that this cannot be done is to say that we can trifle with vested rights in valuable property. Again, suppose a member of the legislature, during a session thereof, should wrongfully and unlawfully enter upon a farm, and drive away a large amount of stock, and carry away other valuable farm property under an assumed claim of right, but not under such circumstances as would constitute larceny or a breach of the peace. Would the rightful owner be without remedy or redress during a legislative session because of this assumed legislative privilege? What are property rights worth, if there is no protection for them? Suppose the time limited for commencing suit upon valuable causes of action against a member would expire during a session of the legislature. Would the cause of action be lost because of this privilege? Certainly it would, if defendants' contention is correct. Suppose, also, that one of the members of the legislature should interfere with our public conveyances, such as railroads and street-cars, and thereby impede public travel and interfere with the public business. Can there be no remedy, no relief, and no redress? Such a claim is preposterous. And the same might be said in cases of the creation and continuance of private or public nuisances whereby serious injury might result. So, too, in case of a member of the legislature becoming insolvent, he could dispose of his property, or attempt to do so, by some fraudulent act, and before the creditor could have any summons served, or other civil proceedings instituted, he might be without remedy, and his rights lost, before an adjournment of the legislature. Attachment proceedings might also be thus rendered useless. One more illustration: It is a well-known fact that at the time of election in several instances, members have been holding important county or town offices, and continued to retain them, and receive the fees and emoluments thereof, in direct violation of a constitutional prohibition. Do the public interests require, or a sound public policy demand, that no writ of quo warrant'o shall be served upon a member of a legislature during a session thereof, in such cases? We say that the highest interests of the public, and especially the public welfare of the communities affected, such as counties and towns, demand that no such privilege or exemption shall exist.

However plausible the theory that a member of the legislature should not be embarrassed with private suits, and thus drawn aside from public duty, we think that the danger and disadvantage is more imaginary than real. We have never heard of an instance where men were deterred from serving

as member of a legislature because they were subject to service of process in a civil action, nor that public business was delayed or suffered from any such cause. It is a notable fact that the constitution provides that a majority of each house shall constitute a quorum for the transaction of business; and the people, through a constitutional amendment, have abolished annual legislative sessions. The rules of nearly all legislative bodies provide for granting leave of absence to individual members, and such leave is seldom refused. Nor under ordinary circumstances, would a case be pressed for trial, against a member of the legislature, during a session thereof. If the claim of privilege is based upon the ground of public policy and public interest, it could as appropriately be claimed by the members of the executive and judicial departments, and by those who have ministerial duties to perform, most of whom are nearly all the time engaged in the discharge of their official duties. And may we not inquire, with great propriety, if it is not as important to execute the laws as to make them?

It remains for us to briefly refer to the authorities upon this subject. Among the English authorities, there appears to be some uncertainty and confusion upon the question of privilege from arrest. It was once the rule there established to protect members of parliament from being molested by their fellow subjects or oppressed by the crown, and to prevent their being diverted from their public duties, and this privilege extended to exemption from the service of civil process. But as early as 1664, in the celebrated case of *Benyon v. Evelyn*, found in Bridgman, 324, in the court of king's bench, it was held: "It is lawful to sue out an original against a member for the house of commons, although parliament is sitting." The opinion was delivered by the chief justice, Sir Orlando Bridgman, and he attacked Lord Coke for asserting a contrary doctrine in his treatises on the High Court of Parliament. In 4 Prynne's Brief Survey of Parliamentary Writs (page 814), it is stated that "the case of *Sir George Benyon v. Sir George Evelyn* was adjudged in the court of common pleas (Hil. 15 & 16 Car. II). by all the judges thereof, upon demurrer, as follows: 'It was resolved upon solemn argument by all the judges (especially the lord chief justice, Sir Orlando Bridgman, arguing it very largely and learnedly) that the privilege of parliament did not take away the liberty of the subject to commence and prosecute actions of trespass, debt, account, covenant, and the like, against members of parliament, or their menial servants, even in parliament time.'" Lord Campbell says of Sir Orlando Bridgman, the chief justice, "that this was his most celebrated judgment, and endeared his memory to the enemies of parliamentary privilege." The action itself was one in debt for merchandise, and the defense interposed was that Sir George Evelyn was a member of the house of commons, and privileged from service of process. These privileges and exemptions were pressed and claimed in so many instances that they became odious and

intolerable, so that the courts of justice were called upon to determine the question; and finally parliament itself passed an Act in 1869, which we find in 10 Geo. III. chap. 50, which declares: "Sec. 1. Any person may at any time commence and prosecute any action or suit in any court of record, or court of equity, or of admiralty, and in all cases matrimonial and testamentary, against any peer or lord of parliament of Great Britain or against the knights, citizens, or burgesses for the time being or against any of their menial or any servants or any other persons entitled to the privilege of parliament; and no such action, suit, or other process or proceeding thereupon, shall at any time be impeached, stayed, or delayed by or under any color, or pretense of any privilege of parliament." We believe that this act has been the law of England ever since, and settled all controversy upon the subject, and there established the doctrine contended for by the plaintiff here. This, it will be observed, was prior to our Declaration of Independence, July 4, 1776, and the adoption of the United States Constitution, which was signed in 1787. We fail, therefore, to see how this claim of privilege made by the defendants could have been the common law of this country, or of the territory or state of Wisconsin, or of this state, at any time. The case of *Merick v. Giddings*, reported in Mac-Arth. & M. 55, is an able decision, rendered by Mr. Justice Wyllie, holding that "a member of congress of the United States is at all times as liable to service of process as any other individual, except that during his attendance on the session of congress, and in going to and returning, he is privileged from arrest in any suit or action." In the case of *Gentry v. Griffith*, 27 Tex. 461, it was held that "members of the legislature are not privileged against the service of citation in civil suits by virtue of the provisions in the constitution of the state granting immunity from arrest to such members during the session of the legislature, and while going to and returning from the same." While some of the authorities cited by the defendants sustain their contention, yet most of them are not in point, and not applicable to this question. The privilege from service of a summons or process in a civil action, of a witness or party, in certain cases, as in attendance upon court, is based upon the ground that it is necessary for the due administration of justice. If witnesses or parties living beyond our jurisdiction, or abroad, were subject to the service of civil process when coming within the jurisdiction of the courts of this state, they would be deterred from coming at all, as nonresidents cannot be compelled to appear here and testify, and there might frequently be a failure of the complete administration of justice in such cases. Nor is there a case cited by the defendants' counsel which, by force of its reasoning, or weight as authority, tends in the least to change our views upon the question submitted for our consideration. We do not think that any practical injury can result to the public or the individual members of the legislature from our holding in this case as we do, but

that, on the other hand, public interest and private rights might receive serious injury, and become greatly impaired or destroyed, if defendants' contention is upheld.

Possibly, this opinion has been extended to an unnecessary length, but the importance of the question is our excuse and justification

for so doing. In conclusion, we say that this constitutional provision is not a mass of jangled words and unfathomable mysteries, and it should not be wrenched from its obvious meaning, in direct violation of its straightforward, grammatical sense.

The order of the court below is reversed.

RHODE ISLAND SUPREME COURT.

OAKDALE MANUFACTURING CO. *et al.*

v.

Sebastian GARST.

(.....R. L.....)

1. **The issuance of an injunction against violation of his agreement not to engage again individually in the business** cannot be prevented on the ground that the contract tends to create a monopoly, by a manufacturer who, for mutual advantage, unites with other manufacturers of the same product in a combination of stocks, machinery, accounts, and good-will, and the formation of a corporation to operate the combined business.
2. **A foreign corporation will not be denied recognition** by the courts of a state merely because composed exclusively of its own citizens.
3. **A contract will not be declared void for unreasonableness** which prevents a manufacturer of oleomargarine from again engaging in the business for five years upon his uniting with other manufacturers in the formation of a corporation for the production of that article.

(February 27, 1894.)

BILL in equity to restrain defendant from violating his agreement not to engage in the business of manufacturing oleomargarine. *Decees in favor of complainants.*

The material part of the agreement which was the foundation of this suit was as follows:

"And it is further mutually covenanted and agreed by and between the parties hereto, each for himself, however, and not for the others, that they will not engage directly or indirectly in any business of the same kind or for the same purpose or purposes as that to be carried on by the corporation to be formed, nor will they directly or indirectly be concerned in or be interested in any firm, firms, corporation, or corporations, engaged in the same business, or business similar to the business of the corporation to be formed, for the period of five years from and after the date of the agreement."

The further facts appear in the opinion.

Mr. Arnold Green, with **Messrs. Comstock & Gardner**, for complainants:

Public policy is a variable quantity; it must vary, and does vary, with the habits, capacities, and opportunities of the public. Originally all contracts in restraint of trade were void; now only such restraint as cannot under

any circumstances be needed for the protection of the person for whose benefit it is made is void. Formerly the burden of proof was upon the covenantee to show that the restraint was reasonable; now it is upon the covenantor to show that it is unreasonable.

Mills v. Dunham [1891] 1 Ch. 576.

Where the restraint is partial, that is to say subject to some qualifications, either as to time or space, there is no hard and fast rule which holds the contract illegal by reason of the absence of limitation in one of these respects. The question then is whether the covenant is reasonable, and if reasonable it is good in law.

The reasonableness of the restraint depends upon all the circumstances, which must be duly weighed in each case. If the restraint is greater than can possibly be required for the protection of the business of the covenantee, the covenant is unreasonable and void. If the restraint is not greater than can possibly be required for the protection of the business of the covenantee, it is not unreasonable and will be enforced.

Leather Cloth Co. v. Lonsont, L. R. 9 Eq. 345; *Rousillon v. Rousillon*, L. R. 14 Ch. Div. 851; *Badische Anilin und Soda Fabrik v. Schott* [1892] 3 Ch. 447; *Printing Numerical Registering Co. v. Sampson*, L. R. 19 Eq. 462; *Hubbard v. Miller*, 27 Mich. 15, 15 Am. Rep. 153; *Morse Twist Drill & Mach. Co. v. Morse*, 103 Mass. 78, 4 Am. Rep. 513; *Tode v. Gross*, 19 L. R. A. 652, 127 N. Y. 480; *Watertown Thermometer Co. v. Pool*, 51 Hun, 157; *Central Shade Roller Co. v. Cushman*, 143 Mass. 353; *Ellerman v. Chicago Junction Railways & Union Stock Yards Co.* 49 N. J. Eq. 217; *Herreshoff v. Boutineau*, 8 L. R. A. 469, 17 R. I. 8.

A covenant which would otherwise be void, because too broad in its restraints, may sometimes be enforced against the covenantor on the ground that he has not deprived himself of a continuing interest in the business forming the subject of the contract, and therefore is not injured but rather benefited by entering into it.

Diamond Match Co. v. Roebber, 106 N. Y. 473, 60 Am. Rep. 464; *Dolph v. Troy Laundry Machinery Co.* 28 Fed. Rep. 653.

Contracts void as tending to create a monopoly are only such as have for their sole or main object the suppression of competition. Covenantants entered into by the vendor of a business and of its good-will with his vendee do not come within the rule.

More v. Bennett, 15 L. R. A. 361, 140 Ill. 69;

NOTE.—On the subject of foreign incorporation to evade the law of the state, see, in connection with the present case, *Demarest v. Grant* (N. Y.) 13 L. R. A. 864; *Empire Mills v. Alston Grocery Co.* (Tex.) 12 L. R. A. 366, and *note*.

23 L. R. A.

As to contracts not to engage in business, see *Dills v. Doebler* (Conn.) 20 L. R. A. 432; *Droun v. Forrest* (Vt.) 14 L. R. A. 80; *Herreshoff v. Boutineau* (R. I.) 8 L. R. A. 469, and *note*.

Spelling, Trusts & Monopolies, 74, and cases cited.

The business of the plaintiff corporation violates no law or policy of either Rhode Island or Kentucky.

Messrs. Edward D. Bassett and Simon S. Lapham, for respondents:

The law does not say that instruments of this description before they may be declared illegal, shall, in plain language, affirm the intention to be to prevent competition and control the market or advance the prices of necessary commodities. If it did it would by that requirement supply a device for evading its wholesome restraints and rendering its principles wholly nugatory.

Woodruff v. Woodruff, 52 N. Y. 53; *Phippen v. Stickney*, 3 Met. 384; *People v. North River Sugar Ref. Co.* 5 L. R. A. 386, 54 Hun, 354.

Such being the true purpose of this combination the law is too well settled to be questioned as to its legality.

Arnot v. Pittston & E. Coal Co. 68 N. Y. 558, 28 Am. Rep. 190; *Gardiner v. Morse*, 25 Me. 140; *Saratoga County Bank v. King*, 44 N. Y. 37; *Emery v. Ohio Candle Co.* 47 Ohio St. 320; *Berlin Mach. Works v. Perry*, 71 Wis. 496; *Craft v. McConoughy*, 79 Ill. 346, 23 Am. Rep. 171; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 173, 8 Am. Rep. 159.

This contract sought to be enforced is one entered into by individuals to form a corporation in violation of the laws of this state. As such it cannot be enforced.

A foreign corporation is only recognized by comity.

Bank of Augusta v. Earle, 38 U. S. 13 Pet. 558, 10 L. ed. 293; *Merrick v. Van Santvoord*, 34 N. Y. 208; *American & Foreign Christian Union v. Fount*, 101 U. S. 353, 25 L. ed. 888.

Comity does not require the enforcement of a provision in an executory contract for the breach of its laws.

Montgomery v. Forbes, 148 Mass. 249; *Hill v. Beach*, 12 N. J. Eq. 31; *Empire Mills v. Alston Grocery Co.* (Tex.) 12 L. R. A. 366.

The agreement in restraint of trade here sought to be enforced is unreasonable. It is world-wide. And unless the business sought to be restricted was commensurate to the space restricted it will not be enforced.

Herreshoff v. Boutineau, 8 L. R. A. 469, 17 R. I. 8; *Wiley v. Baumgardner*, 97 Ind. 66, 49 Am. Rep. 427; *Callahan v. Donnelly*, 45 Cal. 152, 18 Am. Rep. 172.

Stiness, J., delivered the opinion of the court:

The complainants seek an injunction against the respondent to restrain him from violating his covenant that he would not engage or be concerned in, directly or indirectly, the manufacture or sale of butterine or oleomargarine, for the space of five years from the date of the covenant. Prior to April 30, 1891, the parties carried on that business separately, when they agreed to unite and form a corporation for the purpose of carrying on their business together. To this end, all the parties turned in the stock, machinery, accounts, and good-will of their respective concerns, at a valuation greatly in excess of the value of the property itself, 23 L. R. A.

taking an amount of stock in the corporation represented by such valuation. The corporation has carried on the business since that time. In August, 1892, the defendant sold his stock in the company, to present holders, for \$60,000, although, as he says, the property it represented was worth only about \$28,000. After this he entered the same business again, and claims the right to do so upon the following grounds, viz.: (1) That he was induced to enter into the contract through false and fraudulent misrepresentations of the complainants; (2) that the contract is void as a combination to raise the price of a necessary and useful commodity in trade, and to stifle competition; (3) that one purpose of the contract was to form a corporation in violation of the laws of this state; (4) that, the contract being in restraint of trade, its enforcement is unreasonable.

As to the first defense, it is sufficient to say that we do not find it to be supported by the evidence. The respondent knew perfectly well what he was doing in making the arrangement, and agreed to it freely. The facts that one of the companies was using a secret process to preserve the freshness of the product, so that it could be exported to tropical climates, and that it was engaged to some extent in such export are shown by the proof.

In support of the second ground of defense, the respondent cites cases of contracts to create a monopoly and to force prices. Such was *People v. North River Sugar Ref. Co.*, 54 Hun, 354, 5 L. R. A. 386, a proceeding to vacate the charter of the company because it had become a partner in the "Sugar Trust." The unlawfulness of such a combination was largely dwelt upon, but in the court of appeals (121 N. Y. 582, 9 L. R. A. 33) the decision was sustained only upon the ground that the company had practically relinquished its corporate functions, and so had forfeited its franchise. *Arnot v. Pittston & E. Coal Co.* 68 N. Y. 558, 28 Am. Rep. 190; *Craft v. McConoughy*, 79 Ill. 346, 23 Am. Rep. 171; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 173, 8 Am. Rep. 159, and *Emery v. Ohio Candle Co.* 47 Ohio St. 320,—were cases where contracts, based upon a monopoly, were held to be invalid. Undoubtedly, there may be combinations so destructive of the right of the people to buy and sell and to pursue their business freely that they must be declared to be void upon the ground of public policy. In such cases the injury to the public is the controlling consideration. But it does not follow that every combination in trade, even though such combination may have the effect to diminish the number of competitors in business, is therefore illegal. Such a rule would produce greater public injury than that which it would seek to cure. It would be impracticable. It would forbid partnerships and sales by those engaged in a common business. It would cut off consolidations to secure the advantages of united capital and economy of administration. It would prevent all restrictions and exclusive privileges, and hamper the familiar conduct of commerce in many ways. There may be many such arrangements which

will be beneficial to the parties, and not injurious to the public. Monopolies are liable to be oppressive, and hence are deemed to be hostile to the public good. But combinations for mutual advantage, which do not amount to a monopoly, but leave the field of competition open to others, are neither within the reason nor the operation of the rule. This is well put in *Skrainka v. Scharringhausen*, 8 Mo. App. 522, where twenty-four owners of stone quarries, on account of a ruinous competition, which made it impossible to work their quarries at a profit, made an agreement to sell through a common agent for the space of six months, and the agreement was sustained. The court says: "But not every agreement in restraint of trade is illegal. Where the contract injures the parties making it, by diminishing their means for supporting their families, tends to deprive the public of the services of useful men, discourages the industry, diminishes the production, prevents competition, enhances prices, and, being made by large companies or corporations, excludes rivalry, and engrosses the markets,—tends to 'make a corner,' to use the slang of the stock and provision gamblers,—it is against the policy of the law. But restraints upon trade imposed by agreement, under limitations as to locality, time, and persons, are not necessarily restraints of trade in the general sense which is objectionable." So in *Tode v. Gross*, 127 N. Y. 480, 13 L. R. A. 652, the defendants had sold their business of making cheese by secret process, under a general restriction not to engage in the business for five years, with reference to which it is said: "The covenant was not in general restraint of trade, but was a reasonable measure of mutual protection to the parties, as it enabled the one to sell at the highest price, and the other to get what they paid for. It imposed no restriction on either that was not beneficial to the other by enhancing the price to the seller or protecting the purchaser. Recent cases make it very clear that such an agreement is not opposed to public policy, even if the restriction was unlimited as to both time and territory. The restriction under consideration, however, was not unlimited as to time." These two cases state a very sensible rule, both as to the public and the parties, and they are exactly like the case before us. Here there is no monopoly. Three of the four companies in New England in this line of manufacture agreed to unite; one inducement being to stop the sharp competition then existing between them. But even so, not only is the field open to the other company, equal in strength to either of these, but it is also open to competition from companies in other parts of the country and to the formation of new companies. This is neither a monopoly, nor such an approach to it as amounts to the same thing. It is the common occurrence of a consolidation of firms. It is not illegal on the ground of reducing competition.

With reference to the third ground of defense, it does not appear that the agreement in any way violates the laws or policy of this state, and if it did, the defendant, be-

ing a party to it, could not set it up. *Thafes v. Sprague Mfg. Co.* 14 R. I. 168. The mere fact that the complainant corporation is created under the laws of the state of Kentucky is not sufficient to warrant a dismissal of its case, for foreign corporations have frequently been recognized as suitors in this court. *Windham County Bank v. Kendall*, 7 R. I. 77; *Hove Mach. Co. v. York*, 11 R. I. 888; *Boston & O. Smelting Co. v. Smith*, 18 R. I. 27, 43 Am. Rep. 8; *Singer Mfg. Co. v. King*, 14 R. I. 511. They are also recognized as doing business here by comity. *Pierce v. Orompton*, 13 R. I. 312. While the fact that citizens of Rhode Island go to Kentucky for an act of incorporation is one that naturally excites curiosity, if not suspicion, as to the motives and good faith of the concern, yet so long as it pursues a lawful business, and violates no law of this state, we do not see how we can refuse to recognize it. True, the advantages of yearly statements and liability of stockholders, given to creditors under our statute, are wanting; but that is a matter for those who deal with the corporation to consider. We can hardly deny the right of a foreign corporation to do business in this state, upon considerations of public policy, when our own statutes (Pub. Laws, chap. 1900) expressly provide for corporations formed in this state for carrying on business out of the state.

The fourth ground of defense involves the reasonableness of the restrictive covenant. The test of reasonableness is the test of validity in contracts of this kind. The test is to be applied according to the circumstances of the contract, and is not to be arbitrarily limited by boundaries of time and space. There has been much discussion upon this subject, which need not be repeated. The law has advanced, *pari passu* with social progress, to a point of practical unanimity. The rule, now generally received, has been recognized in this state, that contracts in restraint of trade are not necessarily void by reason of universality of time (*French v. Parker*, 16 R. I. 219), nor of space (*Herrshoff v. Boutineau*, 17 R. I. 3, 8 L. R. A. 469); but they depend upon the reasonableness of the restrictions under the conditions of each case. The diversity of these conditions produces an apparent diversity of decision, and yet it will be found upon examination that most of the cases really turn upon the reasonableness of the restriction. For example, in *Wiley v. Baumgardner*, 97 Ind. 66, 49 Am. Rep. 427, cited by the respondent, sale was made of a dry-goods store, with the vendor's agreement not to engage in the dry goods business for five years; and in *Herrshoff v. Boutineau* the agreement was not to teach within this state. In these cases the subjects of the contracts were of a purely local character, and outside restraint was unreasonable. On the other hand, in *Watertown Thermometer Co. v. Pool*, 51 Hun, 157, where the business was extensive, restraint within the entire territory of the United States, and in *Tode v. Gross*, 127 N. Y. 480, 13 L. R. A. 652, unlimited restraint as to territory, were sustained. The contract is to be determined by its subject-matter and the conditions under

which it was made; by considerations of extensiveness or localism, of protection to interests sold and paid for, of mere deprivation of public rights for private gain, of proper advantage on one side, or useless oppression on the other. In this case the contracting parties were all capable business men. They knew what they were about. The clause objected to was mutually beneficial and equally restrictive. The respondent was to gain as much advantage from it as any of the others, so long as he remained in the company, and in case of sale it would enhance the value of his stock. And this it did; for, when he sold his stock, he received for it more than double what he testified the property was worth. Having received this large price for his stock, he now seeks to destroy its value upon the ground that the original agreement

was unreasonable. The circumstances show that it was not unreasonable. The parties contemplated an extensive business, with a special effort to develop an export trade. No limitation of foreign countries could be made in advance, for the company was to seek its markets. In this country it might need to set branches in different parts for the sale or manufacture or exportation of its products. Time was needed to ascertain what could be done, and where, and so the term of five years was agreed upon within which the company should be free to seek its field of operation. To allow the respondent now to overthrow that agreement would be grossly inequitable.

We think the complainants are entitled to the relief prayed for.

VIRGINIA SUPREME COURT OF APPEALS.

Robert W YOUNG, Jr., et al., *Piffs. in Err.*,

N. F. YOUNG et al.

(20 Va. 675.)

1. A mere possibility, such as the right to a fee in real property in case of sur-

viving another person, is not attachable under a statute authorizing the attachment of "estate or debts."

2. A contingent remainder may be charged with a deed of trust under a statute authorizing "any interest or claim to real estate" to be disposed of by deed or will.

(April 21, 1906.)

NOTE.—*What expectant and contingent interests in real property are subject to attachment or levy on execution.*

This note will be confined exclusively to the interest of an heir in the lands of his ancestor, to reversions, remainders, executory devises, inchoate rights of dower, and curtesy initiate.

General rule.

The general rule is that lands, tenements, and hereditaments which may be taken and sold on execution include all possible titles to lands contingent or otherwise, where there is a real interest, but do not include mere expectancies such as that of an heir apparent. *Roe v. Humphreys*, 1 Yeates, 427.

Thus laid down in a case in which property was devised to a sister of the testator for life remainder to a nephew for life and the heirs of his body lawfully begotten, and in default of such heirs, to another nephew in fee, the court holding that the estate of the first nephew is included in the words "lands, tenements, and hereditaments" which may be taken and sold on execution. See also *Woodrate v. Fleet*, 44 N. Y. 1; *Williams v. Amory*, 14 Mass. 20; *Brown v. Gale*, 5 N. H. 417,—for substantially similar rulings.

So the term "land" as used in the California statute embraces all titles legal or equitable, perfect or imperfect, any interest in land therefore, whether legal or equitable, is subject to attachment or execution. *Fish v. Fowlie*, 58 Cal. 373. So held with reference to the interest of a purchaser under an executory contract of purchase.

In *Wilkinson v. Chew*, 54 Ga. 602, it was said that "upon principle as well as authority subjection to levy and sale should rest on two questions only: Is there a vested interest? and, Is it so definite as to be susceptible of description in terms of legal certainty? What equities may afterwards arise between co-tenants or co-distributes may be left to the general resources of remedial jurisprudence."

But where it is uncertain to whom the estate will

go, or where it is limited to take effect upon a dubious or uncertain event, it is a mere contingency not subject to levy and sale. *Haward v. Peavy*, 128 Ill. 483; *Decker v. Burnham*, 146 Ill. 9; *Roundtree v. Roundtree*, 26 S. C. 450.

This rule is laid down with reference to vested and contingent remainders in the cases above cited. See *infra* under head of "*Reversions, remainders, and executory devises*." But it would appear to be generally applicable to future estates in lands.

Thus the right of a minor to avoid a conveyance of his real property upon coming of age is not subject to attachment, and a sale thus made which he neither avoids nor confirms is good as against an attachment made by a creditor after he becomes of age. *Kendall v. Lawrence*, 22 Pick. 540.

So the mere right of survivorship which both husband and wife have in lands held by them by the entirety is an incident of the estate and not a contingent or vested remainder, which is subject to sale on execution. *Davis v. Clark*, 26 Ind. 423, 39 Am. Dec. 471; *Chandler v. Cheney*, 37 Ind. 301; *Jones v. Chandler*, 40 Ind. 583; *Carver v. Smith*, 90 Ind. 223, 46 Am. Rep. 210; *Hulett v. Inlow*, 57 Ind. 412, 26 Am. Rep. 64; *Vinton v. Beamer*, 55 Mich. 550.

The joint estate cannot be sold to satisfy a judgment against the husband. *Thomas v. De Baum*, 14 N. J. Eq. 87.

And if the creditors have levied upon it during the life of the husband as his estate the wife may recover it after his death if she survive him in an action of ejectment. *Brownson v. Hull*, 16 Vt. 300, 42 Am. Dec. 517.

Some of the cases, however, have treated the husband's estate in lands held with his wife by the entirety without referring to the expectancy based upon the right of survivorship as subject to execution holding that under statutory provision preserving the rights of the wife, a purchaser at the execution sale takes in subordination to the contingent rights of the wife who will become the absolute owner, if she survives her husband, but if

ERROR to the Corporation Court of the City of Norfolk to review a decree establishing certain liens against the shares of certain of the tenants in common in real estate which the tenants were seeking to have partitioned between them. *Reversed in part.*

The case sufficiently appears in the opinion.

Messrs. Watts & Hutton, for appellants:

Mr. Fearn, in his classification of contingent remainders, places under class 4 those which are contingent because of the uncertainty of the person to take. He says those remainders are contingent where the persons to take are not *in esse* or not ascertained. It is impossible to tell, during the lifetime of Ann Porter Young, which of her children will survive her. The children of Ann Porter Young took during her lifetime a contingent remainder in the real estate devised and such remainder was contingent on account of the uncertainty of the person to take.

1 Minor, Inst. 337, 339; Fearn, Rem. 1-9, 116, 117; *Roundtree v. Roundtree*, 26 S. C. 450; *Watson v. Dodd*, 68 N. C. 530.

Such remainder is not such an interest in, or right to, real estate as is liable to, or affected by, the lien of a judgment or attachment, or such an interest as can be passed by a deed or other conveyance.

Our Statute (Code 1887, § 3567; Code 1878, chap. 182, § 6) provides that a judgment shall be a lien on all the real estate of or to which the judgment debtor is possessed or entitled at or after the date of the judgment. And real estate is declared to include lands, tenements, and hereditaments, and all rights there-to or interests therein, other than a chattel interest. Code 1887, § 5, par. 10; Code 1878, chap. 15, § 9, par. 10.

At common law where the person was certain and the event uncertain, the remainder was descendable and passed to the heirs of the

the husband survives the purchaser becomes the absolute owner thereof, though until the time of the wife's death he cannot take possession or interfere with the property. See *Ames v. Norman*, 4 Sneed, 633, 70 Am. Dec. 269; *McCurdy v. Canning*, 64 Pa. 41; *French v. Mehan*, 56 Pa. 236.

An estate deeded to husband and wife is held in Wisconsin as at common law, and at least the husband's life estate therein is subject to execution. *Bennett v. Child*, 19 Wis. 362, 83 Am. Dec. 602.

In *People v. Haskins*, 7 Wend. 462, it was held that a rent reserved upon a lease in fee containing a clause of distress and re-entry, constitutes an interest in land which may be sold on execution as real estate, but that a *rent seek* is not such an interest.

People v. Haskins, *supra*, however, was overruled in *Payn v. Beal*, 4 Denio, 405, in which it is said that the right of re entry is a mere possibility of an estate which is neither lands, tenements, nor real estate within the meaning of the statute authorizing the levy of execution thereon.

But the doctrine that a grant of lands reserving an annual rent to be paid to the grantor his heirs or assigns payable in designated installments upon the proper payment of which the rent shall cease constitutes a rent charge which may be taken on execution, is adopted in Pennsylvania. *Hurst v. Lithgow*, 3 Yeates, 24, 1 Am. Dec. 326.

A statute allowing the creditor to take in execution "all rights of entry into land" refers to cases in which the debtor has been ousted or dispossessed of a freehold, and does not confer a right to take in execution a right of entry for breach of condition in a deed. *Bangor v. Warren*, 34 Me. 324, 56 Am. Dec. 657.

Such interests can be taken under execution only under the Illinois statute (Rev. Stat. chap. 77, § 8) as may be disposed of by the debtor himself; so held with reference to a devise of real property for life without the privilege to sell. *Emerson v. Marks*, 24 Ill. App. 642.

And diota is to be found in some of the cases to the effect that all such interests and only such as can be sold or assigned can be taken on execution. See *Douglass v. Massie*, 16 Ohio, 271, 47 Am. Dec. 375; *Watson v. Dodd*, 68 N. C. 528.

But contingent estates and remainders have been held to be assignable when they were not subject to levy and sale under execution. *Roundtree v. Roundtree*, 26 S. C. 450; *Allston v. Bank of the State*, 2 Hill, Eq. 235; *Patterson v. Caldwell*, 124 Pa. 455.

And under statutory provisions authorizing sales under execution differing from provisions 23 L. R. A.

authorizing the assignment of interests in lands, such a rule would of course have no application. See the principal case.

So a restriction on a husband's right to sell an estate granted to the husband for the benefit of his wife has reference to a voluntary sale and does not prevent alienation by process of law to satisfy his debts. *Stoehler v. Knerr*, 5 Watts, 181.

In *Nugent v. McCaffrey*, 33 La. Ann. 271, it was held that under a statute providing that an action for the recovery of an immovable estate or an entire succession shall be considered as among lucro-poreal rights which are immovable from the objects to which they apply, an action for the recovery of real estate with damages is liable to seizure and sale under execution.

Interest of an heir in his ancestor's lands.

The undivided interest of an heir in lands in the hands of an administrator of his deceased ancestor may be attached, an attachment not dispossessing the administrator or interfering with the administration, but the levy is subject to be defeated, if it is found necessary to resort to the land to pay the debts of the intestate. *McClellan v. Solomon*, 23 Fla. 437.

And the undivided share of an heir in his ancestor's estate may be seized and sold under execution. *Noble v. Nettles*, 8 Rob. (La.) 15; *Mayo v. Stroud*, 12 Rob. (La.) 105; *Dearmond v. Courtney*, 12 La. Ann. 251; *Black v. Steel*, 1 Ball. L. 307.

The same rules are also substantially laid down in *Hyde v. Barney*, 17 Vt. 230, 44 Am. Dec. 335; *Douglass v. Massie*, 16 Ohio, 271, 47 Am. Dec. 375; *Black v. Steel*, *supra*.

The heirs of an intestate have a vested interest in his estate immediately after his death and before settlement thereof. *Hyde v. Barney*, *supra*.

And it is not necessary that the executor of an estate should have fully closed up the administration thereof, if he has assented to the life interest therein in order to render the interest in remainder or reversion limited upon the life estate subject to execution. *Wilkinson v. Chew*, 54 Ga. 602.

So an attachment followed by an execution in due course levied and extended upon the property of a co-heir immediately after the death of the person from whom he inherits and a sale thereunder transfers a good title as against a co-heir to whom that property is regularly assigned in the distribution of the estate. *Proctor v. Newhall*, 17 Mass. 81.

The seizure by a creditor under execution of the interest of his debtor as one of the heirs of an undivided estate, however, must extend to his whole interest subject to the charges with which it is

remainderman, but this was not so where the person was uncertain and the event certain.

Fearne, Rem. 534-546; Lomax, Dig. 601; *Witton v. Dodd*, *supra*; 4 Kent, Com. 262.

The distinction is well settled and universally recognized and seems to proceed upon this principle: That where the person is certain and the event only uncertain, though the remainder is contingent, yet the contingency cannot fall in without benefitting that particular person; hence, whatever this thing the remainderman has is, whether you call it a possibility or an interest, however little it may be worth, it is his and no one's else, and whatever an ancestor has in the nature of an interest in land, however small its value, passes by descent; while, on the other hand, it is inherent, in the very nature of descent, that there should be something in the ancestor, and if it is uncertain that the ancestor is to take even

if the event happen, then there can be no such thing as a descent from him. And a contingent remainder, whether descendable or not, has never been called an interest in or right to the land.

Story, Eq. Jur. 1040; Fearne, Rem. 15-33.

There is nothing in the statute to indicate any intention to make the judgment lien binding upon interest in or right to real estate, one half of which could not previously have been bound by the elegit.

The writ of elegit did not bind contingent estates.

Gilbert, Executions; *Burton v. Smith*, 38 U. S. 18 Pet. 464, 10 L. ed. 248; Freeman, Executions, p. 178.

There is nothing in either the letter or spirit of the statutes referred to, which justifies an extension of their operation to interests in or rights to lands, which were not included with

burdened: the right of the debtor to a part of the undivided property cannot be seized. Mayo v. Stroud, *supra*.

So in *Clarke v. Harker*, 45 Ga. 596, it was held that the undivided interest of a devisee in a portion of an estate cannot be sold on execution under a judgment against him, on the grounds that such a sale would defeat the right of the others to have a distribution in kind.

But this case was criticised in *Wilkinson v. Chew*, *supra*, however, in which it was held that an interest in reversion or remainder is subject to execution, the court saying that if each distributee can sell privately as much or as little of his individual interest as he chooses it is difficult to see why it may not be levied upon and sold by the sheriff.

Under the Delaware statute declaring that the acceptor or assignee of intestate lands shall take by force of the assignment in the orphan's court all the title which the intestate had at the time of his death and hold it paramount to any incumbrance created by any heir of the intestate, the interest of an heir-at-law of intestate land cannot be attached so as to prevent an assignment. *State v. Huxley*, 4 Harr. (Del.) 343.

And in *Penn v. Spencer*, 17 Gratt. 85, 91 Am. Dec. 345, it was held that the sale under execution of an unascertained interest in the estate of a deceased person is void, and that if the purchaser goes into possession thereunder he is liable to account for all rents and profits thereof while he retains possession as well as for the value of any part thereof which he may have converted, lost, or destroyed.

In *Thomas v. Simpson*, 8 Pa. 60, it was held that where property is devised to descend in the manner directed by law, the interest of the widow of the testator is subject to execution in proceedings against her whether regarded as a right of dower under the Pennsylvania statute or as that of a devisee.

Where lands are devised to be sold and the moneys realized paid over to legatees they are not subject to attachment or execution against a legatee, even though at the death of the testator the legal title descended to him, it being held in trust for the purpose of the sale and distribution. *Baker v. Copenbarger*, 15 Ill. 108, 58 Am. Dec. 600; *Hess v. Shorb*, 7 Pa. 231.

Or at least not until the happening of the event upon which the power to sell depends. *Hess v. Shorb*, *supra*.

Thus a devisee of an estate in the course of administration given to executors to sell whenever they deemed it best and after certain specific bequests giving the residue to trustees to be used for the maintenance of the devisee with others and 23 L. R. A.

paid over upon certain conditions upon his arriving at the age of twenty-five years, has no interest in the lands subject to attachment. *Wilkinson v. Severance*, 80 Iowa, 493.

So in *Ricketson v. Merrill*, 148 Mass. 76, it was held that a will giving real estate to executors to sell a part of which was to be held for ten years if a designated price could not be sooner obtained, directing the payment of the proceeds to the children of the testator in such manner as to equalize the amount received by each taking into consideration advances previously made, gives a child no right in the property as such, which is attachable.

And in *Hiscock v. Fulton*, 17 N. Y. Supp. 408, it was held that one to whom a legacy is given under a will devising all the testator's real estate to other persons has no interest in such real estate which is subject to execution until the legacy is declared a charge thereon by the court in a proper proceeding even though the personal property left by the testator was insufficient to discharge it.

In *Eneberg v. Carter*, 98 Mo. 647, the rule was laid down that where there are no words in a will which will raise a fee in a devisee, either expressly or by strong implication, the fee remains in the heirs-at-law by virtue of the statute of descent until it shall be divested by sale according to law and in accordance with the terms of the will and until such time the heirs have an interest therein which is subject to sale under execution. But where a clause of the will operates by its own force and without action on the part of the executor to convert the land of the testator into money, the land is not affected by a judgment against a devisee who will become entitled to the proceeds thereof when they shall be sold as directed by the will.

Though there is a power of sale, if no imperative duty to sell is imposed there is no equitable conversion of the land into money. *Haward v. Peavey*, 128 Ill. 490.

In *Morrow v. Brenizer*, 2 Rawle, 185, it was held that where real estate is directed to be sold by executors after the decease of testator's wife, and the proceeds divided among his children, a sale of a share of the real estate under execution against one of the children passes no interest to the purchaser though the will empowers the executors to rent the premises if they cannot sell.

But in *Brett v. Williamson*, 12 Lea, 656, it was held that a devise of land to testator's wife, directing that upon her death or marriage it be sold and the proceeds divided between certain sons and a grandson, gives the grandson an interest therein which is subject to execution and a purchaser at an execution sale made before the death or mar-

in the terms of the statute. A contingent remainder limited to an uncertain person is not an "interest in or right to" land.

Roundtree v. Roundtree, 26 S. C. 450; *Watson v. Dodd*, 63 N. C. 580.

The so-called interest of T. W. Young was just the same as that of his brother, R. W. Young, Jr., derived from the same source, and, in fact and in law, was no interest at all, but a bare possibility uncoupled with an interest and incapable of being passed by any conveyance.

Jackson v. Waldron, 18 Wend. 178; *Pike v. Galvin*, 20 Me. 188; 4 Kent, Com. 259; 1 Lomax, Dig. 601; *Watson v. Dodd*, *supra*; *Burners v. Keran*, 24 Gratt. 42.

There is nothing in the terms of this deed to create an estoppel.

Jones v. Sasser, 18 N. C. 464.

Where one conveys only his right, title, and

interest in and to a piece of property, in which he has no assignable interest or title, with general warranty, without making any recital or averment of particular ownership or estate in such property, than the warranty, it does not estop the grantor from setting up an after-acquired title.

Blanchard v. Brooks, 12 Pick. 47; *Comstock v. Smith*, 13 Pick. 116, 23 Am. Dec. 670; *White v. Brocas*, 14 Ohio St. 848; *Adams v. Ross*, 80 N. J. L. 509, 32 Am. Dec. 237; *Hanrick v. Patrick*, 119 U. S. 156, 80 L. ed. 896; Rawle, Covenants for Title, 895, 420.

Mr. John Johns also for appellants.

Mr. J. F. Crocker, for appellee:

The facts in proof on the hearing of the attachment are not made a part of the record of said proceedings, and there cannot be a presumption that anything was lacking in the proof to justify the judgment of the court. If

riage of testator's wife will take the grandson's share as against other creditors seeking to appropriate it at the time of the distribution. In this case, however, the heir had furnished the boundaries of the land levied upon, waived notice of sale, and stipulated for time within which to redeem his interest, all for the purpose of having his interest in the land applied in satisfaction of the execution, and the court treated these acts as a stipulation that his interest might be sold, the case turning upon that point.

See also *Lewitt v. Durant*, 78 Mich. 186, in which the question whether a will devising a life estate to testator's widow and giving specific legacies to children, charging them upon the real estate and making them payable out of the proceeds thereof upon final disposition after the termination of the life estate, creates an interest in the legacies which is subject to execution, was raised but not decided, the case going off on other points.

Under a statute authorizing the attachment of rights and credits, lands and tenements, etc., a legacy charged upon real estate may be attached in the hands of the devisee of the real estate for a debt of the legatee. *Woodward v. Woodward*, 9 N. J. L. 145, 17 Am. Dec. 462.

Reversions, remainders, and executory devises.

A vested remainder in fee may be taken in execution and sold by virtue thereof under a judgment against the remainderman. *Den v. Hillman*, 7 N. J. L. 218; *Wilkinson v. Chew*, 54 Ga. 602.

Thus in *Wiley v. Bridgman*, 1 Head, 68, a bill in chancery framed to reach a remainder or reversionary interest in real property was dismissed upon demurrer upon the ground that such interest can be sold under execution and that therefore an adequate remedy at law existed.

So a devise of land to the testator's mother for life, remainder to be equally divided among her children in fee simple, vests an estate in such children which may be seized under execution during the lifetime of the mother. *Davis v. Go-forth*, 1 Lea, 31.

And where property is left by will to certain persons for life, the remainder to revert to the estate, the persons entitled to the estate take a vested remainder which is subject to levy and sale under attachment before the death of the tenant for life. *Shipp v. Gibbs*, 88 Ga. 184.

Likewise a vested remainder in tail may be taken in execution and sold by the sheriff. *Humphreys v. Humphreys*, 2 Dall. 223.

So also a reversion in fee after a term of years is a subject of execution, and a sheriff's deed there- 23 L. R. A.

under is as effectual to pass title as would be that of the reversioner himself. *Murrell v. Roberts*, 33 N. C. 424, 53 Am. Dec. 419.

And an heir having a reversionary interest in lands after the death of a life tenant has a vested interest which may be taken on execution though the life estate has not terminated. *Wilkinson v. Chew*, 54 Ga. 602.

And such an interest may be seized and sold under execution though the reversion is contingent upon the happening of events, which may never occur, and though the extent of interest cannot be ascertained. *Woodgate v. Fleet*, 44 N. Y. 1.

So one who takes an executory devise defeasible upon the contingency of his dying without issue living at the time of his decease, takes a vested estate in fee or in tail defeasible upon a contingency which is subject to execution and may be taken and held by the creditor and his assigns, until the happening of the contingency. *Phillips v. Rogers*, 12 Met. 405.

In *DeHaas v. Bunn*, 2 Pa. 335, 44 Am. Dec. 201, it was held that a devise by a testator to his daughter for life and after her death to such child or children, as she now has or may have in fee, and if she die without issue then over to her son, creates an interest in the executory devise, subject to execution during the lifetime of the daughter though his estate is liable to be terminated by her death leaving issue.

Contingent remainders, however, in which the persons who are to take cannot be identified until the termination of a particular estate, cannot be taken and sold on execution against any of the persons who may be entitled thereto. *Haward v. Peavey*, 123 Ill. 430; *Ducker v. Burnham*, 146 Ill. 9; *Roundtree v. Roundtree*, 26 S. C. 450.

In *Ducker v. Burnham*, *supra*, the court distinguished between a vested remainder which can be taken on execution and a contingent one which cannot be taken by defining a vested remainder to be one in which the estate is fixed to remain to a determinate person after the particular estate is spent, and a contingent remainder to be one in which the estate in remainder is limited to take effect either to a dubious or uncertain person or upon a dubious or uncertain event, and the same distinction is substantially made in *Roundtree v. Roundtree*, *supra*.

A person in being who will have an immediate right of possession of lands upon the death or marriage of another, has a vested remainder which may be taken under execution before the happening of the event which will give him the right of possession. *Kelly v. Morgan*, 3 Yerg. 437.

But if the remainderman must survive the first taker to be entitled to take, the remainder is con-

it could be made to appear that there was nothing before the court on the matter of what was the interest of the then defendant in the said real estate than the will of Tapley Webb, the question would then have arisen for the adjudication of the court whether that interest was or was not a contingent remainder, and if yea, was a contingent remainder attachable? If the court be taken to have held that a contingent remainder was attachable, it was not without precedents and authority for so holding. Admit that the court was in error in so holding, can such error be impeached or corrected or even inquired into in this suit? This is a collateral impeachment of said judgment. Proceedings of a court having jurisdiction of the subject-matter and of the person cannot be impeached collaterally on account of mere error.

Gray v. Stuart, 83 Gratt. 357.

There is a manifest distinction between an

erroneous judgment and a void judgment. The first is a valid judgment, though erroneous until reversed, provided it is a court of competent jurisdiction. The latter is no judgment at all. It is a mere nullity. The first cannot be assailed in any other court but an appellate court. The latter may be assailed in any court, anywhere whenever any claim is made or rights asserted under it.

Ibid.; *Lancaster v. Wilson*, 27 Gratt. 627.

The court of hustings for the city of Portsmouth, in which the judgment was rendered, is a court of general jurisdiction. It has jurisdiction of actions of debts and of attachments, and it therefore had jurisdiction of the subject-matter of said suit and attachment and it acquired jurisdiction of the defendant, R. W. Young, Jr., by an order of publication.

Wilcher v. Robertson, 78 Va. 802; *Fisher v. Bassett*, 9 Leigh, 181, 38 Am. Dec. 227; *Prigg v. Adams*, 2 Salk. 674; *Osby v. Thomas*, 9 Gratt.

tingent within these rules. *Roundtree v. Roundtree*, *supra*.

Though a power of sale in the life tenant does not make the remainder a contingent one. *Ducker v. Burnham*, *supra*.

Thus a devise to a wife for life with remainder to certain named children with a subsequent provision that if any of the children die before the wife the property is to be equally divided among the survivors, creates a vested remainder subject to execution; but where the devise is to the wife for life and at her death to such of the children as shall then be living, the intent which is controlling is that the remainder shall not vest until the death of the wife, the children taking as survivors of the wife, though in the absence of anything showing such intent words of postponement will be presumed to relate to the enjoyment of the estate and not to the vesting thereof. *Ibid.*

So a conveyance of real estate to the use of a husband and wife for their joint lives, then to his use during life and after his death to their children, creates an estate in the husband and wife for their joint lives which is not subject to execution for his debts, but his life estate based upon the contingency of his survivorship is subject to seizure and sale under execution against him. *Roanes v. Archer*, 4 Leigh, 550.

Likewise where a devise is to such of several persons as shall be alive at the termination of the particular estate until that time the lands cannot be taken and sold on execution against any of such persons, their interests being nothing but contingent remainders not subject to levy and sale. *Haward v. Peavey*, 128 Ill. 420.

So also a will creating spendthrift trusts for the benefit of the testator's children and grandchildren providing that either at the death of the last survivor of such children and grandchildren, who may be living at the time of his death or at the expiration of twenty-one years from his own death, whichever event should first happen, the estate should vest in the persons entitled to the income for distribution, leaves it uncertain as to who will be the recipient of the estate at the time of distribution, and the interest in the estate thereby created is therefore contingent and not subject to seizure on an execution attachment. *Patterson v. Caldwell*, 124 Pa. 455.

In *Jackson v. Middleton*, 52 Barb. 9, which was a case of a grant made to one for life and after his death to his heirs and assigns forever, it was held that the contingent remainder thereby created was not subject to levy and sale upon execution under a statute charging judgments upon 28 L. R. A.

lands, tenements, real estate, and chattels real, and directing the sale of such estates by the sheriffs.

In *Moore v. Littell*, 41 N. Y. 66, however, which was a case arising upon the same grant as that set forth in *Jackson v. Middleton*, *supra*, it was held that the remainder though liable to open and let in afterborn children and subject to be defeated as to any particular charge by his death before that of his father, is a vested and not a contingent remainder. (*Justices Grover, Daniel, and Hunt dissenting.*)

So in *Sheridan v. House*, 4 Abb. App. Dec. 218, 4 Keyes, 569, which case also arose upon the grant set forth in *Jackson v. Middleton*, *supra*, it was held that where lands are conveyed to one for life and after his death to his heirs and assigns forever, the heirs have a vested estate in the remainder which is subject to execution, and it is not made contingent by its liability to be defeated or modified by the death of any of the children, who are to take the remainder, or the birth of other children during the lifetime of the life tenant.

A devise to testator's widow during life or widowhood and after her death or marriage to another in fee creates a vested remainder in fee in the latter which may be levied upon and sold under execution for his debts during the continuance of the life estate. *Harrison v. Maxwell*, 2 Nott & McC. 347, 10 Am. Dec. 611.

But where lands are devised to one for life and at his death to such of his children as might be then living and the issue of such as have died leaving issue, and if such life tenant should die leaving no issue living at his death, then to a third person in fee, the contingent interest of such third person cannot be taken and sold on execution against him while the life tenant remains unmarried and without children, the court saying that contingent remainders, conditional limitations, and executory devises are not assignable at law and therefore cannot be sold under execution. *Watson v. Dodd*, 68 N. C. 523.

Where lands are devised to testator's wife till their youngest child becomes of age, remainder to the two sons, charged with legacies to be paid to the daughters, and in case of the death of either son without issue, to the other in fee, and one of the sons dies, the interest of the other including that which came to him through the death of his brother, is subject to execution though the estate of the brother has not terminated. *Drake v. Brown*, 68 Pa. 223.

So in *White v. McPheeters*, 75 Mo. 202, it was held that where lands are conveyed in trust for the use of a married woman during her natural life remainder

828; *Cline v. Catron*, 22 Gratt. 894; *Lancaster v. Wilson*, 27 Gratt. 680; *Burners v. Keran*, 24 Gratt. 64; *Neale v. Utz*, 75 Va. 480.

Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565, does not rule this case.

The decisions of the United States Supreme Court are not binding on the state courts except in cases involving a federal question. When the United States court comes to pass on the validity of a judgment of a state court, it applies to it the same rule that is applied when the courts of one state come to judge of the validity of the judgments of the courts of another state. No judgment *in personam* is binding unless the defendant has been served with process or voluntarily appeared in the suit; and that the record of the judgment may be contradicted as to the facts necessary to give the court jurisdiction against its recital of their existence. This rule is very different from the rule of a state court in judging of the validity of a judgment of its own state courts.

in fee simple in trust for her husband should he survive her, the trustee covenanting to convey to the survivor, and to convey to any person designated by them upon their joint request, the remainder is subject to execution under a statute making all real estate of which the defendant is seized whether in law or in equity subject thereto whether it is a vested or a contingent remainder, the court not deeming it necessary to decide which it was.

A statute providing that the creditor may levy his execution upon the real estate of the debtor, authorizes a levy upon every species of estate in land, a vested remainder or reversion falling within the meaning of the term. *Williams v. Amory*, 14 Mass. 20.

And an estate in remainder in real estate is property within a statute making "property debts and other effects subject to execution." *Lockwood v. Nye*, 2 Swan, 515. 58 Am. Dec. 73.

And it is within a provision subjecting houses, lands, and other hereditaments and real estate to execution for the payment of debts. *Harrison v. Maxwell*, 1 Nott & McC. 347. 10 Am. Dec. 611.

Under the Missouri statute providing that all real estate whereof a defendant is seized either in law or in equity shall be subject to seizure and sale under execution, contingent as well as vested remainders are subject thereto. *White v. McPheeters*, *supra*.

In *Kissom v. Nelson*, 2 Helsk. 4, it was held that a remainder must be levied on and sold as such, and that it will not pass by a levy made in general terms.

But in *Atkins v. Bean*, 14 Mass. 404, in which an execution was extended upon an undivided seventh part of a remainder in fee when the judgment debtor owned but nine-sixty-fourths of it, the court held that this was sufficient to pass the judgment debtor's title.

Right of dower.

The mere right of a widow to have dower assigned to her in the lands of her husband before actual assignment cannot be taken on execution under a judgment against her for her debts. *Nason v. Allen*, 5 Me. 479; *Pennington v. Yell*, 11 Ark. 212, 55 Am. Dec. 262; *Graham v. Moore*, 5 Harr. (Del.) 218; *Blain v. Harrison*, 11 Ill. 384; *Summer v. Babb*, 13 Ill. 438; *Newman v. Willetts*, 45 Ill. 534; *Petty v. Malter*, 15 B. Mon. 591; *Gooch v. Atkins*, 14 Mass. 378; *Torrey v. Minor*, 1 Smedes & M. 499; *Wallis v. Doe*, 2 Smedes & M. 220; *Ligon v. Spencer*, 58 Miss. 37; *Tompkins v. Fonda*, 4 Paige, 442, 3 L. ed. 510; *Waller v. Mardus*, 29 Mo. 25.

33 L. R. A.

Bowler v. Huston, 30 Gratt. 266, 33 Am. Rep. 678, announces and applies in the strongest terms this international rule. Our state court has adopted very different principles than those declared by the court in *Pennoyer v. Neff*, *supra*; *Williamson v. Gayle*, 7 Gratt. 152; *Schofield v. Cox*, 8 Gratt. 523; *Fisher v. March*, 26 Gratt. 776.

Under these cases not only may a personal judgment be entered against the nonresident defendant, but that judgment creates a lien on the real estate.

T. W. Young conveyed with general warranty, "all his interest being that of one of the children of Ann P. Young" in the property in question.

It is immaterial whether he then had such interest or not or any title to it or not. He is now entitled and his covenant estops him from denying that he was entitled; his deed was an affirmation that he was entitled, and he is not now allowed to say he was not entitled.

Baines v. Walker, 77 Va. 92; *Gregory v.*

Previous to its assignment a dower right is not an estate of freehold subject to execution. *Tompkins v. Fonda*, *supra*.

It is a mere potential interest amounting to nothing more than a chose in action. *Pennington v. Yell*, *Torrey v. Minors*, and *Waller v. Mardus*, *supra*.

Thus where a widow remarries and her unassigned dower in the lands of her former husband is seized and sold under execution for a debt of the subsequent husband, the purchaser cannot be regarded as a creditor and be substituted in the place of the plaintiff in the execution. *Waller v. Mardus*, *supra*.

A right of dower creates no seisin in the widow which can be attached or taken on execution by the widow's creditors until it has been assigned to her even though she be in actual possession with the acquiescence of the persons in interest. *McMahon v. Gray*, 5 L. R. A. 742, 160 Mass. 220.

And the fact that a widow is in possession of the mansion house of her husband before dower is assigned, does not subject the right to seizure and sale under execution, its possession being only in quarantine. *Shields v. Batta*, 5 J. J. Marsh. 12.

Nor will a statute providing that lands may be taken on execution after the expiration of eighteen months after the owner's death making no reservation of the right of dower interfere with the widow's right to remain in the mansion house of her deceased husband. *Stokes v. McAllister*, 2 Mo. 162.

The interest of a widow under the Pennsylvania act providing for partition among children and that her portion shall remain charged upon the land and be recoverable in like manner as rents, is in the nature of a rent charge, and it may be seized and sold under execution when sufficient personality cannot be found under the Pennsylvania statute authorizing the seizure and sale of "all lands, tenements, and hereditaments whatsoever." The point was decided upon an objection to evidence of a sale and deed under execution. *Shaupe v. Shaupe*, 12 Serg. & R. 9; *Thomas v. Simpson*, 3 Pa. 60.

And in *Pitts v. Hendrix*, 6 Ga. 453, it was held (citing *Thomas v. Simpson*, *supra*) that when a wife remains in possession of her husband's lands after his death, her possession is such an interest in the lands as may be seized and sold under execution.

The common-law doctrine that a right of dower before assignment is not subject to execution is not changed by a statute giving married women one-third part for life of all the lands of which their husbands died seized and authorizing them to re-

Peoples, 80 Va. 355; *Burners v. Keran*, 24 Gratt. 42; *Donnell v. Buchanan*, 3 Leigh, 384, 28 Am. Dec. 280.

If the seisin or possession of a particular estate is affirmed in the deed, either in express terms or by necessary implication, the grantor and all persons in privity with him shall be estopped from ever afterwards denying that he was so seised and possessed at the time he made the conveyance. The estoppel works upon the estate and binds an after-acquired title as between parties and privies.

Reynolds v. Cook, 88 Va. 817; *Van Rensselaer v. Kearney*, 52 U. S. 11 How. 297, 13 L. ed. 703; *Moore v. Crawford*, 180 U. S. 123, 32 L. ed. 878; *Ryan v. United States*, 186 U. S. 86, 34 L. ed. 447; 2 Smith, Lead. Cas. 6th Am. ed. 739 (697) 730 (688) 731.

A contingent remainder is a mere right, and cannot be transferred before the contingency happens, otherwise than by way of estoppel.

tain possession of the plantation dwelling house of the deceased husband until dower is assigned. *Ligon v. Spencer*, 68 Miss. 87.

Tenancy by curtesy initiate.

Where a wife acquires or owns a freehold estate and issue is born alike capable of inheriting, the husband becomes a tenant by the curtesy initiate, and has an estate in such freehold which may be seized and sold under execution for the payment of judgments against him. *National Metropolitan Bank of Washington v. Hitz*, 1 Mackey, 111; *Manley v. Bonham*, 53 Ark. 354; *Shortall v. Hinckley*, 31 Ill. 219; *Day v. Cochran*, 24 Miss. 261; *Schermerhorn v. Miller*, 2 Cow. 439; *Canby v. Porter*, 13 Ohio, 79; *Mattocks v. Stearns*, 9 Vt. 323.

The interest of one who is in possession of premises by virtue of a conveyance thereof in fee to his wife within rules relating to attachment and execution is a freehold estate during their joint lives, and a freehold in remainder to himself for life as tenant by the curtesy. *Canby v. Porter*, *supra*. To the same effect, *Brown v. Gale*, 5 N. H. 417.

And the life estate of the husband together with the wife's remainder constitutes the entire estate in or title to the property. *Shortall v. Hinckley*, *supra*.

The rule would be the same where the levy is made before the death of the wife, where the curtesy is initiate, as where made after it becomes consummate by her death; the estate when initiate is the husband's freehold, and when consummate it can be nothing more. *ReWinne*, 1 Lans. 514. This statement which was not necessary to the decision was made in case a holding that the husband's common-law estate by the curtesy is abolished in New York in all the wife's property affected by the Married Women's Act of 1848, 1849.

Where one of the heirs of an intestate is a married woman her husband has an interest vesting at the instant of the death of the intestate even though no settlement of the estate has been made, which may be attached or taken on execution for his debts. *Hyde v. Barney*, 17 Vt. 280, 44 Am. Dec. 335.

And when a husband and wife are seised of a remainder in fee in her right he has a present vested interest against which an execution against him may be extended. *Brown v. Gale*, 5 N. H. 416.

In *Gentry v. Wagstaff*, 14 N. C. 270, however, it was held that the husband acquires no interest in a vested remainder belonging to his wife, and a sale thereof upon execution against the husband passes nothing to the purchaser, the court adopting the rule that a husband can acquire no interest in 23 L. R. A.

Any conveyance by matter of record or by deed indented, of an executory or contingent interest will work an estoppel. Estoppels exist when no interest passes from the party.

1 Lomax, Dig. 602; 4 Kent, Com. 260, 261.

The provisions of the code relative to the effect of deeds are broad enough to include the conveyance of pretended titles to land.

Middleton v. Arnolds, 13 Gratt. 489; 2 Story, Eq. Jur. § 1040b.

Hinton, J., delivered the opinion of the court:

By his will, which was probated in February, 1884, one Tapley Webb, of the city of Portsmouth, devised the two lots of land, with the buildings thereon, in the proceedings mentioned, to his daughter Ann Porter Young, for life, with remainders in fee to such of her issue as might be living at her death. On the 5th day of November, 1884, Mrs. Young died,

the estate of his wife of which he is not actually seised. But in this case there had been no living issue and therefore the tenancy was not by the curtesy initiate.

The levy of an execution against a husband upon his wife's land will pass his interest in the land whatever it may be or however it may have been derived, though the return does not show whether he is entitled to curtesy or not, or describe the land as being held in the right of the wife. *Litchfield v. Cudworth*, 15 Pick. 23.

And the extent of an execution upon lands as those of the debtor owned in fee when in fact he was a tenant by curtesy initiate vests in the creditor a freehold estate for the life of the debtor. *Mechanics Bank in Newburyport v. Williams*, 17 Pick. 433.

The moment the wife acquires title to land the rights of the husband therein are perfected and the liability of his interest to execution for his debts attaches, and is not affected by the subsequent enactment of statutes securing to married women their rights to property. *Beale v. Knowles*, 45 Me. 479; *McLellan v. Nelson*, 27 Me. 129; *Meyers v. Gale*, 45 Mo. 416; *Harvey v. Wickham*, 23 Mo. 112; *Cunningham v. Gray*, 20 Mo. 170.

Where estate by the curtesy vests before the passage of an act changing the common law with reference to what property is subject to execution, the estate is liable whether the credit was given before or after the passage of the law. *National Metropolitan Bank of Washington v. Hitz*, 1 Mackey, 112.

The Connecticut statute providing that the interest of a married man in the real estate of his wife shall not be taken by attachment or execution, however with a proviso that the act shall not affect suits then pending, exempts any suit then pending and the judgment therein rendered, from the operation of the act so that an attachment creditor whose suit was pending at the time of the enactment of the statute may, after the lien of his attachment has expired, levy his execution upon the husband's interest in the wife's real estate. *Johnston v. Chapman*, 35 Conn. 550.

A statute providing that the separate property of a wife shall not be liable for her husband's debts does not exempt his estate by the curtesy from liability to levy and sale for his debts. *Uhler v. Adam*, 1 D. C. App. 392.

And the effect of an act providing that no real estate acquired by marriage shall be liable to execution during the life of the wife for the debts of the husband, is not to destroy the right of curtesy but merely to suspend the right of execution on

leaving the following issue: Robert W. Young, Jr., Tapley W. Young, Anna Virginia d'Abbadie, and Nathaniel F. Young; and upon her death the remainders, which had theretofore been contingent, became vested. In June, 1888, this suit was instituted. In their bill the plaintiffs, who are the above-named remaindermen, ask for a partition of the property, which they allege is free from incumbrance, although they say that they are informed that the interest of Robert W. Young, Jr., is claimed to be affected and charged with a judgment recovered against him at the April term, 1874, of the hustings court of Portsmouth, in an action brought by his uncle N. P. Young, but that said judgment is void, the said court having had no jurisdiction to render it; and that the interest of said Tapley W. Young is claimed to be affected and charged with a deed of trust made by said Tapley W. Young to R. V. Boykin, trustee, in whose place and stead R. C. Marshall has been substituted, but the said deed of trust constitutes no charge upon the said interest of said Tapley W. Young, and is of no effect. And, after making some other allegations not material to these proceedings, the bill prays that N. P. Young, Nathaniel F. Young, and R. C. Marshall, trustee, be made

defendants, and required to answer the same. That partition be made of the said real estate, or that the same be sold, and the proceeds divided. And that the cause be referred to one of the commissioners of the court to take and report, among others, the following accounts: (1) An account of all liens and charges against the interest of said Tapley W. Young, and the priorities thereof; (2) an account of all liens and charges against the interest of Robert W. Young, Jr., and the priorities thereof. That a decree be entered determining the validity and priority of all liens existing, or claimed to exist, against the said property, or the interest of either party therein, and that an injunction be awarded, restraining said R. C. Marshall, trustee, and N. P. Young, from making any sale under said deed of trust. The commissioner reported that the judgment constituted no lien or charge on the interest of R. W. Young, Jr., and that the deed of trust executed by T. W. Young to R. V. Boykin, trustee, dated the 3d of February, 1858, was a valid lien on the one fourth interest of T. W. Young in said property. The first of these reports was duly excepted to by N. P. Young, and was excepted to by the said Tapley W. Young. At the hearing the court entered a decree sus-

the part of the husband's creditors during the life of the wife. *Rice v. Hoffman*, 35 Md. 544; *Schindel v. Schindel*, 12 Md. 299; *Logan v. McGill*, 8 Md. 481; *Anderson v. Tydings*, 1d. 427, 68 Am. Dec. 708; *White v. Dorris*, 35 Mo. 181.

Under the Rhode Island statute providing that the real estate, chattels real, etc., of a married woman shall be so secured to her sole and separate use that the same and the rents, profits, and income thereof shall not be liable to be attached or in any way taken for the debts of her husband, a tenancy by the curtesy initiate is not subject to attachment for the husband's debts. *Greenwich Nat. Bank v. Hall*, 11 R. I. 124.

So a statute providing that the real estate of a married woman shall not be liable for the debts of her husband, but shall be deemed and taken to be her separate property, protects her property from sale on execution for his debts but does not impair his rights therein. *Junction R. Co. v. Harris*, 9 Ind. 184, 68 Am. Dec. 618.

The North Carolina statute providing that no interest of the husband in the real estate of his wife shall be subject to sale to satisfy any execution obtained against him is designed to preserve the rights of the wife during her life, but it leaves the interest of a tenant by the curtesy consummate by the death of the wife subject to execution. *McCaskill v. McCormac*, 99 N. C. 548.

Under the New York Statutes of 1848 and 1849 vesting in the wife the legal title to the rents, issues, and profits of her real estate as against her husband and his creditors, if the title is in her, it cannot be seized to satisfy his debts without proof that her title is fraudulent as against his creditors. *Gage v. Dauchy*, 34 N. Y. 298.

The levy of an execution against a husband upon his life estate in the lands of his wife is not defeated under the Maine Statute of 1874, providing that a married woman may become seised of property in her own right providing it be made to appear that it did not in any way come from her husband after coverture, unless she affirmatively proves that the property levied upon did not thus come to her. *Eldridge v. Preble*, 34 Me. 148.

The Pennsylvania rule adopted under the orphans' court act, however, that a life estate is not

subject to levy and sale under execution, protects a husband's estate in the lands of his wife as tenant by the curtesy initiate from such seizure and sale. *Snively v. Wagner*, 3 Pa. 275, 45 Am. Rep. 640; *Kints v. Long*, 80 Pa. 501; *Parget v. Stambaugh*, 2 Pa. 485; *Gordon v. Lingham*, 1 Grant, Cas. 156.

But where the estate of the wife has been converted into money by a partition between the heirs of the one from whom it descended, the execution creditor is entitled to possession of the fund in the hands of the husband and to take the produce thereof during his life, giving such security for its restoration to the wife at his death as the court may direct. *Lancaster County Bank v. Stauffer*, 10 Pa. 398.

A decree of divorce *a vinculo* upon suit of the wife of a judgment debtor, though rendered in another state, determines the right of the judgment creditor who had levied his execution upon the rents and profits of lands held by the judgment debtor in the right of his wife as her dower in the estate of her former husband. *Barber v. Root*, 10 Mass. 280.

And where a decree of divorce *a mensa et thoro* is rendered against a husband, his creditors cannot seize the wife's separate property under execution upon judgments rendered against him before the divorce but upon which the executions were issued afterwards, where the wife's separate property is ordered to be applied to the support and maintenance of herself and children. *Haviland v. Bloom*, 6 Johns. Ch. 178, 2 L. ed. 92.

A husband's life estate in his wife's lands may be taken under execution either by taking the rents and profits for a definite period or by taking the whole life estate at an appraisal founded on a proper estimate of the probability of human life. *Litchfield v. Cudworth*, 15 Pick. 23.

And an execution against the estate of a tenant by the curtesy may be extended upon the land either by metes and bounds or on the rents and profits. *Roberts v. Whiting*, 16 Mass. 186.

In *Mattocks v. Stearns*, 9 Vt. 326, it was said that the mode of levy upon the estate of a husband who holds by tenancy by the curtesy initiate should be by metes and bounds exhausting his interest as far as the levy extends.

F. H. B.

taining the exception of R. W. Young, and holding the judgment a lien upon the one-fourth interest of the said R. W. Young, Jr., and the deed of trust a lien upon the one-fourth interest of said Tapley W. Young, and from this decree this appeal is taken.

Upon a careful consideration of the case, the court is of opinion that the corporation court of Norfolk, to which the said suit was transferred, clearly erred in holding the judgment a valid lien upon the interest of R. W. Young in said property, for the reason that the court never had jurisdiction of the case. The proceedings were, as the record shows, commenced by attachment sued out on the 31st October, 1878, long before the death of said Ann P. Young, before the remainder of R. W. Young had become vested, and while he had no interest in said property which could be subjected to a lien of attachment. In the opinion of this court, the words "estate or debts" due him "within the county or corporation in which the suit is," in section 1, chap. 148, Code 1878, were not intended to apply to a mere possibility, such as the said R. W. Young had at the time the said attachment was sued out; and as he was a nonresident, and the court never acquired jurisdiction of his person, there was no foundation for the judgment, and the same is absolutely null and void.

We think, however, that the court was clearly right in holding the deed of trust to be a lien upon the one-fourth interest of Tapley W. Young, although the deed was made before the said Tapley W. Young had acquired

a vested interest in the property. At common law, it is true, a naked possibility, such as this remainder (which was uncertain as to the person) was, could not be the subject of assignment or conveyance. But "this matter," as Mr. Miner expresses it, is assisted in Virginia by statute, which provides that any interest or claim to real estate may be disposed of by deed or will. 2 Miner, Inst. 362; Code, § 2418. "The effect of this enactment," as was said by the supreme court of Kentucky in *Nutter v. Russell*, 8 Met. (Ky.) 168, "is to obviate at once all the difficulties growing out of the distinctions which had been established by judicial construction between such estates as were alienable, and such as were not. It will not be doubted, we suppose, that under this statute every conceivable interest in or claim to real estate, whether present or future, vested or contingent, and however acquired, may be disposed of by deed or will. *Faulkner v. Davis*, 18 Gratt. 674, 98 Am. Dec. 698. But if this were otherwise it would operate, as we think, as an estoppel. *Burners v. Keran*, 24 Gratt. 42; *Raines v. Walker*, 77 Va. 92; *Gregory v. Peoples*, 80 Va. 855; *Watson v. Dodd*, 68 N. C. 528. For these reasons the decree of the corporation court of Norfolk must be reversed in the particular indicated, and the cause must be remanded to be proceeded with in accordance with the views herein expressed.

Reversed in part and affirmed in part.

Fauntleroy, J., concurs in the result.

Rehearing denied.

NEBRASKA SUPREME COURT.

Patrick W. O'CONNOR, *Pff. in Err.*,

v.

Fred WALTER.

(.....Neb.....)

*1. Where there were due a resident of Nebraska, from a railroad company operating a line of railroad through Iowa and Nebraska, wages, which, in Nebraska, were exempt from execution and attachment process, but which, nevertheless, by means of an assignment of the claim against the party entitled to such exemption to a resident of Iowa, were procured, by the garnishment of said railroad company in Iowa, to be applied to the payment of said claim, the assignor of such claim is liable to such debtor for the amount so appropriated without his consent.

2. As between said assignor and the party entitled to the benefits of such exemption in Nebraska, the proceedings in Iowa were in no sense *res judicata*.

(July 29, 1898.)

*Headnotes by RYAN, C.

NOTE.—On the subject of the protection of non-residents against garnishment proceedings the above case strengthens the authorities which deny the power of court to take away the chose in action of a nonresident who is out of the jurisdiction by garnishing the debtor. See, on this subject, *Missouri*, 23 L. R. A.

ERROR to the District Court for Lancaster County to review a judgment in favor of plaintiff in an action brought to recover the amount of wages, exemption of which plaintiff had been deprived of by reason of garnishment proceedings in another state by an assignee of defendant, to whom plaintiff owed a certain debt. *Affirmed*.

The facts are stated in the commissioner's opinion.

Messrs. Sawyer & Snell, for plaintiff in error:

Can a resident of this state sue another in the courts of a sister state and by garnishment there appropriate certain of the debtor's property to the payment of his claim which by the laws of this state is exempt?

Wright v. Chicago, B. & Q. R. Co., 19 Neb. 175, 56 Am. Rep. 747, held that where a debt is contracted in another state, by whose laws it is exempt, the exemption shall continue in this state in case an action is brought on the claim. The courts of Iowa have uniformly held the contrary.

Walter waived his right of exemption to his wages garnished in Iowa.

ri Pac. R. Co. v. Sharitt (Kan.) 18 L. R. A. 385; and *Illinois Cent. R. Co. v. Smith* (Miss.) 19 L. R. A. 577, and note; also the more recent cases of *Neufelder v. German American Ins. Co.* (Wash.) 23 L. R. A. 287; *Bragg v. Gaynor* (Wis.) 21 L. R. A. 161, and *Dougllass v. Phenix Ins. Co.* (N. Y.) 20 L. R. A. 112.

A debtor may enjoin his creditor from sending his claim into another jurisdiction for the purpose of evading the exemption law of the state where they reside and from collecting the claim from property exempted by the laws of the home state.

Snook v. Snetser, 25 Ohio St. 516; *Cole v. Cunningham*, 133 U. S. 107, 38 L. ed. 539.

He had his remedy by injunction if O'Connor was using West as a figurehead by which to subject wages exempt in this state to the payment of his debt.

If Walter prevails it would amount to an annulling of the Iowa judgment.

Moore v. Chicago, R. I. & P. R. Co. 43 Iowa, 388; Thompson, Homesteads & Exemptions, § 28.

Mr. A. G. Greenlee, for defendant in error:

The laborer has his remedy by action against the original creditor if the latter assigned his claim for the purpose of bringing suit in Iowa, and for the purpose of evading the exemption laws of Nebraska.

Albrecht v. Treitschke, 17 Neb. 205; *Chicago, B. & Q. R. Co. v. Moore*, 31 Neb. 629.

The garnishment proceedings in Council Bluffs in the case of *West v. Walter* in the justice court of N. Schurz are not entitled to any more faith and credit than the garnishment proceedings in Omaha in the justice court of Charles Brandes in the case of *Albrecht v. Treitschke*.

Cooley, Const. Lim. ed. 1890, p. 185.

Ryan, C., filed the following opinion:

The petition of Fred Walter, plaintiff, alleged, as against Patrick W. O'Connor, as defendant, that for a long time prior to the 5th day of March, 1889, the said plaintiff was, and ever since had been, a married man, the head of a family, and a resident of Cass County, Nebraska, and that during the whole of said time the said plaintiff had lived with and provided for his family, by day labor, in the employ of the Chicago, Burlington & Quincy Railroad Company, and that said plaintiff's sole income and means of support for himself and his family were the wages by plaintiff earned in said employment; that on March 5, 1889, one D. M. West filed a petition in the court of N. Schurz, a justice of the peace in the city of Council Bluffs, Iowa, claiming to be the assignee of said O'Connor of a claim against plaintiff for the sum of \$18.50 and costs; that said West caused the Chicago, Burlington & Quincy Railroad Company to be garnished and requiring said railroad company to answer as to the indebtedness of the said company to plaintiff; that on March 11, 1889, the said railroad company accordingly answered that it was indebted to said Walter in the sum of \$55, whereupon said cause was continued, and service was obtained by publication upon Walter, and the day for hearing was set for May 10, 1889; that in April, 1889, the said railroad company filed an affidavit of the said Walter that he was the head of a family, and that his wages were exempt from execution, and asking that said proceedings be dissolved; that nevertheless the said justice of the peace entered judgment against plaintiff, Walter, for the sum of \$18.50 damages, and

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costs taxed at \$8.00, and requiring said railroad company to pay into court the sum of \$32.10 out of plaintiff's wages, which said railroad company thereupon did, and that said \$32.10 was deducted by said railroad company from the sum of \$55 due plaintiff, and that plaintiff has never received said sum so deducted; that said sum of \$55 was due plaintiff for labor performed as a brakeman by plaintiff for said railroad company within the sixty days immediately preceding said date of garnishment, and that the wages so garnished were exempt from seizure by attachment, execution, or garnishee process in this state, which facts the said West and O'Connor also well knew; that said West was not the owner of the account of the said O'Connor, if any such he had, but held it simply for collection for O'Connor, who was the real party in interest, though a pretended assignment thereof had been made by O'Connor to said West. For a second cause of action, plaintiff claimed to be entitled to \$37.50 as damages indirectly resulting from said garnishment, which he alleged was simply a conspiracy between West and O'Connor to deprive plaintiff of his exemptions under the laws of Nebraska. There was an answer in denial of each of the above averments. The allegations of the petition are set out at great length, and with considerable particularity, for the reason that, with the exception of the averments in respect to the second cause of action, each allegation of said petition was, upon the trial, fully sustained by the proofs. These allegations, therefore, fairly state the facts in this case, wherefore it is needless that they be repeated. It was stipulated between the parties in the district court that, by the laws of the state of Iowa, the wages of a nonresident of that state are not exempt from attachment, execution, or garnishment. Upon a trial of the issues the jury returned a verdict in favor of Walter, against Patrick O'Connor, for \$24.50, for which, with costs, judgment was duly rendered. For the reversal of this judgment, O'Connor brings this cause to this court by his petition in error, with the necessary record and bill of exceptions.

In *Albrecht v. Treitschke*, 17 Neb. 205, this court held that, where a judgment creditor procures the exempt wages due to a laborer to be taken by garnishee process, and applied to the payment of his judgment, a cause of action arises in favor of the judgment debtor against the creditor for the amount of such wages wrongfully appropriated, unless the right of exemption is waived by the debtor. The statute exempting from seizure by judicial process such earnings of a laboring man as have accrued within the period of sixty days immediately preceding service of garnishment process was intended for the support of the family of which such laborer is the head and stay. In extending credit, every one dealing with the head of a family must take into account this right of exemption, and, presumably, in every extension of credit, this right is recognized. It therefore in no way operates to the injury of the law-abiding creditor. The rapacity which respects neither implied contract obligations nor statutory enactments must, in damages, respond for this, as for any other act of misappropriation. From the facts

which we have under consideration it appears that O'Connor assigned his claim to West solely for the purpose of collection. In his evidence, O'Connor admitted this, at the same time stating that the arrangement was that West was to receive for making the collection 20 per cent of the amount thereof. It is true the court in which suit was brought by West had jurisdiction of the garnishee, which operated its line of railroad as well in Iowa as Nebraska, and that, therefore, the amount was lost to Walter, beyond recovery, as against the garnishee. *Chicago, B. & Q. R. Co. v. Moore*, 81 Neb. 629. But why should this operate in favor of O'Connor, who was the prime mover in this garnishment proceeding? In all respects the deprivation of this exemption was as harsh and effectual as in the case of *Albrecht v. Treitschke*, *supra*. Let us suppose the exemption was of a specific article of personal property. It would be unquestioned that, if he appropriated it to his own use in this state, O'Connor would be liable to Walter for its value. Instead of its being appropriated in this state, let us suppose that this property was found and appropriated by O'Connor in Iowa. Would his liability for its value in the courts of Nebraska be in any way modified by that fact? Would it at all relieve of liability for him

to show that his duly-authorized agent in Iowa converted the property to the use of O'Connor? Certainly not; and there is no appreciable difference, in principle, between the cases supposed and that at bar. If the judgment creditor, directly or indirectly,—no matter where, or by what process,—appropriates to the payment of a debt due him the exempt wages of a debtor, without such debtor's consent, such creditor is liable to the debtor entitled to such exemption to the full amount of the misappropriation. In this case, however, it was urged that the judgment of the Iowa court was *res judicata*, and therefore unassailable. An estoppel of that, as well as of any other, nature, requires mutuality between the parties to render it effective. If O'Connor is entitled to the benefit of the judgment pleaded it must appear that a judgment against him would have been likewise binding. This could not have been, for, purposely, he was not a party to the Iowa proceeding, in any way.

Under the proofs no other verdict could properly have been returned than that which was rendered, and the judgment of the District Court is affirmed.

The other Commissioners concur.

MARYLAND COURT OF APPEALS.

FIDELITY & DEPOSIT CO., of Maryland, *Appt.,*
v.

Hanson H. HAINES *et al.*

(.....Md.....)

1. A deed in trust for the benefit of creditors vests the title of personal property in the trustee, under Code, art. 16, § 206, when the deed is recorded and the bond filed in the county in which the grantor resides; and such title is not affected by the fact that the bond is subsequently filed in another county in which real estate of the grantor is located.
2. A counterclaim existing against the assignor cannot be interposed to a claim arising in favor of the assignee after an assignment for the benefit of creditors.
3. A note given for the purchase price of chattels is not a good set-off against a demand by the maker's assignee for creditors upon the seller for damages for wrongfully replevying the chattels after they had passed into his possession.

(January 12, 1894.)

A PPEAL by defendant from a judgment of the Superior Court of Baltimore City in favor of plaintiffs in an action brought to enforce defendant's alleged liability as surety on

a replevin bond, the condition of which had been broken. *Affirmed.*

The facts are stated in the opinion.

Mr. F. C. Slingluff for appellant.

Messrs. E. H. Gans and B. H. Haman for appellees.

Briscoe, J., delivered the opinion of the court:

The appellees sued the appellant, a corporation, in this state, in an action of debt, as surety on a replevin bond. The following facts arise on the pleadings: On the 1st of December, 1889, the Bolton Mines Company of Baltimore city, sold a certain lot of fertilizers or phosphates to the Waring Manufacturing Company, of Cecil county, Md. The goods were delivered, and a note, dated the 15th of March, 1890, was executed and delivered for the contract price. Afterwards, on the 23d of May, 1890, the latter company, being financially embarrassed, made a deed of trust to the appellees for the benefit of creditors. This deed of trust was recorded in Cecil county, the place of domicile of the corporation, and the bond of assignees filed on May 30, 1890, in the same county. On the 9th of June following, the Bolton Mines Company replevied the identical goods of the appellees, and took possession of them. The replevin suit was not prosecuted with effect, or the property returned, but was dismissed by order

NOTE.—The right of set-off between an insolvent's obligation and a claim in the hands of his assignee for creditors is shown in a note to *Merrill v. Cape Ann Granite Co. (Mass.) ante*, 313. That note does not include cases like the present in 28 L. R. A.

which the claim of the assignee is one which has arisen since the assignment. The decision in the present case states the doctrine generally accepted in respect to this latter class of cases.

of the plaintiff in the replevin suit; and this action was brought against the appellant, as surety on the replevin bond.

The questions to be passed upon by us arise upon demurrers and exceptions to the various prayers. It is contended upon the part of the appellant that, when the fertilizers were replevied, on the 9th of June, 1890, the appellees had no title to them, because, while the deed of trust was recorded in Baltimore city on the 5th of June, 1890, the assignee's bond was not filed there until the 11th of June, two days after the goods had been replevied. This contention can be disposed of by a single reference. In the case of *Siegel v. Barton*, 73 Md. 411, we passed upon the identical question, and in construing the 205th section of article 16 of the Code, which provides "that every trustee to whom any estate, real, personal, or mixed, shall be conveyed for the benefit of creditors, . . ." there said that a deed conveying real property for the benefit of creditors must be recorded in the county or counties, or in the city of Baltimore, in which the land lies; and, if it conveys personal property, it must be recorded in the county or city in which the grantor resides. We said also that, as the property in dispute in *Barton's Case* was personal property, the deed ought to have been recorded in the county where the grantor resided, and the bond of the trustee ought to have been filed with the clerk of that county for his approval; and until the deed was so recorded, and the bond of the trustee so filed, no title to the property could vest in the trustee. There can be no question, then, that as the deed of trust in the case now under consideration was recorded, and the bond of the trustees was approved and filed in Cecil county, the place of the domicile of the grantor prior to the issuing of the writ of replevin, and in the absence of fraud in the sale, which charge is abandoned by the appellant, the legal title to the personal property of the Waring Manufacturing Company passed to the trustees, under the deed of assignment, and the taking of this property was a wrongful and unlawful interference with the possession of the assignees. The subsequent recording of the deed and filing of the bond in Baltimore city was manifestly for the purpose of passing title to the real estate, and could in no wise affect the title to the personal estate. The demurrer, therefore, to the defendant's third plea, which raised this question, was properly sustained. *Wilson v. Carson*, 13 Md. 77; *Siegel v. Barton*, *supra*.

We come now to the second question in the case,—that is, the appellant claims to recoup or set off against the plaintiffs' demand the amount of the note made by their assignor, which demand arose out of matters altogether subsequent thereto. It is well settled that recoupment is a species of common-law set-off for damages due the defendant growing out of the same transaction, and is allowed in this 28 L. R. A.

state, in actions both *ex contractu* and *ex delicto*, in order to avoid circuity and multiplicity of actions. *Baltimore Marine Ins. Co. v. Dalrymple*, 25 Md. 809; *Dowler v. Oushoa*, 27 Md. 387; *Warfield v. Booth*, 33 Md. 68. And while it is true that an assignee for the benefit of creditors stands in the place of the assignor, and is merely such for the payment of pre-existing creditors, and takes the property under the assignment subject to all existing equities, yet it is clear that a liability subsequent to the assignment cannot be set off against the assignee. *Burrill, Assignm.* § 403. The reason of this is that the assignee, in virtue of the assignment, becomes a trustee for the creditors. The status of the assignors, debtors, and creditors is fixed by the assignment in trust for the creditors. The case of *Seldner v. Smith*, 40 Md. 602, relied on by the appellant, is entirely distinguishable from this case. The principle recognized and applied in that case was that, a replevin bond being one of indemnity only, a surety on said bond is entitled to be subrogated to the right of his principal, and to avail himself of the same defenses which were open to him. In *Seldner's Case* the plaintiff was the party to whom the goods had been sold, and the title had not passed to a third party, as, in this case, to an assignee for the benefit of creditors. The claims were mutual, and arose out of the same transaction; whereas, in the case at bar, the liability on the bond arises out of transactions subsequent to the assignment, and for a claim also subsequent thereto. In *Thompson v. Whitmarsh*, 100 N. Y. 35, it was held that upon new contracts made by an executor or administrator, and never existing in favor of the decedent, but growing out of the dealing of the former alone, a debt against the decedent cannot be made the subject of a counterclaim. And the same rule has been established by this court in the cases of *Scott v. Scott*, 17 Md. 78, and *Schwallenberg v. Jennings*, 43 Md. 554. To sustain the contention of the appellant would destroy the principle of equality among creditors in the settlement of insolvent estates, and establish an inequitable preference in the administration of estates, entirely at war with the established doctrine of this court.

For the reasons we have stated, the demurrers to the pleas were properly sustained. The plaintiff's first prayer fairly submitted to the jury the finding of every fact essential to their right to recover, and was properly granted. The second prayer relates to the measure of damages, and was correct. The third prayer was conceded. The defendant's first prayer, relating to the recoupment and set-off, was properly rejected, for the reasons we have heretofore given. The third prayer, in reference to the measure of damages, was fully covered by the plaintiffs' third prayer, which was correct. The rulings of the court below will therefore be affirmed.

Judgment affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

CHICAGO & NORTHWESTERN R. CO.,
Plf. in Err.,

v.

E. H. PRESCOTT.

(59 Fed. Rep. 237.)

1. One attempting to cross a railroad track at a street crossing is not, as matter of law, guilty of contributory negligence because the rear end of a train occupies all but fourteen feet of the width of the driveway, where other vehicles have safely passed through and he is driving an old and gentle horse not in the habit of jumping or shying when in proximity to engines, and is invited by the flagman to make the crossing.
2. The doctrine of voluntary assumption of a risk as distinguished from contributory negligence does not apply to the case of one passing along a highway partially obstructed by a railroad train projecting across it.
3. It cannot be held as a matter of law that a person who travels over a defective street with knowledge of the defects therein or who drives by an obvious obstruction in a public thoroughfare, thereby assumes the risk of injury and is precluded from recovering against one who is responsible for the defect or who has negligently caused the obstruction. He is not deprived of the right to recover unless in view of all the circumstances he failed to exercise that degree of care which persons under similar circumstances ordinarily exercise and was guilty of contributory negligence.
4. A license to lay a railroad track across a street in a large city or town does not carry with it the right to use the crossing for the purpose of standing trains of cars thereon for such period as suits the convenience of the railroad company or to use the highway as a depot-yard.
5. A railroad company which assumes to stop a train across a public street in a large town or city without express authority for so doing must be prepared to show, as against one who has sustained a special injury by the obstruction of the street, that there was some overweighing necessity rendering the blockade justifiable, especially where the street is heavily burdened with traffic.
6. The issue as to whether a street was rightfully obstructed by a railroad train should be submitted to the jury if the circumstances attending the blockade are such that reasonable persons might entertain different views as to whether the action of the company was justifiable or not.
7. It is not a valid excuse for the obstruction of a street by a railroad train that the depot of the company is located at the corner of that and another street and that trains coming from one direction and halted at the station will necessarily project to some extent into the street as it is the company's duty so to locate its depot that trains can be stopped thereat without obstructing travel on the public thoroughfare.

8. The sudden shying of a horse driven past the rear end of a train projecting into and obstructing a highway cannot be regarded as the sole proximate cause of the injury occasioned by the wagon coming into contact with the rear car and throwing the driver to the ground, but the obstruction directly contributes to the accident.

(December 4, 1903.)

ERROR to the Circuit Court of the United States for the Northern District of Iowa to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Argued before Caldwell and Sanborn, *Circuit Judges*, and Thayer, *District Judge*.

Messrs. N. M. Hubbard, N. M. Hubbard, Jr., and F. F. Dawley, for plaintiff in error:

The question of proximate cause is one of law for the court, and the court should have held that the presence of the car was not the cause of the injury. It was merely a condition—its presence rendered such an injury possible, but it did not cause it. The cause was plaintiff's attempt to drive through and the sudden swerving of the horse to one side.

Gerhard v. Bates, 2 El. & Bl. 400; *Scheffer v. Washington City*, V. M. & G. S. R. Co. 105 U. S. 249, 26 L. ed. 1070; *Williams v. Central Railroad of Iowa*, 43 Iowa, 396; *Sikes v. Sheldon*, 58 Iowa, 744.

Plaintiff knew and understood the situation, and he must be held to have known whatever dangers were likely to be incurred in attempting to cross.

He took the chances, with full knowledge of all the dangers, when there was no necessity or urgency to excuse him.

It will not excuse him to say that men of ordinary prudence might do the same thing, or that ordinarily no accident would happen.

Hickey v. Boston & L. R. Co., 14 Allen, 429.

One who knowingly drives upon an obstruction in a highway and is injured cannot recover.

Butterfield v. Forrester, 11 East, 60; *Beach*, Contrib. Neg. 2d ed. § 9; *Yahn v. Ottumwa*, 60 Iowa, 429; *Tuffree v. State Center*, 57 Iowa, 538; *Union Pac. R. Co. v. Hutchinson*, 39 Kan. 485; *Louisville & N. R. Co. v. Schmidt*, 81 Ind. 264; *Whitney v. Maine Central R. Co.* 69 Me. 208; *Goldstein v. Chicago, M. & St. P. R. Co.* 46 Wis. 404; *Hill v. Tionesta Twp.* 146 Pa. 11; *Pittsburgh Southern R. Co. v. Taylor*, 104 Pa. 306.

Messrs. Charles A. Clark and John C. Leonard, for defendant in error:

A railroad company must use the streets with due regard for the rights of the public.

Delaware, L. & W. R. Co. v. Conners, 139 U. S. 469, 35 L. ed. 216; *Northern Pac. R. Co. v. Sullivan*, 10 U. S. App. 473, 53 Fed. Rep. 219.

NOTE.—While the questions of negligence and contributory negligence at railroad crossings arising in endless variations of circumstances are most often in respect to collisions with running 23 L. R. A.

trains, the present case is one of a kind quite likely to occur. As to liability for obstruction of crossings see note to *Sellick v. Lake Shore & M. S. R. Co.* (Mich.) 18 L. R. A. 154.

Public highways, from side to side and end to end, belong to the public.

State v. Berdette, 78 Ind. 193.

The construction of a railway merely across a highway without proper authority constitutes an obstruction for which the company is liable to indictment.

Com. v. Nashua & L. R. Corp. 2 Gray, 54;

Com. v. Old Colony & F. River R. Co. 14 Gray, 93; *Pittsburgh, Ft. W. & C. R. Co. v. Reich*, 101 Ill. 157; *State v. Troy & B. R. Co.* 57 Vt. 144; *Fanning v. Osborne*, 103 N. Y. 441.

Grants against the public are strictly construed.

Rauch v. Lloyd, 31 Pa. 358, 73 Am. Dec. 747; *Murray v. South Carolina R. Co.* 10 Rich. L. 227, 70 Am. Dec. 219.

They have no right to use the street as a freight yard.

Gahagan v. Boston & L. R. Co. 1 Allen, 190, 79 Am. Dec. 724.

A railway company has no right to leave its hand-cars within the limits of its right of way at the side of a highway.

Pittsburgh, B. & St. L. R. Co. v. Sponier, 85 Ind. 163; *Vars v. Grand Trunk R. Co.* 23 U. C. C. P. 143; *Brownell v. Troy & B. R. Co.* 55 Vt. 218. See also *Jones v. Housatonic R. Co.* 107 Mass. 261; *Rez v. Russell*, 6 East, 427; *People v. Cunningham*, 1 Denio, 524, 48 Am. Dec. 709; *Rez v. Jones*, 3 Campb. 280; *State v. Chicago, M. & St. P. R. Co.* 4 L. R. A. 298, 77 Iowa, 443; *State v. Morris & E. R. Co.* 25 N. J. L. 441; *Duffy v. Chicago & N. W. R. Co.* 82 Wis. 375; *Roberts v. Chicago & N. W. R. Co.* 35 Wis. 684; *State v. St. Paul, M. & M. R. Co.* 35 Minn. 131, 59 Am. Rep. 313; *Cooke v. Boston & L. R. Corp.* 183 Mass. 185; *Manley v. St. Helen's Canal & R. Co.* 2 Hurlst. & N. 840; *English v. New Haven & N. Co.* 32 Conn. 241; *Cohen v. New York & L. R. A.* 406, 118 N. Y. 532; *Bussian v. Milwaukee, L. S. & W. R. Co.* 56 Wis. 325; *Young v. Detroit, G. H. & M. R. Co.* 56 Mich. 430; *Ogle v. Philadelphia, W. & B. R. Co.* 3 Houst. (Del.) 267; *Foshay v. Glen Haven*, 25 Wis. 288, 3 Am. Rep. 73; *Corey v. Northern Pac. R. Co.* 32 Minn. 457.

An unlawful obstruction or defect in a highway is the proximate cause of injury, even where a horse becomes unmanageable and runs away, if such defect directly contributes to the injury.

Manderschid v. Dubuque, 25 Iowa, 110; *Palmer v. Andover*, 2 Cush. 600; *Hinckley v. Somerset*, 145 Mass. 326; *Titus v. Northbridge*, 97 Mass. 256, 93 Am. Dec. 91; *Clark v. Lebanon*, 63 Me. 393; *Aldrich v. Gorham*, 77 Me. 287; *Houfe v. Fulton*, 29 Wis. 297, 9 Am. Rep. 568; *Allen v. Hancock*, 16 Vt. 280; *Winship v. Enfield*, 42 N. H. 197; *Baldwin v. Greencrooks Turnp. Co.* 40 Conn. 238, 14 Am. Rep. 33; *King v. Cohoes*, 77 N. Y. 33, 33 Am. Rep. 574; *Hull v. Kansas*, 54 Mo. 601, 14 Am. Rep. 487; *Hey v. Philadelphia*, 81 Pa. 44, 22 Am. Rep. 733; *Pittsburgh v. Grier*, 23 Pa. 54, 60 Am. Dec. 65; *Sherwood v. Hamilton*, 37 U. C. Q. B. 410; *Rassett v. St. Joseph*, 55 Mo. 295, 14 Am. Rep. 446; *Aurora v. Pulfer*, 56 Ill. 275; *Langworthy v. Green Twp.* 95 Mich. 95.

If the locus in quo was a highway, there can be no doubt, under the evidence, that the standing car was an unlawful obstruction, and

that this was the proximate cause of the injury.

Skjeggerud v. Minneapolis & St. L. R. Co. 38 Minn. 56; *Andrews v. Mason City & Ft. D. R. Co.* 77 Iowa, 673; *Powell v. Deveney*, 8 Cush. 305, 50 Am. Dec. 738, citing *Lynch v. Nurdin*, 1 Q. B. 29; *Peterson v. Chicago & W. M. R. Co.* 64 Mich. 621.

It is only when the inference of negligence, or the absence of it, is necessarily deducible from the undisputed facts and circumstances proved that the court is justified in taking the case from the jury.

Hoye v. Chicago & N. W. R. Co. 63 Wis. 673, 67 Wis. 14; *Greany v. Long Island R. Co.* 101 N. Y. 419; *Chicago, St. L. & P. R. Co. v. Hutchinson*, 120 Ill. 587; *Pennsylvania Co. v. Frana*, 112 Ill. 405; *Philadelphia & R. R. Co. v. Kilips*, 83 Pa. 405; *Texas & P. R. Co. v. Cox*, 145 U. S. 606, 36 L. ed. 833; *Jones v. East Tennessee, V. & G. R. Co.* 128 U. S. 448, 32 L. ed. 478; *Grand Trunk R. Co. v. Ives*, 144 U. S. 48, 36 L. ed. 485; *Sioux City & P. R. Co. v. Stout*, 84 U. S. 17 Wall. 657, 21 L. ed. 745; *Pollock, Torts*, p. 381; *Illinois Cent. R. Co. v. Foley*, 10 U. S. App. 537, 53 Fed. Rep. 459; *Chaffee v. Boston & L. R. Corp.* 104 Mass. 114.

The fact is of importance that he was invited to pass over the crossing by defendant's flagman.

Staley v. London, B. & S. Coast R. Co. L. R. 1 Exch. 21; *North Eastern R. Co. v. Wanless*, L. R. 7 H. L. 12; *Lunt v. London & N. W. R. Co. L. R. 1 Q. B. 277*; *Warren v. Fitchburg R. Co.* 8 Allen, 280, 85 Am. Dec. 700; *Sweeny v. Old Colony & N. R. Co.* 10 Allen, 377, 87 Am. Dec. 644; *Chaffee v. Boston & L. R. Corp. supra*; *Wheelock v. Boston & A. R. Co.* 105 Mass. 208; *Chicago, B. & Q. R. Co. v. Sikra*, 96 Ill. 162; *State v. Boston & M. R. Co.* 80 Me. 430; *Cincinnati, C. C. & I. R. Co. v. Schneider*, 45 Ohio St. 678; *Chicago, R. I. & P. R. Co. v. Clough*, 184 Ill. 566; *Peck v. Michigan Cent. R. Co.* 57 Mich. 3; *Pittsburgh, C. & St. L. R. Co. v. Yundt*, 78 Ind. 373, 41 Am. Rep. 580; *Philadelphia & R. R. Co. v. Kilips, supra*; *Ernst v. Hudson River R. Co.* 35 N. Y. 9, 90 Am. Dec. 761; *Kissenger v. New York & H. R. Co.* 56 N. Y. 538; *Beisiegel v. New York Cent. R. Co.* 34 N. Y. 633, 90 Am. Dec. 741; *McGovern v. New York Cent. & H. R. R. Co.* 67 N. Y. 417; *Dolan v. Delaware & H. Canal Co.* 71 N. Y. 285; *Casey v. New York Cent. & H. R. R. Co.* 78 N. Y. 522; *Buchanan v. Chicago, M. & St. P. R. Co.* 75 Iowa, 393.

Under all of the circumstances, it is perfectly idle and preposterous to claim that the alleged question of contributory negligence should not have been submitted to the jury.

Bussian v. Milwaukee, L. S. & W. R. Co. 56 Wis. 325; *Bryant v. Randolph*, 133 N. Y. 70; *Eddy v. Powell*, 4 U. S. App. 259, 49 Fed. Rep. 814; *Corey v. Northern Pac. R. Co.* 32 Minn. 457; *Pittsburgh, C. & St. L. R. Co. v. Kitley*, 118 Ind. 152; *Peterson v. Chicago & W. M. R. Co.* 64 Mich. 621; *Gereke v. Grand Rapids & I. R. Co.* 57 Mich. 589; *Skjeggerud v. Minneapolis & St. L. R. Co.* 38 Minn. 56; *Young v. Detroit, G. H. & M. R. Co.* 56 Mich. 430; *Continental Imp. Co. v. Stead*, 95 U. S. 165, 24 L. ed. 406.

Thayer, District Judge, delivered the opinion of the court:

This is a writ of error to reverse a judgment which was recovered by the defendant in error in a suit brought by him against the Chicago & Northwestern Railway Company. The facts on which the recovery was predicated are not in dispute, and they are, substantially, as follows: The defendant company maintains and operates a double track railroad through the city of Cedar Rapids, Iowa, and for some distance within the limits of that city its tracks are laid in and along Fourth street, and across First avenue, at the point where Fourth street crosses that avenue. The passenger depot of the defendant company is located at the southwest corner of First avenue and Fourth street. On the morning of April 4, 1890, the plaintiff, with his two sons, was driving down First avenue, towards Fourth street, in a one horse delivery wagon. As they approached the railroad crossing on Fourth street, they found the street partially blockaded by one of the defendant company's west-bound passenger trains, which had recently arrived from the east. First avenue, at that point, is about 80 feet wide, from curb to curb; but so much of the street was taken up by the standing passenger train that it only left a roadway about 14 feet in width between the rear end of the train and the east sidewalk, for the passage of vehicles. After the plaintiff reached the crossing, he halted on the north side of the train for a few moments, whereupon the defendant company's flagman, who was standing on the track at the rear end of the train, said: "Hurry up. Come on. You are all right." The gates across First avenue were at the time elevated, and several vehicles that were going in the same direction as the plaintiff had already crossed the tracks in safety. The engine of the passenger train was detached therefrom, and had moved to an adjoining track to take up a mail car which was to be coupled to the train; and a switch engine was standing on the same track as the passenger train, at the rear end thereof, and about 40 or 50 feet distant from the rear car. Under these circumstances, the plaintiff attempted to cross the tracks by the narrow roadway at the rear end of the train. While making such attempt, his horse, for some reason, suddenly shied to the right, bringing the wagon in contact with the buffers of the rear car. By reason of the sudden shock, plaintiff was thrown from his seat to the ground, and sustained serious injuries, for which a jury awarded him damages in the sum of \$1,500.

It is contended by the defendant company that as the plaintiff had an unobstructed view of the entire situation at the time he attempted to cross the tracks, and as the situation was not altered before the accident happened by any act of the defendant company, he should be held to have voluntarily assumed whatever risk was incurred in making the crossing, and should also be adjudged guilty of contributory negligence. These propositions were submitted to the trial court in the form of instructions, and its refusal to so charge constitutes one of the errors complained of. In view of all of the circumstances to which we have ad-

verted, we find ourselves unable to hold, as a matter of law, that the plaintiff was guilty of contributory negligence. The passageway at the rear end of the train was wide enough to permit a team to be driven through, with ordinary safety. Other vehicles had passed through before the plaintiff attempted to cross the tracks. The plaintiff testified that the horse which he was driving was an old and gentle horse, that had been driven about the city for seven or eight years by himself for the purpose of delivering groceries, and was not in the habit of jumping or shying when in proximity to cars or engines. Moreover, the plaintiff was invited by the defendant's flagman to make the crossing, which was an assurance that the train would not be immediately moved, and that the crossing could be made in safety. Under these circumstances, it was clearly the duty of the trial court to submit the question of contributory negligence to the determination of the jury. In other words, on the state of facts disclosed by the record, the plaintiff's attempt to cross the tracks on the occasion in question cannot be said to have been attended by such obvious dangers to life or limb that all reasonable men would declare him to have been guilty of culpable negligence. *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 36 L. ed. 485; *Hays v. Chicago & N. W. R. Co.* 62 Wis. 672; *Philadelphia & R. R. Co. v. Killips*, 88 Pa. 405; *Chicago, St. L. & P. R. Co. v. Hutchinson*, 120 Ill. 587; *North Eastern R. Co. v. Wantless*, L. R. 7 H. L. 12; *Wheelock v. Boston & A. R. Co.* 105 Mass. 203; *Eddy v. Powell*, 49 Fed. Rep. 814, 4 U. S. App. 259.

With reference to the further contention of counsel,—that the plaintiff voluntarily assumed the risk of crossing the tracks, and should be precluded from recovering on that ground,—it seems sufficient to say that the rule invoked has no application to the present case. As the jury found that the plaintiff exercised ordinary care and circumspection in attempting to drive around the rear end of the train, the railway company is not released from liability for an injury occasioned by a negligent obstruction of the street, which rendered plaintiff's act necessary, merely because the plaintiff had full knowledge of the situation when he undertook to make the crossing. The doctrine of "voluntary assumption of a risk," as distinguished from contributory negligence, is generally applied in cases arising between employer and employé, where an employé, without any valid excuse for so doing, voluntarily undertakes to work with a tool or an appliance which is known to be defective, and by so doing assumes the risk of getting hurt, and thereby releases his employer from liability. It is no doubt true, as a general proposition, that a person is not entitled to claim compensation for an injury which he has sustained by voluntarily encountering a known danger, which there was no occasion to encounter, and that might as well have been avoided. But this general proposition must be accepted with the qualification that where one negligently places an obstruction in a public street, which occasions an injury to a traveler upon the highway, he will not be absolved from liability to the injured party merely by showing that the

latter had knowledge of the obstruction before the injury was sustained. In all such cases, to relieve the wrongdoer from liability for the injury, it must be made to appear that the injured party failed to exercise ordinary care in attempting to pass by the obstruction at all, or in the manner in which the attempt was made. The streets and sidewalks of large towns and cities are frequently obstructed to some extent, and it is not an uncommon occurrence to find defects therein. People who reside in such places often have occasion to travel over defective streets, and to drive around temporary obstructions that are found in the public thoroughfares; and they cannot be expected to refrain altogether from using a street which they find it convenient or necessary to use, because it is not as safe as it might be, or wholly free from obstructions. In a given case the circumstances may be such as to justify a man in attempting to drive over a defective street, or past an obstruction therein, though in so doing he incurs some risk. It cannot be held, therefore, as a matter of law, that a person who travels over a defective street, with knowledge of the defects therein, or who drives by an obvious obstruction in a public thoroughfare, thereby assumes the risk of injury, and is precluded from recovering against one who is responsible for the defect, or who has negligently caused the obstruction. The better view is that a person is not deprived of the right to recover damages, in such cases, unless it be made to appear that, in view of all the circumstances, he failed to exercise that degree of care which persons under similar circumstances ordinarily exercise, and was therefore guilty of contributory negligence. *Monongahela Bridge Co. v. Bevard* (Pa.) 11 Atl. Rep. 575; *Kendall v. Albia*, 78 Iowa, 241; *Millcreek Twp. v. Perry* (Pa.) 12 Atl. Rep. 149; *Dewire v. Bailey*, 181 Mass. 169, 41 Am. Rep. 219; *Montgomery v. Wright*, 72 Ala. 411, 47 Am. Rep. 423; *Gulf, C. & S. F. R. Co. v. Gasscamp*, 69 Tex. 546; *Spearbracker v. Larrabee*, 64 Wis. 573, 578; *Kelly v. New York Cent. & H. R. R. Co.* 9 N. Y. Supp. 90; *Beach, Contrib. Neg.* § 87. From what has been said, it follows that no error was committed by the circuit court in refusing the several instructions to which we have heretofore referred.

It is next insisted that the trial court erred in refusing to charge, as it was requested to do, that there was no evidence that the railway company "unnecessarily blocked the crossing, nor for an unreasonable or unlawful length of time." In support of this contention, it is claimed that the court should have declared, as a matter of law, that under the circumstances disclosed by the testimony the railway company had an undoubted right to obstruct travel on First avenue for the length of time that it appears to have occupied the crossing on the morning of the accident, and that there was no evidence tending to show that the company was guilty of any fault or neglect. It is not claimed, however, and the record does not disclose, that there was any local law or ordinance of the city of Cedar Rapids, then in force, which permitted the company to halt its trains on First avenue, or to occupy the crossing for any greater length of time than would ordinarily be consumed in moving a

train of cars across the street. The contention on the part of the railway company that it had the right to stop its trains on the crossing, and to temporarily obstruct travel, seems to be founded altogether on the fact that it had been authorized to lay its tracks for the movement of its trains in and along Fourth street and across First avenue. But as the streets of a city are primarily designed for the use of persons who have occasion to pass over them, either on foot or with vehicles, it cannot be inferred that a license to lay a railway track across a street in a large city or town carries with it the right to use the crossing for the purpose of standing trains of cars thereon for such period as happens to suit the convenience of the railway company, or to use the highway as a depot yard. We would not be understood as holding that a railway company cannot, under any circumstances, lawfully halt a train across a public thoroughfare, over which it has been permitted to lay its tracks, so as to obstruct travel thereon. A case might be supposed where it would, no doubt, be justified in so doing. But when a railway company assumes to stop a train across a public street in a large town or city, without express authority for so doing, it must be prepared to show, as against one who has sustained a special injury by the obstruction of the street,—especially if it is a street that is heavily burdened with traffic,—that there was some overweighing necessity which rendered the blockade justifiable. And, according to well established rules, the issue as to whether a street was rightfully obstructed, should be submitted to the jury, if the circumstances attending the blockade are such that reasonable persons might entertain different views as to whether the action of the company was justifiable. *Gahagan v. Boston & L. R. Co.* 1 Allen, 190, 79 Am. Dec. 724.

In the case at bar the evidence tended to show that First avenue, where it is crossed by the defendant company's tracks, was more heavily burdened with traffic than any other street in the city of Cedar Rapids. The blockade occurred in the daytime, during business hours, and may have lasted six or seven minutes, and possibly longer. The engine of the passenger train had stopped in front of the depot, a short distance east of a switch, so that it might move through the switch to an adjoining track, and pick up a mail car. This left the rear end of the train on the crossing, which it effectually blockaded for some 60 or 70 feet. In view of these facts, we are not prepared to say that all reasonable persons would necessarily conclude that the railway company was without fault; that it exercised its right of transit across the street in a reasonable manner, and with due regard for the rights of the public. It seems to have been using the highway, when the accident occurred, as a depot yard,—to stand its cars, and to make up its train,—and it can hardly be contended that, under a license to lay its tracks across the street, it could lawfully devote the highway to such uses. Nor was it a valid excuse for the obstruction of the street that the depot had been located at the corner of Fourth street and First avenue, and that trains coming from the east, when halted at the station,

would necessarily project to some extent into the avenue. It was the defendant's duty to so locate its depot that trains could be halted thereat without obstructing travel on the public thoroughfares, and it cannot plead the faulty location of its depot or switches as a justification for incommoding the public. *State v. Morris & E. R. Co.* 25 N. J. L. 441; *State v. Chicago, M. & St. P. R. Co.* 77 Iowa, 448, 4 L. R. A. 298; *Jones v. Housatonic R. Co.* 107 Mass. 264.

We are therefore constrained to hold that the issue concerning the negligence of the railway company was properly submitted to the jury, and that no error was committed in refusing the instructions to which we have last above referred.

With respect to the suggestion that the injuries complained of were immediately occasioned by the sudden shying of the horse which the plaintiff was driving, it is only necessary to say that the shying of the horse cannot be regarded as the sole, proximate cause of the injury. The obstruction which had been placed in the highway directly contributed to the accident, and the jury was justified in so finding. *Andrews v. Mason City & Ft. D. R. Co.* 77 Iowa, 672; *Skjeggervud v. Minneapolis & St. L. R. Co.* 38 Minn. 56; *Corey v. Northern Pac. R. Co.* 32 Minn. 457.

The result is that *the judgment of the Circuit Court must be affirmed*, with costs; and it is so ordered.

MISSOURI SUPREME COURT (In Banc).

William T. HICKMAN, *Respt.*,

v.

CITY OF KANSAS, *Appt.*

(.....Mo.....)

1. A constitutional provision that property shall not be damaged for public use without compensation is self-enforcing.

2. A statutory remedy for a constitutional right to damages in a condemnation case cannot be made exclusive, where the owner of the property is given no power to initiate such proceeding or to enforce payment after the damages are assessed.

3. Damage occasioned by establishing a grade in a street on first raising the grade above the natural surface, as well as damage by

NOTE.—Damage to abutting owner by first grading and improvement of street.

Prior to the existence of constitutional or statutory provisions upon the subject the rule had become firmly established that in the absence of negligence or trespass a city could change the grade of its streets at pleasure without liability to abutting owners for the consequential injuries thereby inflicted upon them. See *note to Seiden v. Jacksonville (Fla.)* 14 L. R. A. 870. And this rule with some few exceptions was held to apply to the original establishment of a grade and bringing the surface to such grade. In fact, as will appear from cases cited below, there has been some tendency to discriminate against the original establishment of grades and refuse damages in such cases where they would be allowed in cases of change of grade.

In England no distinction seems to have been made so far as the common-law rule is concerned.

In *Governor & Co. of British Cast Plate Mfrs. v. Meredith*, 4 T. R. 794, the right to damages for injuries caused by the raising of the grade of a street was distinctly denied, and the accuracy of the report of *Leader v. Moxon*, 3 Wils. 461, in which such a right seems to have been recognized, is questioned.

In New York the right to damages for consequential injuries in the opening of a street was apparently recognized in *Re Furman Street*, 17 Wend. 649.

But whatever implication of that nature is to be found in that case seems to have been completely ignored in *Radcliff v. Brooklyn*, 4 N. Y. 195, 66 Am. Dec. 367, where *Re Furman Street*, is cited as denying liability for consequential damages.

And the common-law rule is nearly uniform that there is no liability for injuries caused by grading. *Simmons v. Camden*, 23 Ark. 278, 7 Am. Rep. 620; *Rome v. Omberg*, 28 Ga. 46, 78 Am. Dec. 745; *Roll v. Augusta*, 34 Ga. 326; *Snyder v. Rockport*, 6 Ind. 237; *Terre Haute v. Turner*, 36 Ind. 522; *Weis v. Madison*, 75 Ind. 241, 39 Am. Rep. 136; *Creal v. Keokuk*, 4 G. Greene, 47; *Lee v. Minneapolis*, 22 Minn. 12; 28 L. R. A.

Alden v. Minneapolis, 24 Minn. 254; *St. Louis v. Gurno*, 12 Mo. 414; *Taylor v. St. Louis*, 14 Mo. 20, 65 Am. Dec. 39; *Nebraska City v. Lamplin*, 6 Neb. 27; *Wilson v. New York*, 1 Denio, 595; *Green v. Reading*, 9 Watts, 839; *Philadelphia v. Randolph*, 4 Watts & S. 518, 39 Am. Dec. 103; *Re Levering Street*, 14 Phila. 348; *Humes v. Knoxville*, 1 Humph. 408, 24 Am. Dec. 667; *Kehrer v. Richmond City*, 81 Va. 745.

So there can be no recovery for an establishment of a grade. *Kelly v. Baltimore*, 65 Md. 171.

And this is so, although the two sides of the street are constructed at different levels with a retaining wall between them. *Yanish v. St. Paul*, 50 Minn. 518.

And the city is not liable for injury to buildings by the removal of the soil in the street by the process of grading. *Quincy v. Jones*, 76 Ill. 231, 20 Am. Rep. 243.

In Ohio, however, a somewhat different rule has been recognized. And it has been held that the city may be liable for cutting the street down to grade to the injury of buildings erected on adjoining property. *McCombs v. Akron*, 15 Ohio, 474; *Akron v. McComb*, 18 Ohio, 229, 51 Am. Dec. 453.

For the present state of the Ohio doctrine, see the cases cited below.

Liable for negligent or illegal act.

The above rule only applies, however, in the absence of negligence and when the city has acted regularly and has committed no trespass on the adjoining property.

The municipality may be liable for negligence. *Wallace v. Muscatine*, 4 G. Greene, 373, 51 Am. Dec. 181.

The city is liable if the acts were illegal. *Smith v. Cincinnati*, 4 Ohio, 514.

The city may be liable for piling dirt above a retaining wall in such a way as to crush it and cause it to fall on the property below to its injury. *Gardner v. Soranmont*, 11 Pa. Co. Ct. Rep. 574.

For bringing the road to a grade illegally established the city is liable. *Crosett v. Janesville*, 28 Wis. 320.

raising or lowering a grade previously established, must be compensated under a constitutional provision for compensation in case of property taken or damaged for public use.

4. The rule that benefits deducted in measuring damages in a condemnation case must be special and peculiar and cannot include general benefits shared in common with other property in the neighborhood instead of taking the difference between the value of the property before and after as the measure of damages, applies as well to a case of damaging as to one of taking property.
5. Damage for change of grade of a street includes the injury resulting from the raising of a portion of the street by a railroad company in obedience to the ordinance fixing the grade.
6. A person is not estopped from claiming damages because of the change of grade of a street, because after a portion of the street had been raised by a railroad company in accordance with the ordinance fixing the grade, he requested that the grading of the street might be finished.

(February 13, 1894.)

CERTIFICATE by the Kansas City Court of Appeals for the opinion of the Supreme Court of an appeal from a judgment of the Circuit Court for Jackson County in favor of plaintiff in an action brought to recover dam-

ages for injuries to plaintiff's property alleged to have been caused by the establishment of a grade for a street in front of it, which compelled plaintiff to change the grade of his lot and raise his buildings. *Affirmed.*

The facts are stated in the opinion.

Messrs. R. W. Quarles, W. A. Alderson, F. F. Rosselle, W. S. Cowherd, and James Black for appellant.

Messrs. Scarritt & Scarritt and Karnes, Holmes & Krauthoff, for respondent.

The act of the legislature in permitting a municipal corporation to damage private property first, and pay compensation therefor afterwards, is contrary to the provision of the constitution to the effect that, "until the same [compensation] shall be paid to the owner, or into the court for the owner, the property shall not be disturbed" [damaged].

There is not a word in the act relating to the ascertainment and payment of the compensation before the damage is done, but it requires in express terms that the compensation shall be ascertained and paid after the damage is done. This is in direct conflict with and repugnant to the provisions of the constitution.

Mo. Const. art. 2, § 21; *Sess. Acts 1885*, p. 49; *Blanchard v. Kansas City*, 16 Fed. Rep. 444; *McElroy v. Kansas City*, 21 Fed. Rep. 257; *Johnson v. Parkersburg*, 16 W. Va. 402, 87 Am. Rep. 779; *Chambers v. Cincinnati & C.*

There may be a recovery if the lower grade has not been properly established before the contractor proceeds to cut down the street. *Delphi v. Evans*, 38 Ind. 60, 10 Am. Rep. 12.

In *Parke v. Seattle*, 20 L. R. A. 68, 5 Wash. 1, causing abutting land to slide into the street by negligent grading was held to be a taking within the meaning of the constitution.

Damages must be paid to the abutting owner if dirt from the street is cast on his property so as to cause injury to it. *Broadwell v. Kansas*, 75 Mo. 213, 42 Am. Rep. 403.

There may be a liability for causing water to flow on the adjoining premises. *Ellis v. Iowa City*, 29 Iowa, 220.

Nevins v. Peoria, 41 Ill. 502, 30 Am. Dec. 302, held the city liable for grading a street so as to turn a stream of mud and water upon adjoining premises. And the principle in that case was followed in *Pekin v. Breerton*, 67 Ill. 477, 16 Am. Rep. 629.

The city will be liable for throwing water back on an adjoining lot if it could have been avoided by the exercise of reasonable care. *Smith v. Alexandria*, 33 Gratt. 203, 36 Am. Rep. 768.

As to the liability of a municipality for damages from surface water caused by a change of grade, see *note to Gray v. McWilliams* (Cal.) 31 L. R. A. 508.

The effect of statutes.

Statutes have been passed providing for damages for injuries for change of an established grade, which do not appear to apply to grading for the first time. *Columbus v. Hydraulic Woolen Mills Co.* 38 Ind. 435.

Under such statutes a city is not liable for consequential injuries from the grading of a street unless there is negligence. *North Vernon v. Voegler*, 103 Ind. 314.

A lotowner is not entitled to damages resulting from the original grading of a street. *Anderson v. Bain*, 120 Ind. 254.

To authorize a recovery, the change must be from an established grade. *Morris v. Council Bluffs*, 67 Iowa, 343, 56 Am. Rep. 343.

33 L. R. A.

Original grading will not give damages, under the Kansas statutes. *In re State Consol. Rapid Transit R. Co. v. Early*, 46 Kan. 197.

Injuries caused by raising or lowering the surface in repairing a street will entitle an owner to damages, under the Massachusetts statutes. *Woodbury v. Beverly*, 153 Mass. 245; *Brown v. Lowell*, 8 Met. 172; *Fernald v. Boston*, 12 Cush. 374; *Burr v. Leicester*, 121 Mass. 241.

But in *Snow v. Provincetown*, 109 Mass. 133, in which the surface of a street, which had been previously widened, was afterward raised, the court in sustaining the right to damages says the damages paid for the widening no doubt included compensation for changes in the surface of the street injurious to the owners, and which were contemplated as necessary in its original construction.

As far as acts of the city commissioners are concerned, the only damages for change of grade that can be allowed are those rendered necessary by the original construction. *Murphy v. Boston*, 130 Mass. 419.

There is no liability except for a change of previously established grade. *Re Germantown Ave. Change of Grade*, 15 Phila. 413.

Under the Rhode Island statutes, there is liability for damages caused by changing grade, but not by establishing a grade or bringing the road to grade. *Aldrich v. Providence Board of Aldermen*, 12 R. I. 241; *Gardiner v. Johnston*, 16 R. I. 94.

The New York act providing damages for injuries resulting from a change of grade does not apply to a city. *Folmsbee v. Amsterdam*, 66 Hun. 214.

Constitutions giving damages for property injured or damaged.

Under constitutional requirements for damages, in case of property injured or damaged for public use, compensation may be required in case of injuries caused by grading. *Atlanta v. Green*, 97 Ga. 386; *Moore v. Atlanta*, 70 Ga. 611.

Giving compensation for property damaged covers the case of damage inflicted by bringing the

Railroad, 69 Ga. 320; *Thompson v. Grand Gulf R. & Bkg. Co.* 3 How. (Miss.) 240, 34 Am. Dec. 81; *Oakley v. Williamsburgh*, 6 Paige, 262, 8 L. ed. 978; *Walther v. Warner*, 25 Mo. 277; *Prosser v. Chicago, R. I. & P. R. Co.* 57 Mo. 256; *State v. Lubke*, 15 Mo. App. 164; *Vanderlip v. Grand Rapids*, 8 L. R. A. 247, 78 Mich. 522.

The court laid down the proper measure of damages.

Mississippi River Bridge Co. v. Ring, 58 Mo. 491; *Springfield v. Schmook*, 68 Mo. 395; *St. Louis & St. J. R. Co. v. Richardson*, 45 Mo. 466; *Sheehy v. Kansas City Cable R. Co.* 94 Mo. 574; *Quincy, M. & P. R. Co. v. Ridge*, 57 Mo. 600; *Wyandotte, K. C. & N. W. R. Co. v. Waldo*, 70 Mo. 629; *Lee v. Tebo & N. R. Co.* 53 Mo. 179; *Pacific Railroad v. Chrystall*, 25 Mo. 544; *Newby v. Platte County*, 25 Mo. 275; *Taylor v. Kansas City Cable R. Co.* 38 Mo. App. 671.

Damages may be claimed for the grading of a street to the first established grade.

Werth v. Springfield, 78 Mo. 110.

If an impediment or defect exists in the remedy marked out by the legislature by reason whereof that remedy is of no avail or is inadequate to the suitor it is not the exclusive remedy. It is no remedy.

Jamison v. Springfield, 53 Mo. 224; *Johnston v. Louisville*, 11 Bush, 527; *Merriam v. Moody*, 25 Iowa, 170; *Ryan v. Gallatin County*, 14 Ill. 83; *Dunlap v. Gallatin County*, 15 Ill. 9.

Plaintiff should enforce his common-law rem-

edy and not seek relief by mandamus against the common council and mayor of the city.

People v. New York, 25 Wend. 690; *State v. Coleman*, 33 Mo. App. 470; *American Casualty Ins. & Security Co. v. Fyler*, 60 Conn. 448.

If the natural surface of the ground has been used or improved for street purposes and that surface or grade is changed by authority of the city and private property is damaged thereby, the municipality is liable for such damage.

Bloomington v. Pollock, 33 Ill. App. 183, 141 Ill. 846; *Schaller v. Omaha*, 28 Neb. 825; *Harmon v. Omaha*, 17 Neb. 548, 52 Am. Rep. 420; *Ft. Worth v. Howard*, 3 Tex. Civ. App. 537; *Werth v. Springfield*, 78 Mo. 110.

The damage to property is placed upon the same basis as the value of the property taken, and neither can be done without compensation first made.

McElroy v. Kansas City, 21 Fed. Rep. 257.

This rule as to the measure of damages is not only recognized as a fundamental principle by our courts, but by the legislature and people as well.

Neenan v. Smith, 50 Mo. 525; *Farrar v. St. Louis*, 80 Mo. 394; *Allen v. Krenning*, 28 Mo. App. 569; *Kansas City v. Morton*, 117 Mo. 446.

Brace, J., delivered the opinion of the court:

This is an action, commenced in the circuit court of Jackson county, for damages

street to grade. *Beardon v. San Francisco*, 66 Cal. 492, 56 Am. Rep. 109.

Damages to property by grading a street are within a constitutional provision that property shall not be damaged without making compensation to the owner. *Blanchard v. City of Kansas*, 5 McCrary, 217, 16 Fed. Rep. 444.

Injuries done in bringing the street to grade for the first time must be paid for under a constitution prohibiting the damaging of property without compensation. *Bloomington v. Pollock*, 141 Ill. 346, affirming 38 Ill. App. 133.

The city is liable if it permits a railroad company to fill up the street so as to make access to an adjoining lot difficult. *Pekin v. Winkel*, 77 Ill. 56.

Under the constitution of Nebraska, damages caused by bringing the street to the first established grade are recoverable. *Harmon v. Omaha*, 17 Neb. 546, 52 Am. Rep. 420; *Schaller v. Omaha*, 28 Neb. 825.

Damages are recoverable if the road does not pass over plaintiff's land but merely alongside of it, if by reason of bringing the road to grade his property is injured. *Hutchinson v. Parkersburg*, 25 W. Va. 226.

Establishing grade on paper.

How far the mere establishment of a grade will entitle to damages does not appear to be definitely settled. The general language of some of the cases would seem to imply that the damages are payable when the grade is established.

When property is damaged by establishing the grade of a street, it is damaged for public use within the meaning of the Missouri constitution. *Werth v. Springfield*, 78 Mo. 170.

Although that statement is a dictum in the *Werth* Case, it is recognized in *Sheehy v. Kansas City Cable R. Co.* 94 Mo. 574; *Gibson v. Owens*, 115 Mo. 258.

When property is damaged by establishing the grade of a street, it is damaged for public use. *McElroy v. Kansas City*, 21 Fed. Rep. 257.

The charter of Newark provides for damages in 2 N. J. R. A.

the case of the establishment of a grade. *Rock v. Newark*, 33 N. J. L. 129.

A constitution prohibiting the damaging of property without compensation applies to the original establishment of the grade. *Hammond v. Harvard*, 31 Neb. 635.

Some of the cases go so far even as to state that the damages must be settled at the time the land is taken for the street for whatever injuries will be occasioned by bringing the street to a probable grade, although no grade has been designated at the time.

In *Montgomery v. Townsend*, 30 Ala. 489, 60 Am. Rep. 112, it is held that a requirement of compensation for property taken, injured, or destroyed, does not apply to the changes which must have been in contemplation of the parties when the property was taken or dedicated, but only applies to extraordinary changes which may not be due to the natural formation of the surface nor to the mode of original construction as then deemed sufficient.

The damages for opening and grading must be assessed at the same time. *Pusey v. Allegheny*, 33 Pa. 522.

Cutting to the original grade is covered by the compensation for the taking. *Van Ripper v. Essex Public Road Board*, 33 N. J. L. 23.

So under the Massachusetts statutes no recovery can be had for bringing a street to the established grade, as it is presumed that they were a ward at the time the street was laid out. *Brady v. Fall River*, 121 Mass. 262.

When land is taken for a street, abutting owners are entitled to damages for such changes in the surface as must necessarily have been contemplated on the construction of the public street. *Ryan v. Boston*, 118 Mass. 242; *Geraghty v. Boston*, 120 Mass. 416.

The city in taking the property is presumed to compensate the abutting owner for necessary change of grade. *Fellowes v. New Haven*, 44 Conn. 240, 26 Am. Rep. 447.

to plaintiff's property occasioned by a change of the grade of Ninth street, in said city, in which the plaintiff obtained judgment for \$1,000, from which the defendant appealed to the Kansas City court of appeals, and the case is certified here, under the constitutional amendment, as involving the decision of a constitutional question. Plaintiff's property, which he claims was damaged by the action of defendant, abuts on Ninth street. Previous to the extension of the city limits in 1885, Ninth street was a county road, which had been graded and used as such for many years, both sides of which, in the vicinity of plaintiff's property, had been built up with residences and stores for a considerable distance beyond the city limits. The plaintiff bought his property in 1883, and the next year built upon and improved it with reference to the then existing grade. In October, 1884, the Kansas City & Independence Railway Company obtained the consent of the county court to build and operate a cable street railway on said road or street; the court, in its order, providing that the company should build its line of railway upon the grade of the street as then maintained, and should in no wise disturb the surface of the street in such manner as to impair its usefulness, or prevent the flow of

water along and across the same. In the latter part of 1885 the limits of the city were extended so as to take in that part of said road or street in front of plaintiff's property. By ordinance approved April 15, 1886, the city changed the grade of said street in front of plaintiff's property to the present established grade, which raised the grade in front of said property about 8½ feet. In the mean time all the rights and franchises of the Kansas City & Independence Railway Company, which had never availed itself of the privilege aforesaid granted by the county court, passed to the Kansas City Cable Railway Company, which latter company, soon after the passage of said ordinance, constructed the line of road on the grade established by said ordinance, filling in the street in the center thereof up to said grade to the width of about 20 or 23 feet. Afterwards, the city, under an ordinance approved November 19, 1886, filled up and graded the street on each side of this roadbed to the full width of the street (50 feet). The evidence tended to show that after the railroad company constructed its road, and before the city finished the grading, the street in front of plaintiff's property was left in such a condition as to render it impassable, and to necessitate the completion of the grading by the city; that the

Under the constitutional provision for compensation for property damaged, the abutting owner cannot recover for injuries caused by a reasonable grade or improvement of a street in a careful manner. *Denver v. Bayer*, 7 Colo. 113.

But damages may be recovered if the grading is an act separate and distinct from the opening of the street. *Jones v. Bangor*, 144 Pa. 633.

And the fact that a grade had been fixed at the time the street was opened will not prevent the recovery of damages for bringing it to the grade, if the street was opened on another grade which was recognized and followed for a number of years afterward. *Cambridge v. Middlesex County Comrs.* 125 Mass. 529.

What is regarded as establishing a grade.

The establishment of a grade requires an order of the common council involving a general plan. *Mattingly v. Plymouth*, 100 Ind. 545.

Use of an adopted country road for thirty years at its old grade may establish that to be the grade of the city street, so that it cannot be changed without paying damages. *Youngstown v. Moore*, 30 Ohio St. 333.

Purchasing a turnpike road by a city is not an adoption of the grade of the road. *Re German-town Ave.* 14 Phila. 351.

Merely working streets or otherwise improving them is not sufficient to establish a grade. *Kepple v. Keokuk*, 61 Iowa, 663, 2 Am. & Eng. Corp. Cas. 447.

A city need not pay damages for change from grade established by the town prior to its becoming a city. *Wabash v. Alber*, 38 Ind. 423.

Change from natural surface.

Injuries by change from the natural grade are within the meaning of a constitutional provision giving damages for property injured. *New Brighton v. United Presby. Church*, 96 Pa. 331; *Hendrick's App.* 103 Pa. 353.

There is a liability for changing the grade from the natural surface. *Davis v. Missouri Pac. R. Co.* (Mo.) Dec. 23, 1893.

Under the New York act, the fact that the ex- 23 L. N. A.

isting grade was that of a highway which was taken by the municipality as one of its streets, and that the only change made was from the grade of the highway, does not defeat the right to compensation. *Bartlett v. Tarrytown*, 52 Hun, 380.

The statute does not require the abutting owner, damaged by change of grade, to show that a grade had been previously established by the municipality in order to entitle him to recovery. *Bartlett v. Tarrytown*, 55 Hun, 432; *McCall v. Saratoga Springs*, 121 N. Y. 704, affirming 29 N. Y. S. R. 639; *Re Church of Our Lady of Mercy*, 33 N. Y. S. R. 307.

Damages may be recovered for change of the natural physical grade of the old highway. *O'Brien v. Philadelphia*, 150 Pa. 550.

Damages may be given for change of surface, though no grade had previously been established. *Ft. Worth v. Howard*, 3 Tex. Civ. App. 537.

Building after establishment of grade.

There can be no recovery for damages to houses in cutting to the grade established before they were erected. *Groff v. Philadelphia*, 150 Pa. 594.

The Ohio doctrine.

As shown above, *McCombs v. Akron*, 15 Ohio, 474 Ohio at first refused to follow the general rule refusing compensation for injury to property by grading. But subsequent decisions reached the same result as those which followed the rule and Ohio must now be classed among the less progressive states. It was held that the owners of unimproved lots cannot recover, and those making improvements must do so with view to a reasonable and proper grade. And no recovery can be had for injuries, if the city uses reasonable care in bringing the street to a reasonable grade. *Crawford v. Delaware*, 7 Ohio St. 459.

Subsequently the doctrine was established that the owner of unimproved property improves it at his peril. *Akron v. Chamberlain Co.* 34 Ohio St. 323, 32 Am. Rep. 307; *Cincinnati v. Penny*, 21 Ohio St. 503, 8 Am. Rep. 72; *McGee v. Avondale*, 31 Ohio L. J. 163.

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raising of the grade necessitated the filling of plaintiff's lot, the raising of his house and other structures, and the readjustment of all of his improvements to conform to the established grade, at a cost of about \$1,000. The court, after refusing certain instructions asked by defendant, among them two instructing the jury that on the pleadings and evidence the plaintiff could not recover, submitted the case to the jury on other instructions, which will be noted, as far as necessary, in the course of the opinion.

1. By the Constitution of 1875 it is provided "that private property shall not be taken or damaged for public use without just compensation. Such compensation shall be ascertained by a jury or board of commissioners of not less than three freeholders in such manner as may be prescribed by law, and until the same be paid to the owner, or into court for the owner, the property shall not be disturbed, or the proprietary rights of the owner therein divested." Const. art. 2, § 21. Prior to the adoption of this Constitution of 1875 (although the doctrine was vigorously attacked in *Thurston v. St. Joseph*, 51 Mo. 510, in the opinion of Judge Adams), it was uniformly held that any damage resulting to an abutting property owner from a change of grade was *damnum absque injuria*, for which the municipality was not liable unless the injury could have been shown to have resulted from the negligent or improper manner in which the work was done. *St. Louis v. Gurno*, 12 Mo. 415; *Taylor v. St. Louis*, 14 Mo. 23, 55 Am. Dec. 89; *Hoffman v. St. Louis*, 15 Mo. 851; *Schaltner v. City of Kansas*, 53 Mo. 103; *Imler v. Springfield*, 55 Mo. 119, 17 Am. Rep. 645; *Wegmann v. Jefferson*, 61 Mo. 55; *Swenson v. Lexington*, 69 Mo. 157; *Stewart v. Clinton*, 79 Mo. 603. To uproot this doctrine, and provide for compensation when property is damaged as well as when it is taken for public use, the eminent domain clause in the Constitution of 1865 was amended by the Constitution of 1875 to read as quoted, and since it has been considered the settled law in this state that "when property is damaged by establishing the grade of a street, or by raising or lowering the grade of a street previously established, it is damaged for public use, within the meaning of the constitution." *Werth v. Springfield*, 78 Mo. 10; *State v. City of Kansas*, 89 Mo. 34; *Householder v. City of Kansas*, 83 Mo. 488; *Sheehy v. Kansas City Cable R. Co.* 94 Mo. 574; *Gibson v. Owens*, 115 Mo. 258. It is also well-settled law that this article of the constitution gives an absolute right, and is self-enforcing; and, although the legislature may have enacted no law providing a mode for the ascertainment and payment for the compensation provided for, resort may be had, by the party entitled to the right, to any common-law action which will afford him adequate and appropriate means of redress. *Householder v. City of Kansas*, 83 Mo. 488; *Sheehy v. Kansas City Cable R. Co.* 94 Mo. 574; *Keith v. Bingham*, 100 Mo. 300.

2. The defendant's first contention is that this action, commenced on the 19th day of September, 1887, is not maintainable, for the reason that by a law then in force, being an

act entitled "An act to provide for the ascertainment of, and payment for, damages done by municipal corporations to private property for public use, as directed by section 21, article 2, of the State Constitution," approved March 26, 1885 (Sess. Acts 1885, p. 47), amended by an act approved March 31, 1887 (Sess. Acts 1887, p. 37), provision was made for the recovery of damages in cases like the one in hand, and that by section 8 thereof it was provided that "the above proceedings shall be exclusive of all other remedies in the courts of this state for the recovery from any municipal corporation of damages done to any private property for public use, within the meaning of section 21, article 2, of the State Constitution." The rule is that if the statute gives a remedy in the affirmative, without containing any express or implied negative, for a matter which was actionable at common law, this does not take away the common-law remedy, but the party may still sue at common law as well as upon the statute. In such cases the statute remedy will be regarded as merely cumulative. But where a new right or means of acquiring it is given, and an adequate remedy for violating it is given, in the same statute, then the injured parties are confined to the statutory remedy. *State v. Bittinger*, 55 Mo. 596; *Baker v. Hannibal & St. J. R. Co.* 86 Mo. 543; *Soulard v. St. Louis*, Id. 546. As we have seen, the right which plaintiff had in this case was not a common-law right. It was a new right; not a statutory right, strictly speaking, but a constitutional right,—to have his damages ascertained and paid to him, or into the court for his use, before his property was disturbed. Unquestionably, the legislature might have provided a mode of procedure for ascertaining and paying the owner his damages, under the constitutional provision giving the right, that would not have been exclusive; but the Act of 1885-87 did not undertake to enforce this constitutional right. Its whole scope was an attempt to provide a remedy for its invasion. The constitution, *ex proprio vigore*, has already provided the owner remedies through the courts of its creation for the protection of that right. These courts were at all times open to him, either to restrain the municipality from damaging the property until compensation therefor is ascertained and made (*Gates v. Kansas City Bridge & Terminal R. Co.*, 111 Mo. 28), or having damaged it, to compel the municipality to respond with the amount thereof, ascertained by such courts in a constitutional manner (cases cited *supra*). While it may be conceded that it was in the power of the legislature to provide an exclusive special remedy for determining the compensation for the property damaged within the meaning of the constitution, and for securing the payment thereof to its owners, yet such remedy, in order to be exclusive, must be commensurate with the constitutional right, and the remedies which, by force of the constitution, the owner is entitled to for its protection. The mere declaration of the legislature could not make the remedy provided by the act a substitute for the remedies to which the

owner was entitled under the constitution, unless, in point of fact, it was an adequate substitute. Leaving out of view entirely the injunctive remedy, by which the owner had a constitutional right to have his compensation measured and paid before the damages were inflicted, and for which the statute of 1885-87 undertook to substitute no remedy whatever, was the proceeding therein provided for him to obtain compensation for the damages suffered an adequate substitute for the remedy afforded him by an action for such damages, under the constitution, independent of the statute? In view of the facts that section 8, which contains the legislative declaration aforesaid, was left out in the revision of 1889, and the exclusive character of the act removed by a new section (1821, Rev. Stat. 1889), it will be necessary to point out only one or two particulars in which the enactment failed to come up to the measure of an adequate substitute for the owner's remedy under the constitution. The act does not give the owner the right of initiating the proceedings or process, or other means of obtaining payment, after the amount of his damages has been ascertained. It is true the original act did provide that the application to the circuit court for the ascertainment of the amount of damages by petition might be made, "either by the city authorities, or the owner of the property for which damages are claimed," but the Amendment of 1887 (page 38) required that, before the filing of such petition, the city authorities must first define a benefit district. It is also true that section 7 of the original act did provide for execution against the municipality in the event that damages were not paid within six months after they were finally ascertained by the court; but this section was repealed in the amended Act (page 39). Thus, the owner was left without the power of initiating the statutory proceeding for the ascertainment of his damages, and without process to compel their payment after they were ascertained; and although the plaintiff in this case, by reason of the fact that no benefit district was ever defined by the defendant, was deprived of the poor privilege of testing its efficacy for his relief, yet this statute is invoked to defeat his action, secured to him by the original law of the state. That under it the city might have had the plaintiff's damages ascertained might be conceded; but having failed to do so, and to provide the means to pay the same, it cannot be permitted to interpose this statute and its own neglect to defeat his action. *Elgin v. Eaton*, 88 Ill. 535, 25 Am. Rep. 412; *Lafayette v. Wortman*, 107 Ind. 404; *Jamison v. Springfield*, 58 Mo. 224.

8. It is next contended that, as the effect of the ordinance establishing the grade of Ninth street was for the first time to raise the grade above the natural surface, the defendant is not liable for any damages that may have resulted from the establishment of such grade; and in support of this contention Dillon on Municipal Corporations, and other cases from our sister states, are cited in support of the doctrines favored by the learned

author in section 9955 (4th ed.) of his valuable work, where he says: "It seems to us that, on principle, the mere provision of the constitution imposing a liability for property damaged for public use does not create a liability on the part of the municipality for reducing the natural surface of the street, in the course of its normal and ordinary improvement for street purposes proper, to a grade line for the first time established." The instruction of the court on this subject was in harmony with what has been understood to be the Missouri doctrine, as announced and recognized in the cases cited *supra*,—that the municipality is liable for damage occasioned by establishing a grade, as well as for damage occasioned by raising or lowering a grade previously established. In *Davis v. Missouri Pac. R. Co.* (decided Dec. 28, 1898, in division No. 1, not yet officially published), 24 S. W. Rep. 777, the precise question was presented, and, after mature consideration of the subject and a discussion of the authorities, the conclusion of that division of the court was expressed by Macfarlane, J., as follows: "We are of the opinion, therefore, that the rule which allows compensation for consequential damages to property caused by a material change of grade from the natural surface is the most equitable to the property owners, and best conserves the public interest; and this rule is generally adopted under similar constitutional provisions,"—citing cases from other states, to which may be added *Groff v. Philadelphia*, 150 Pa. 594. Without going over this ground again, it is sufficient to say that we adhere to the doctrine as it has hitherto been recognized by this court, and so recently and directly in *Davis v. Missouri Pac. R. Co.*, *supra*, and hold that the court committed no error in predicated a right of recovery thereon.

4. It is next urged that the court committed error in the instructions on the measure of damages, which were, in substance, that the plaintiff should be allowed such a sum as would compensate him for the damage sustained by him by reason of the grading of the street in front of his premises, less any special and peculiar benefits to the property resulting from such grading, in which, however, was not to be included general benefits shared in common with other property in the same neighborhood. It is insisted for appellant that the true measure of damages in such cases is the difference between the value of the property before, and the value after, the change of grade,—a rule that would charge the owner with general, as well as special, benefits, and which has received the support of the courts in some of the states, as appears by the cases cited in the brief of counsel for appellant. When the Constitution of 1875 was adopted, it was settled law in this state that, in adjusting the compensation to be made to owners of land taken for public use, the benefit to be deducted from the damage which the owner sustains by such taking is the direct and peculiar benefits that would result in particular to the owner's land not taken, and not the general benefit that such land would de-

rive, in common with the land of other owners, in the neighborhood, from the public use for which it was taken. *Newby v. Platte County*, 25 Mo. 258; *Louisiana & F. Pl. Road Co. v. Pickett*, 25 Mo. 585; *Pacific Railroad v. Chrystal*, 25 Mo. 544; *St. Louis & St. J. R. Co. v. Richardson*, 45 Mo. 466; *Lee v. Tebo & N. R. Co.* 53 Mo. 178; *Quincy, M. & P. R. Co. v. Ridge*, 57 Mo. 600; *Hosher v. Kansas City, St. J. & O. B. R. Co.* 60 Mo. 308. In the decisions of these cases the constitutional provision applied reads: "That no private property ought to be taken or applied to public use without just compensation." Const. 1820, art. 13, § 7; Const. 1865, art. 1, § 16. While a slight change in the phraseology was made in the Constitution of 1875, the only change in the meaning was effected by inserting the word "damaged," and coupling it with the word "taken," and thereafter "just compensation" was to be made for property "damaged," as theretofore it had been made for property "taken." The compensation for property damaged was made just as broad, and no broader or narrower, than compensation for property taken. The standard for the measurement of the one had been already settled by judicial action, and by the same standard is the other to be measured, under the Constitution of 1875. In the language of Brewer, J., in *McElroy v. Kansas City*, 21 Fed. Rep. 267: "The damage to property is placed upon the same basis as the value of property taken, and neither can be done without compensation first made. In other words, uniting 'property damaged' with 'property taken' in the same clause, and subject to the same prohibition, places them in the same category as to judicial action. . . . When the constitutional convention met, the rule of protection against the taking of private property had long been settled, and must have been familiar. It did not attempt to prescribe two rules. It did not even make two enactments, but simply added 'property damaged' to 'property taken'; and for the courts to now hold that under the same language two rules were prescribed is to create a distinction with no just foundation, and would be mere judicial legislation." In the course of the establishment by this court of the rule in regard to the benefit to be taken into consideration in determining the compensation to be made to the landowner, and since, it has, from time to time, been noted in the opinions that a different rule obtained in some other jurisdictions. But this court has consistently maintained its position from the beginning, through a long line of decisions, down to the present day. *Wyandotte, K. C. & N. W. R. Co. v. Wuldo*, 70 Mo. 629; *Combs v. Smith*, 78 Mo. 82; *Allen v. Wabash, St. L. & P. R. Co.* 84 Mo. 646; *Springfield & S. R. Co. v. Calkins*, 90 Mo. 558; *Daugherty v. Brown*, 91 Mo. 26; *Kansas City, C. & S. R. Co. v. Story*, 96 Mo. 611; *McReynolds v. Kansas City, C. & S. R. Co.* 110 Mo. 484; *Ragan v. Kansas City & S. R. Co.* 111 Mo. 456; *Spencer v. Metropolitan Street R. Co. (Mo.)* 22 L. R. A. 668; *Kansas City v. Morton*, 117 Mo. 448. These cases show that the rule obtains, and has been applied in the same manner, regardless of the

character of the public use for which the property of the owner was taken or damaged, whether for the purposes of a railroad, a county road, or a street. It has, in fact, become a fundamental rule, universally recognized by the legislature, by the courts, and the people, in the measurement of damages sustained by the landowner for the public benefit. We have heretofore been urged to make a distinction in the measure of damages between cases wherein the land of the owner was appropriated and damaged without being previously condemned for public use, and when the damages were to be ascertained in such proceedings; but the court would have none of it, replying that "the damage was the same, and the compensation should be the same." *McReynolds v. Kansas City, C. & S. R. Co.* and *Ragan v. Kansas City & S. R. Co. supra*; *Doyle v. Kansas City & S. R. Co.* 113 Mo. 28. We have also been pressed to make a distinction between a case in which a part of a tract of land is taken and one in which the tract is damaged only; it being insisted that in the latter case the damage would only be the diminution in the actual pecuniary or market value, to obtain which all benefits, whether general or special, would have to enter into the calculation. In *Kansas City v. Morton, supra*, which was a proceeding to assess the damages which would result to an abutting proprietor from the grading of an alley, division No. 1, through Macfarlane, J., replied that, "while the rule had been thus declared in some of the states under constitutional and charter provisions similar to ours, we do not think it consistent with our decisions. Our constitution secures to the property owner the right to compensation when his property is damaged in the same terms as when it is actually invaded and taken. No reason is seen why the rule for assessing the benefits should be different." And in *Spencer v. Metropolitan Street R. Co., supra*, which was an action for damages to an abutting lot owner, division No. 2, speaking through Burgess, J., said: "While contrary opinions have been maintained with great ability in courts of other states, and by elementary writers of much distinction, the rule in this state is well established that, in cases of this kind, in estimating benefits, the jury should be restricted, in estimating such benefits, to peculiar and direct benefits or increase of value as result to the lots in controversy, in which other lots in the same locality do not participate." It would be a work of supererogation to add anything to what has been so well said, in many of the cases cited, in support of the justice and reasonableness of the Missouri rule on this subject, or to further show that the case in hand is within its principle. The rule is founded on the broad and equitable doctrine that every citizen should share the common benefits of a government whose common burden he is required to bear; in the spirit of which axiom, while we maintain, on the one hand, that the abutting landowner whose property is damaged for the public use should have only such damages as are peculiar to his property, on the other hand we maintain, as illustrated in the cases cited,

that in ascertaining damages it shall not be reduced by benefits other than those that are peculiar to his property. The vitality of the rule in either case is to be found in its inherent equity, and furnishes a sufficient reason for its adoption and maintenance. The instruction of the court upon the measure of damages in the present case was in harmony with this rule, and therefore not erroneous.

5. The railroad company, under its license from the county, had authority to lay its track upon the road. When the city extended its limits, it succeeded to the relation formerly sustained by the county to the road, and took municipal jurisdiction of the territory, subject to all rights acquired under its predecessor. When thereafter the city established the grade of the street, as it had the power to do, the only way possible for the railway company to exercise its right was to lay its tracks in conformity to such grade. In bringing their roadbed to that grade for the purpose of laying their tracks, they were simply obeying the command of the municipal government expressed by an ordinance. The damage for which plaintiff recovered was for the injury to his property resulting from the raising the grade in front of his

property by the employes of the railroad company and those of the city, in compliance with the requirement of that ordinance. The damage was the result of the exercise of the city's power, for which it is liable. *Sheehy v. Kansas City Cable R. Co.* 94 Mo. 574, and cases *supra*. The *Sheehy Case* is cited by counsel for appellant in support of the measure of damages for which they contend, but it is not at all in point for that purpose, and we know of no Missouri case that does give it support, except *Taylor v. Kansas City Cable R. Co.* 88 Mo. App. 668, the ruling in which, upon that question, we do not approve. The fact that the plaintiff, after the grading of its railroad had been completed by the cable company, requested that the grading of the street might be finished, ought not to estop him from recovering damages for his injury. If any error is to be found in the instructions upon this issue, it is in favor of the defendant. We find no error in the record calling for a reversal, and *the judgment of the Circuit Court is affirmed.*

All concur.

Rehearing denied.

ILLINOIS SUPREME COURT.

Mary F. VAN MATRE, *Appt.*,

v.

John SANKEY *et al.*

Henry L. GLOS *et al.*, *Appts.*,

v.

Caroline C. SANKEY.

(148 Ill. 538.)

1. The jurisdiction of proceedings for the adoption of a child in another state cannot be attacked collaterally on the ground that the adopting parent had only a temporary residence in that state, where this question was passed upon by the court in the adoption proceedings, and also on subsequent petition to set aside the decree of adoption.
2. A determination upon a direct proceeding by the court of last resort of the state that the trial court had jurisdiction to enter a decree of adoption must be given full faith and credit in courts of another state, which will preclude impeachment for irregularities.
3. The jurisdiction of a court in another state to hear an appeal cannot be collaterally questioned, where it rendered a judgment of confirmation on the appeal.
4. The character of a proceeding for the revocation of an adoption is not so summary as to prevent the decision from being conclusive upon the rights of the parties in the

courts of another state, if all the parties interested were before the court, and with every material fact before it the court proceeded to adjudicate the questions raised upon their merits.

5. The fact that a child adopted was not personally present in court, or notified of the proceeding, where this is not required by statute, will not be ground for collateral attack on the decree of adoption in another state.
6. Real property may descend to a child, who, by adoption in another state, has become there the lawful heir of the owner of the property.
7. Diligent inquiry, required by statute for the owners of land sold for taxes before the expiration of the time for redemption is not shown by affidavits of diligent inquiry "in the county" where the land is situated.

(October 26, 1898.)

APPEALS by plaintiff in the original bill, and one of the defendants in the cross bill, from a decree of the Circuit Court for Cook County in favor of Caroline C. Sankey, in a suit brought to obtain the partition of certain real estate, in which a cross-bill was exhibited setting up sole title to the property in said Caroline, and seeking to set aside certain tax deeds of it. *Affirmed.*

Statement by Shope, J.:

Mary F. Van Matre filed her bill in chan-

NOTE.—On the subject of the legal status of an adopted child, see the *note* to *Warren v. Prescott (Me.)* 17 L. R. A. 435.

For other cases as to validity and effect of proceedings for adoption, see *Delano v. Bruerton (Mass.)* 2 L. R. A. 698; *Ferguson v. Jones (Or.)* 3 L. R. A.

R. A. 620; *Helms v. Elliott (Tenn.)* 10 L. R. A. 535; *Markover v. Krauss (Ind.)* 17 L. R. A. 806; *Fosburg v. Rogers (Mo.)* 19 L. R. A. 201; *Nurent v. Powell (Wyo.)* 20 L. R. A. 199; *Re Johnson's Estate (Cal.)* 21 L. R. A. 380; *Schultz v. Roenitz (Wis.)* 21 L. R. A. 423.

cery, in the Cook county circuit court, alleging that she and others named in the bill, including Caroline C. Sankey, were the heirs at law of Samuel Sankey, who died intestate in November, 1886, without issue or widow surviving him, and seised of certain lots and lands in said county, of which partition was sought among said alleged collateral heirs of said decedent. The bill also set up that appellant Henry L. Glos and others claimed some interest in certain of the lands under tax deeds, which were alleged to be void, and were asked to be removed, as clouds upon the title of complainant and her co-heirs. Caroline C. Sankey answered the bill, denying that others were interested in said land and lots, and claiming title in fee to the whole, as heir-at-law of the said Sankey, and filed her cross-bill, alleging that by virtue of certain adoption proceedings in the court of common pleas of Lycoming county, Pa., she was adopted by said Samuel Sankey, deceased, on the 2d day of January, 1879, and that said Sankey having died without issue, and leaving no widow him surviving, his estate descended to her, as heir-at-law. The cross-bill also alleged that said Glos and others held certain tax deeds, which were a cloud upon her title, and alleging in the cross-bill, as amended, certain defects therein, and praying that the same be removed, as a cloud etc. Upon the issues joined upon the original and cross-bills, the court found and decreed in accordance with the prayer of the cross-bill, dismissing the original bill; finding that the tax deeds alleged were void, and upon the terms of payment by complainant in the cross-bill of the taxes for which the tracts were severally sold, interest and costs, etc., removing them, severally, as clouds, etc. From the decree dismissing the original bill, and quieting the title in the complaint in the cross-bill, Mary F. Van Matre appeals. From so much of the decree as finds the several tax deeds void, and clouds, etc., Henry F. Glos appeals.

The statute of Pennsylvania under which the adoption proceedings were had was as follows: "It shall be lawful for any person desirous of adopting any child as his or her heir, or as one of his or her heirs, to present his or her petition to such court in the county where he or she may be resident, declaring such desire, and that he or she will perform all the duties as a parent to such child; and such court, if satisfied that the welfare of such child will be promoted by such adoption, may with the consent of the parents or surviving parent of such child, or if none, of the next friend of such child, or of the guardian or overseer of the poor, or of such charitable institution as shall have supported such child for at least one year, decree that such child shall assume the name of the adopting parent, and have all the rights of a child and heir, of such adopting parent, and be subject to the duties of such child, of which the record of the court shall be sufficient evidence." Act May 4, 1855, § 1 (Purd. Dig. p. 78, pl. 1).

It appears that Caroline C. Sankey was a minor of about the age of nine years; that her father and mother were both dead; that

she and they, up to the time of their death, resided in Lycoming county, Pa. It is not questioned that the court of common pleas had jurisdiction, in that state, of the adoption of children, authorized by the statute quoted. On the 11th day of November, 1878, Samuel Sankey filed in said court his petition, duly verified by his oath, in the words following:

"State of Pennsylvania Lycoming County. In the court of Common Pleas of Said County. To the Honorable the Judges of the Court of Common Pleas and of the Orphans' Court of the County aforesaid: The petitioner, Samuel Sankey, shows to this honorable court that he is a married man, without children now living, and a resident of the city and county of San Francisco, in the state of California, and he is now a temporary resident at Williamsport, in the county aforesaid, and as such resident he is desirous of adopting Caroline Sankey, often and commonly called 'Carrie Sankey,' as his heir-at-law. And your petitioner represents that he will perform the duties of a parent to said Carrie Sankey. And your petitioner further represents that said Carrie Sankey is an orphan, and is the daughter of Cyrus K. Sankey and Caroline, his wife, and that said Cyrus K. Sankey was the brother of your petitioner, and that he and his wife died interstate and wholly insolvent, and that your petitioner is next of kin to said Carrie Sankey, and as such he desires to adopt said orphan child, as stated above. Your petitioner further represents that all the brothers and sisters of said C. K. Sankey cheerfully consent that your petitioner shall adopt said child, who is now of the age of nine years, for the purpose of caring for her, educating her, and protecting her as his own child. Your petitioner shows to the court that the kinfolks on the part of the mother of said child are not so situated and circumstanced that they can care for said child. Respectfully submitted. [Sig.] Samuel Sankey."

It also appears that L. G. Huling had before then been appointed guardian of said infant, and on November 11, 1878, a rule was granted on such guardian to show cause why the prayer of the petition should not be granted, returnable the following day, and a commissioner was appointed to take testimony. The record in that case shows that on application of the guardian the time for taking testimony was twice extended by the court, and finally the following order was entered in said cause: "January 2, 1879, the appointment of L. G. Huling as guardian of Caroline C. Sankey is revoked, and Samuel Sankey is allowed to adopt the minor child." Then follows an order appointing Samuel Sankey guardian of the person and estate of said infant, minor child of Cyrus K. Sankey, deceased; and then follows the final order and decree, viz.:

"January 2, 1879. Order and Decree: Samuel Sankey, Esq., at present resident in said county of Lycoming, presented his petition to the said court, declaring his desire to adopt Caroline C. Sankey, a minor child of Cyrus K. Sankey, deceased, and promising to perform all the duties of a parent, and

confer upon her all the rights of a child and heir; and it appearing to the court that both parents of said minor child are dead, and that the uncles and aunts, as next of kin, on the father's side, of said minor child, consent and approve of said adoption, and after careful investigation and inquiry, it appearing to the court that the interests and welfare of the said minor child will be promoted by being adopted as the child and heir of the said petitioner, therefore, it is ordered and decreed as follows: And now, to wit, January 2, A. D. 1879, at an adjourned court held at Williamsport, in said county, it is ordered and decreed that Caroline C. Sankey, a minor child of Cyrus K. Sankey, late of said county, deceased, be and she is hereby declared to be adopted by Samuel Sankey, Esq., with all the rights of a child and heir of the said Samuel Sankey, and that she be also subject to all the duties of such child, and shall assume the name of the adopting parent, and, to all intents and purposes, have, enjoy, and inherit all the rights and privileges, and be subject to all the duties, of a lawful child of said adopting parent, of which a copy of this record shall be sufficient evidence, agreeable to the provisions of the act of the general assembly of Pennsylvania approved May 4, A. D. 1855. By the Court. James Gamble, P. P."

No appeal was taken from, or writ of error prosecuted to reverse, said decree. But after the death of Samuel Sankey, which occurred November 23, 1886, all the parties alleged to be collateral heirs of said Sankey, except said Caroline C. Sankey, by Aaron Wolf, their attorney in fact, and as administrator of the estate of Samuel Sankey, deceased, on November 3, 1887, filed a petition entitled in the adoption proceeding above mentioned, in the court of common pleas of Lycoming county, Pa., setting forth as follows: "(1) That Samuel Sankey, the petitioner in said proceedings, was a resident and citizen of the state of California at the time of the filing of said petition, and afterwards, to the day of his death, to wit, on the 23d day of November, A. D. 1886, and that the said Caroline C. Sankey is now about eighteen years of age, and now a resident of the city of San Francisco, in the state of California. (2) The petitioner's appointment as attorney in fact, etc.; the names and residences of the heirs; the petitioner's appointment as administrator, etc. (3) A copy of the decree of Hon. James Gamble, heretofore recited. (4) That the said order and decree was made on a petition signed by Samuel Sankey, and duly filed in said number and terms, wherein it is stated that the petitioner is a resident of the state of California, and, further, that the brothers and sisters of said Cyrus K. Sankey cheerfully consented to the adoption prayed for. (5) That your petitioner is informed and believes that he can establish by evidence, on the hearing of this case, that the brothers and sisters of Cyrus K. Sankey never consented to, and had no knowledge of, said application for adoption, except that the brother James W. Sankey may have had some knowledge thereof, and, further, that the

uncle of said Caroline C. Sankey—L. G. Huling, Esq., residing, at the time of the application, in the county of Lycoming, and who was the brother of the mother of the said minor child, and nearest of kin to said child on the side of the mother—objected most strenuously to the decree of adoption. (6) That your petitioner is informed and verily believes that the aforesaid order and decree of adoption were obtained by a misrepresentation of the facts of the case, and, further, your petitioner is informed by counsel the court has no jurisdiction in the premises, the said Samuel Sankey not being a resident of the county of Lycoming, in the state of Pennsylvania, at the time of the application so as aforesaid made. Your petitioner therefore prays your honor to grant a rule to show cause why said order and decree should not be revoked. And he will ever pray, etc. [Sig.] Aaron Wolf, Administrator and Attorney in Fact."

A rule was granted thereon, and Caroline C. Sankey, by her guardian, filed answer and demurrer to the petition. The court sustained the demurrer, dismissed the petition, and discharged the rule to show cause, with costs. On appeal to the supreme court of the state, the judgment of the court of common pleas was affirmed.

Mr. H. S. Mecartney, with Mr. F. W. S. Brawley, for appellants.

Messrs. Hamline, Scott & Lord, for appellee Caroline C. Sankey:

The decree is binding and effectual in Pennsylvania.

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If the decree is binding and effectual in Pennsylvania, where it was rendered, according to its laws, and the decisions of its highest courts, then it is binding everywhere.

Adams v. Adams, 13 L. R. A. 275, 154 Mass. 290; *Colt v. Colt*, 111 U. S. 578, 23 L. ed. 525; *Osceola v. Wilson*, 76 U. S. 9 Wall. 108, 19 L. ed. 604; *Christmas v. Russell*, 72 U. S. 5 Wall. 302, 18 L. ed. 478; *Kirrigan v. Kirrigan*, 15 N. J. Eq. 147; *Nichols v. Nichols*, 25 N. J. Eq. 63; *Kinnier v. Kinnier*, 45 N. Y. 540, 6 Am. Rep. 182; *Shumway v. Stillman*, 6 Wend 447; *People v. Baker*, 76 N. Y. 83, 83 Am. Rep. 274; *Van Orsdal v. Van Orsdal*, 67 Iowa, 85; *Bimler v. Dawson*, 5 Ill. 536, 39 Am. Dec. 430; *Jones v. Warner*, 81 Ill. 248; *Renaud v. Abbott*, 116 U. S. 288, 29 L. ed. 632.

This is particularly so with respect to judgments or decrees affecting the status of a person, they being in the nature of judgments *in rem*, which are binding on the whole world.

Roth v. Roth, 104 Ill. 45, 44 Am. Rep. 81; *Hood v. Hood*, 110 Mass. 463; *Hoes v. Van Alstyne*, 20 Ill. 202.

Courts have uniformly taken notice of the construction given to foreign statutes by the foreign tribunals; and to enable them to do this, they have always been in the habit of looking to the reports of such tribunals.

McDeed v. McDeed, 87 Ill. 548; *Colt v. Colt*, and *Adams v. Adams*, *supra*; *Stark v. Ratcliff*, 111 Ill. 81.

Independently of the decision of the supreme court the original decree was valid, because

the court had jurisdiction (1) of the subject-matter; (2) of the parties, and its decree was within the powers granted it by the statute.

Jurisdiction of the subject-matter is power to adjudge concerning the general questions involved and is not dependent upon the state of facts which may appear in a particular case.

Barnard v. Barnard, 119 Ill. 92; *Hunt v. Hunt*, 72 N. Y. 217, 28 Am. Rep. 129; *Stark v. Batcliff*, *supra*; *Ross v. Himely*, 8 U. S. 4 Cranch, 241, 2 L. ed. 608.

The law of Pennsylvania gave the court of common pleas jurisdiction of the subject-matter of adoption laws of Pennsylvania, 1855, *sub voce* adoption.

The court of common pleas had jurisdiction of Samuel Sankey so far as his residence was concerned, for he was a resident of Lycoming county, Pennsylvania, within the meaning of the law of that state.

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Residence may import temporary sojourn or permanent domicile. The precise meaning depends upon the purpose and phraseology of the statute.

Anderson, Law Dict. 892; *Tyler v. Murray*, 57 Md. 441.

Domicil is distinguished from residence. Domicil is defined to be a residence at a particular place accompanied with positive or presumptive proof of an intention to remain there for an unlimited time.

Whart. Conf. L. § 21; *Collinson v. Teal*, 4 Sawy. 241.

The word "resident" may have different meanings even in the same act.

Brundred v. Del Hoyo, 20 N. J. L. 828.

While a man may have but one domicile he may have several residences, and his domicile may even be in one state and his residence in another.

Way v. Way, 64 Ill. 406; *Hayes v. Hayes*, 74 Ill. 812; *Stout v. Leonard*, 87 N. J. L. 495; *Frost v. Bribin*, 19 Wend. 11, 82 Am. Dec. 428; *Greene v. Greene*, 11 Pick. 415; *Wells v. People*, 44 Ill. 40; *Re Wrigley*, 8 Wend. 184; *Tazewell County Supra v. Davenport*, 40 Ill. 197; *Isham v. Gibbons*, 1 Bradf. 69; *New York v. Genet*, 4 Hun, 487; *Crawford v. Wilson*, 4 Barb. 504; *Chapman v. Chapman*, 129 Ill. 390.

The words "residence" and "domicil" standing alone, and not limited or qualified by the subject are not in law equivalents in meaning. Thus viewed the former does not require the *animus manendi*, the latter does.

2 Bishop, Marriage & Divorce and Separation, § 107; Dicey, Domicil, p. 77.

Even though a party to a decree or judgment is not domiciled in the jurisdiction of the court which rendered it, yet appearance will give jurisdiction to such court.

Re Waite, 99 N. Y. 433; Whart. Conf. L. § 235; *Jones v. Jones*, 108 N. Y. 415; *Bissell v. Briggs*, 9 Mass. 464, 6 Am. Dec. 88; *Randolph County v. Ralls*, 18 Ill. 80; *Kinnier v. Kinnier*, 45 N. Y. 540, 6 Am. Rep. 182; *Hunt v. Hunt*, 72 N. Y. 217, 28 Am. Rep. 129; *Ginn v. Rogers*, 9 Ill. 183; *Fleischman v. Walker*, 91 Ill. 320; *Peak v. People*, 71 Ill. 278; *Jones v. Warner*, 81 Ill. 346.

And having sought and submitted himself to such jurisdiction he may not afterwards question it.

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Re Waite, Randolph County v. Ralls, and *Bissell v. Briggs*, *supra*.

The court of common pleas had jurisdiction of the minor child, Caroline C. Sankey, as the domicile of her last surviving parent was within its jurisdiction.

The domicile of an infant without parents is the domicile of his last surviving parent.

Jacobs, Domicil, § 256; *Lamar v. Micou*, 112 U. S. 452, 28 L. ed. 751; *Holyoke v. Haskins*, 5 Pick. 20, 16 Am. Dec. 372; *Lewis v. Castello*, 17 Mo. App. 593; *Louisville v. Sherley*, 80 Ky. 71; *Mills v. Hopkinsville*, 11 Ky. L. Rep. 164.

Neither the infant himself nor his guardian can change his domicile.

Lamar v. Micou, *supra*; *Lewis' Succession*, 10 La. Ann. 789, 68 Am. Dec. 600; *Story*, Conf. L. § 506; Whart. Conf. L. §§ 41, 42; *Woodworth v. Spring*, 4 Allen, 323; *Re Feyk's Estate*, 5 N. Y. Supp. 90.

Notice to the child was not required, and hence was not necessary to the validity of the adoption; nor was it a jurisdictional fact.

Kurtz v. St. Paul & D. R. Co. 48 Minn. 339; *Luppi v. Winans*, 37 N. J. Eq. 245; *Barnard v. Barnard*, 119 Ill. 92; *Gibson, Appellant*, 154 Mass. 378.

The Illinois law of adoption is "taken directly from the Massachusetts acts."

Hence the courts of Illinois will look to the construction of that law by the tribunals of Massachusetts, from which it was adopted.

Bishop, Written Law, § 79; *Gage v. Smith*, 79 Ill. 219; *Rigg v. Wilton*, 18 Ill. 15, 54 Am. Dec. 419; *Campbell v. Quinlin*, 4 Ill. 288; *Keegan v. Geraghty*, 101 Ill. 38.

Appointment of guardian of child under fourteen years of age does not require notice to child.

Ill. Rev. Stat. chap. 64, § 1; *Gibson, Appellant*, *supra*.

Nor in case of sale of its property is notice required to be given him, except it is specifically required by the law under which such sale is made.

Spring v. Kane, 86 Ill. 583; *Mulford v. Stalzenback*, 46 Ill. 803; *Mulford v. Beveridge*, 78 Ill. 455.

It is not necessary that the person who consents as next friend to the minor should have received an appointment as such from legal authority.

Com. v. Roach, 1 Ashm. 27.

Failure to appoint guardian *ad litem* or next friend would not make the decree void, but only voidable, and that only by the infant, at her election.

Gage v. Schroder, 73 Ill. 47; *Barnett v. Wolf*, 70 Ill. 82; *Goudy v. Hall*, 36 Ill. 813, 87 Am. Dec. 217; *Millard v. Marmon*, 116 Ill. 653; *Colt v. Colt*, 111 U. S. 578, 28 L. ed. 525; *Sevall v. Roberts*, 115 Mass. 262; *Peak v. Shasted*, 21 Ill. 187, 74 Am. Dec. 83; *Harris v. Ross*, 112 Ind. 814.

The court having jurisdiction of the subject-matter and parties, and acting within its powers, the decree, even though erroneous, must stand until reversed in some direct proceeding. It is not open to collateral attack. It will be presumed that the court heard facts which required it to decree as it did.

Barnard v. Barnard, 119 Ill. 92; *Young v.*

Lorain, 11 Ill. 625, 52 Am. Dec. 463; *Stow v. Kimball*, 28 Ill. 107; *Botwick v. Skinner*, 80 Ill. 147; *Fitzgibbon v. Lake*, 29 Ill. 177, 81 Am. Dec. 803; *Spring v. Kane*, 86 Ill. 580; *Housh v. People*, 66 Ill. 181; *Henline v. People*, 81 Ill. 271; *Schnell v. Chicago*, 38 Ill. 390, 87 Am. Dec. 804; *Moffitt v. Moffitt*, 69 Ill. 646; *Cott v. Cott*, *supra*.

In Pennsylvania and Alabama orphans' courts are courts of record, and would seem to stand nearly on the same basis as to presumptions, etc., as other courts of superior jurisdiction.

Crepps v. Durden, 2 Smith, Lead. Cas. 9th Am. ed. p. 1012; Freeman, Judgm. 3d ed. § 123.

A decree of adoption being for the benefit of the child adopted, the court will consider its welfare on any attack upon it.

Baker v. Strahorn, 33 Ill. App. 59; *Sewall v. Roberts*, *supra*.

The doctrine of *res judicata* embraces not only what has actually been determined in the former suit, but also extends to any other matter properly involved, and which might have been determined in it.

Bennitt v. Wilmington Star Min. Co. 119 Ill. 9; *Litch v. Clinch*, 136 Ill. 425; *Kelly v. Donlin*, 70 Ill. 878; *Riverside Co. v. Townshend*, 120 Ill. 9; *Harmon v. Auditor of Public Accounts*, 123 Ill. 122; *Neff v. Smyth*, 111 Ill. 100; *Lyons v. Cooledge*, 89 Ill. 529; *Rogers v. Higgins*, 57 Ill. 244; *Bailey v. Bailey*, 115 Ill. 557; *Morgan v. Beloit*, 74 U. S. 7 Wall. 617, 19 L. ed. 205; *Stickney v. Goudy*, 132 Ill. 281; *Orabill v. Orabill*, 23 Or. 588.

Persons on whose behalf and under whose direction the suit is prosecuted or defended in the name of some other person, are bound by the adjudication.

Bennitt v. Wilmington Star Min. Co. supra; *Cole v. Favorite*, 69 Ill. 457; Freeman, Judgm. § 174.

When the protection of the principle of *res judicata* is invoked it is not necessary that it should be between exactly the same parties or in the same mode of action, as in the former case.

Hanna v. Read, 102 Ill. 607, 40 Am. Rep. 608; *Davenport v. Barnett*, 51 Ind. 829; *Webber v. Mackey*, 81 Ill. App. 376; *Pepper v. Pepper*, 24 Ill. App. 320; *Moore v. Williams*, 182 Ill. 589; *Garrick v. Chamberlain*, 97 Ill. 620; *Hawley v. Simons*, 102 Ill. 115; *Hamilton v. Quimby*, 46 Ill. 98.

The fact that a judgment or decree is entered on a demurrer does not render its effect less conclusive.

Nispel v. La Parle, 74 Ill. 809, citing Gould, Pl. 4th ed. pp. 43, 44; *Gould v. Evansville & C. R. Co.* 91 U. S. 526, 23 L. ed. 416; *Bigelow, Estoppel*, p. 33; *Doughty v. Doughty*, 27 N. J. Eq. 815.

An estoppel of record arising out of a judgment which determines the status of a person is operative and conclusive as to all the world.

Hood v. Hood, 110 Mass. 465.

A judgment of a court of last resort cannot be attacked collaterally in that or in any other state.

Bigelow, Estoppel, p. 22; *Sturgis v. Rogers*, 26 Ind. 1; *Lucas v. San Francisco*, 28 Cal. 591; *Roundtree v. Turner*, 86 Ala. 555; U. S. Const. 23 L. R. A.

art. 4, § 1; Act of Congress, May 26, 1790; U. S. Rev. Stat. p. 171, § 90; *Mills v. Duryee*, 11 U. S. 7 Cranch, 481, 3 L. ed. 411.

The only question that can be inquired into is, whether the court which pronounced the judgment had jurisdiction of the subject-matter and the persons of the parties.

Zepp v. Hager, 70 Ill. 227; *Chippis v. Yancy*, 1 Ill. 3; *Cott v. Cott*, 111 U. S. 578, 28 L. ed. 525.

The full faith and credit required to be given in each state to the judicial proceedings of other states will prevent any evidence to contradict the facts which show a jurisdiction, if such appear on the record.

Hall v. Williams, 9 Pick. 282, 17 Am. Dec. 356; *Zepp v. Hager, supra*; *Westcott v. Brown*, 13 Ind. 83; *Bisell v. Briggs*, 9 Mass. 463, 6 Am. Dec. 88; *Borden v. Fitch*, 15 Johns. 121, 8 Am. Dec. 225; *Cott v. Cott, supra*; *Kinnier v. Kinnier*, 45 N. Y. 540, 6 Am. Rep. 132; *People v. Baker*, 76 N. Y. 83, 32 Am. Rep. 274; *Hunt v. Hunt*, 72 N. Y. 225, 28 Am. Rep. 129; *Doughty v. Doughty*, 28 N. J. Eq. 581; *Nichols v. Nichols*, 25 N. J. Eq. 65.

If the record falsely shows on its face that it had jurisdiction, then it must be "set aside by an *audita querela*, or on petition and motion, such being the familiar practice in similar cases."

Landes v. Brant, 51 U. S. 10 How. 369, 13 L. ed. 458.

Shope, J., delivered the opinion of the court:

The question presented by the appeal of Mary F. Van Matre is whether there was a legal adoption of Caroline C. Sankey by Samuel Sankey, in his lifetime, in Pennsylvania, by which, under the laws of that state, she became his heir-at-law. It is insisted that there was no legal adoption, for the reason that the court was without jurisdiction to enter the decree—First, because said Samuel Sankey was not at the time a resident of the county of Lycoming and state of Pennsylvania, where the same was entered, within the contemplation and meaning of the statute of that state; and, second, that it does not affirmatively appear from the record that said proceedings were had with notice to the child proposed to be adopted. Many minor and collateral objections made may be appropriately considered under these headings.

The question of whether Samuel Sankey was a resident of Lycoming county, Pa., within the meaning of the statute, was directly presented in the proceedings for adoption, and was determined adversely to the contention of appellant. It will be seen from the foregoing statement that the verified petition presented alleged that he was a resident of the city and county of San Francisco, Cal., "and that he is now a temporary resident at Williamsport," in said county of Lycoming, Pa. By the recitals in the decree of adoption, it appears that the court found he was such temporary resident; that he was "at present resident in said county of Lycoming." And the court necessarily held that such temporary residence in the county gave it jurisdiction to hear and determine the adoption proceedings. Again, the same

question was raised and determined in the application made by this appellant and other collateral heirs to that court to revoke the order and decree of January 2, 1879. It was there expressly alleged that the court was without jurisdiction for the reason that said Sankey was a resident of the state of California at the time of the application for adoption. In passing upon that question, that court, in an able opinion by Cummins, P. J., said: "The court is asked to set aside this decree of adoption on two grounds: First, want of jurisdiction; second, misrepresentation of facts. The jurisdiction of the court in this case must appear in the petition presented by Samuel Sankey to the court, asking for the decree of adoption." And after setting out the petition, in substance, and its verification, it is further said: "It is as a 'temporary resident' at Williamsport, in the county of Lycoming, that the petition invokes the powers of the court of that county."

Does the word 'resident,' as used in the Act of May 4, 1855, *supra*, include a temporary resident?" And, after showing that the word "resident" has received various interpretations, it is said: "The purpose of our adoption act is to promote the welfare of the child to be adopted, and any one desirous of adopting a child may invoke the power of the court of the county in which he or she may reside. It does not require that the petitioner shall be a citizen, a freeholder, or an inhabitant, nor does it require that he shall reside any certain length of time. It does not say that he shall be a permanent resident, which has been held to be synonymous with 'inhabitant,' nor that he may be a temporary resident, which has been held to be synonymous with a 'sojourner.' After a careful examination of all the authorities cited (they are too numerous to be classified or referred to here), I am of opinion that the word 'resident,' as used in the Act of May 4, 1855, includes both a permanent and a temporary resident and the jurisdiction of the court is therefore sufficiently set forth in the petition." An appeal having been prosecuted to the supreme court of Pennsylvania from the judgment rendered by the court of common pleas, that court, after setting out in full, and, in effect, adopting, the opinion of the learned judge of the court of common pleas, affirmed the order sustaining the demurrer to the petition to revoke the decree of adoption. *Wolf's App.* (Pa.) 13 Atl. Rep. 760.

By the Act of May 4, 1855, of the state of Pennsylvania, as will be seen in the foregoing statement, it is provided that if any person is desirous of adopting any child as his or her heir, or as one of his or her heirs, it shall be lawful to present his or her petition to the proper court, "in the county where he or she may be a resident," etc. We are now called upon, by the same parties who sought to have the decree of adoption set aside in the courts of Pennsylvania, where it was made, and who claim title under and through said Samuel Sankey, to place upon the statute of that state a construction differing materially from that put upon it by these courts, and to hold that Samuel Sankey was not, at the time of the adoption, a resident of Lycoming

county, Pa., within the meaning of said statute, and that, therefore, the court was without jurisdiction to enter the decree. Neither in the petition of the collateral heirs, filed in the court of common pleas of Lycoming county, Pa., nor in the original bill filed in this case, is the allegation of the original petition filed by Samuel Sankey—that he was, at the time of the application for adoption, "a temporary resident at Williamsport," in the county of Lycoming, etc.—controverted. It will thus be seen that the question there and here presented was whether a temporary residence was sufficient to authorize the adoption under the statute of Pennsylvania. When a statute of a state has been given construction by the highest tribunal of the state, such construction will, ordinarily, in the court of a sister state, be adopted as binding and conclusive. *Hunt v. Hunt*, 73 N. Y. 217 28 Am. Rep. 129; *Güchrist v. West Virginia Oil & O. L. Co.* 21 W. Va. 115, 45 Am. Rep. 555; *Gunn v. Howell*, 35 Ala. 144, 78 Am. Dec. 484; *McDeed v. McDeed*, 67 Ill. 545; *Kingsley v. Kingsley*, 20 Ill. 208. The same rule has been recognized by the Supreme Court of the United States. *Walker v. Mark*, 84 U. S. 17 Wall. 648, 21 L. ed. 744; *Bailey v. Maguire*, 89 U. S. 23 Wall. 215, 23 L. ed. 850; *Galpin v. Page*, 85 U. S. 18 Wall. 350, 21 L. ed. 959; *Secombe v. Milwaukee & St. P. R. Co.* 90 U. S. 23 Wall. 106, 23 L. ed. 67; *Burgess v. Seligman*, 107 U. S. 20, 37 L. ed. 859; *Bucher v. Cheahire R. Co.* 125 U. S. 555, 31 L. ed. 795. And this, although the examining court finds that upon similar language, in a statute within their own sovereignty, they would place a different, or even reverse construction.

We should here notice the objection that the decree of adoption was entered without the consent of the parties required by the statute. The petition filed by Samuel Sankey alleged that the minor was the child of his brother, that her father and mother were dead, that all the sisters and brothers of her deceased father consented to the adoption, and that her kindred on the mother's side were not so situated or circumstanced that they could properly care for the child. The record discloses that evidence was taken, and it must be presumed that the court found the material allegations of the petition to be true. By the act, as will be seen, the court is required to be satisfied that the interests and welfare of the child will be promoted by the adoption. The guardian, the legality of whose appointment by the court is not questioned, contested the adoption proceedings, and the court, in what must be presumed to be the exercise of its lawful powers, removed him previous to the entry of the decree, and appointed said Samuel Sankey as guardian in his stead. The court had in the contest made by the former guardian, "after careful investigation and inquiry," found all the facts necessary to justify the decree. It found that the uncles and aunts of the child, on its father's side, as next of kin, approved and consented, and that the interests and welfare of the child would be promoted by the adoption; and it was expressly held by the

court, on the application of the collateral heirs before mentioned, that "it was not necessary that all of the uncles and aunts should consent." Moreover, as said by that court, "on the day the decree was entered, Huling's appointment as guardian was revoked, and Samuel Sankey, the petitioner in the adoption proceeding, was appointed guardian of the child, and not only consented, but sought the adoption of his ward." By reference to the statute set out in the foregoing statement, it will be seen that the adoption may be had with the consent of the guardian. While it might have conformed more nearly to the practice in this state, after the appointment of the petitioner as guardian, to have formally appointed a guardian *ad litem*, or "a next friend," who, under the statute, could have given the required consent, the failure to do so would, at most, be an irregularity, only, which would not subject the decree to collateral attack. At most, it could render the adoption voidable only. *Prak v. Shasted*, 21 Ill. 187, 74 Am. Dec. 83; *Millard v. Marmion*, 116 Ill. 658. This question was necessarily before the Pennsylvania courts, both in the original proceeding and upon the petition to revoke and set aside the decree of adoption, and it was held that sufficient was shown upon the record to warrant the entry of the decree in the common pleas court. *Wolf's App. supra*.

Moreover, the courts of Pennsylvania, in the later proceeding, held,—as we think, properly,—in considering this and similar contentions, that Samuel Sankey, if living, would be, and the parties now seeking to disregard that decree, claiming under and in privity with him, were, estopped from questioning the validity of the adoption. We do not find it necessary to pursue or determine that matter here. It having been determined, upon direct proceeding, by the court of last resort of the state in which the decree was rendered, that the court of common pleas had jurisdiction to enter the decree, we are required to give it full faith and credit. The Pennsylvania court of common pleas having jurisdiction of the person of parties, and subject-matter, as was necessarily held by the supreme court of that state, it had power to adjudicate the questions involved, and its decree cannot be impeached by showing irregularity in its procedure, or that errors intervened in its rendition. *Kinnier v. Kinnier*, 45 N. Y. 542, 6 Am. Rep. 182. Jurisdiction conferred power upon the court to judicially determine the questions involved, and incorporate its determination in a decree fixing the right of the parties,—the status of each towards the other; and it will, unless attacked for fraud, be held valid, and conclusive upon the parties and their privies, until reversed or set aside in the jurisdiction in which it was rendered. 2 Story, Const. Lim. 1818; *Cheever v. Wilson*, 78 U. S. 9 Wall. 108, 19 L. ed. 604; *Nichols v. Nichols*, 25 N. J. Eq. 68; *People v. Baker*, 76 N. Y. 88, 82 Am. Rep. 274; *Adams v. Adams*, 154 Mass. 295, 18 L. R. A. 275; *Jones v. Warner*, 81 Ill. 348; *Roth v. Roth*, 104 Ill. 85, 44 Am. Rep. 81.

It is contended that the decision of the 23 L. R. A.

supreme court of Pennsylvania in *Wolf's Appeal, supra*, cannot be regarded as an authoritative exposition of the law, for the reason, as it is contended, that no appeal lies from the court of common pleas to that court, and that the appeal to Wolf, therefore, conferred no jurisdiction: There is nothing in this record, or the adjudications of that court, as we understand them, to warrant the contention. The statutes of that state upon the subject were not proved or introduced in evidence, and in rendering its judgment of affirmance the court necessarily, determined its own jurisdiction. It was expressly held in *Lewis' App. (Pa.)* 10 Atl. Rep. 128, by that court, that, upon appeal from a decree of adoption rendered by the court of common pleas, that court could "review the record," and doing so, and finding no error, affirmed the decree. Here, every question presented arose upon the record, and the question determined was whether the matters alleged in the petition for vacation were sufficient to require the setting aside of the original decree. It being the court of last resort, it must be presumed, in the absence of anything appearing to the contrary, that it would not adjudicate unless it had jurisdiction to render judgment in the cause. Its jurisdiction must therefore, upon this record, be presumed. *Davis v. Packard*, 33 U. S. 8 Pet. 823, 8 L. ed. 961; *Cooley*, Const. Lim. 508; 2 Black. Judgm. 896; *Horton v. Critchfield*, 18 Ill. 183, 65 Am. Dec. 701; *Dunbar v. Hallonell*, 84 Ill. 168; *Osgood v. Blackmore*, 59 Ill. 261.

Nor, in view of this decision of the Pennsylvania court, will it be necessary to determine whether the court of common pleas was exercising a special statutory jurisdiction, and therefore the rules applicable to courts of inferior jurisdiction applied, or not. Sufficient appearing upon the face of the record, as held, the jurisdiction must, in any event, be maintained. Nor were the proceedings for revocation of that summary character which will not be regarded as *res judicata*, or as conclusive upon the rights of the parties. The application was made by all of the persons interested in the revocation of the decree of adoption and who are here seeking to avoid it, and against the adopted child. All were before the court. Every material fact now insisted upon, as sufficient to avoid the decree, was there presented, and the sufficiency challenged by the demurrer to the petition. The court, upon their petition, every material averment of which was admitted by the demurrer to be true, assumed jurisdiction to determine the questions upon the merits, and did so. And, as we have seen, the supreme court of the state, adopting the reasoning of the opinion of the judge of the lower court, affirmed the judgment. The application was properly made to the courts of that state. *Rae v. Hulbert*, 17 Ill. 572; *Ambler v. Whipple*, 189 Ill. 811. And, those courts having assumed jurisdiction to pass upon the merits, it must be presumed that the proceeding was in conformity with the practice in such cases in that jurisdiction.

It is urged that the court of common pleas of Lycoming county, Pa., was without jurisdiction, and its decree is void, for the rea-

son that the child adopted was in Illinois, and out of the jurisdiction of that court; and (3) that it is not shown that there was notice to the child proposed to be adopted. It is said this question was not presented by the petition for revocation of the decree, and was not, therefore, passed upon by the courts therein. Without pausing here to determine this latter contention, it may be again said that the question of the jurisdiction of the court to render the decree was necessarily before the court in the later proceedings, and must have been determined. But if this was otherwise, the contention is without merit. Caroline C. Sankey, at the date of the adoption, was of about the age of nine years. She was born in Lycoming county, Pa., where her father and mother were domiciled, and which was also the domicil of her parents, severally, at the time of their decease. There is substantial uniformity of decision that an infant cannot, of its own volition, change its domicil. Jacob, Domicil, §§ 228-229. See cases cited, note 1, p. 866, 5 Am. & Eng. Encyclop. Law. The rule of law is universally recognized, that every person, at birth, has his or her domicil in the country or place in which, at the time, the person on whom the infant is legally dependent is then domiciled, whether it be at the place of the birth or elsewhere. This domicil of origin, which, in case of legitimate children, is the domicil of the father, if living, and if not, that of the mother, continues to be the legal domicil of the child, unless changed by the parent during infancy, until he or she, upon attaining majority, or, perhaps, after being emancipated by the parents, acquires another. During dependency, the legal home or place of domicil follows that of its parents. And it is well settled that if both parents be dead the domicil of the child will be that of its origin, or, if that has been changed by the parents, that of its last surviving parent. Story, Conf. Laws, §§ 48, 506; 2 Kent, Com. § 237, note b; *Woodworth v. Spring*, 4 Allen, 828; *Lewis v. Costello*, 17 Mo. App., 598; 5 Am. & Eng. Encyclop. Law, title, "Domicil." The infant had, as already seen, been committed by the court of common pleas to the care and custody of a guardian, who was amenable to that court for the discharge of that duty. The guardian was duly notified, appeared, and contested the adoption. The statute of Pennsylvania does not require that the child shall be personally present in court, or that it be notified of the proceeding. Notice to it would in no wise add to or detract from the power given or the duty imposed by law upon the court, of determining the question of adoption in the interest and for the welfare of the child. It could neither consent nor object to the power exercised by the state, through the instrumentality of the court, over its person. The power and duty of the state to care for the estates and person of infants, so far as necessary for their protection and education, has been generally recognized. It is in cases of this sort, of the same character of jurisdiction as that exercised by courts of chancery, which is an exercise of the prerogative of the sovereign, springing from its power and duty, as *parens*

patriæ, to guard the interests of dependents, and protect and control them. 2 Story, Eq. Jur. 1838-1841; *Re Ferrier*, 103 Ill. 367, 43 Am. Rep. 10. The precise point arose upon a similar statute in *Gibson, Appellant*, 154 Mass. 378. The decree of adoption was made "without notice, by publication or otherwise," to the child "her parents, relatives, or next of kin." It was held, the statute not requiring it, no notice was necessary; the guardian of the child appearing, and consenting to the adoption. That the child was domiciled in Lycoming county, Pa., and, for the purposes of adoption, under jurisdiction and control of the court to which the state had committed the performance of its duty, and the exercise of its power, in such cases, does not seem to admit of doubt.

It is insisted that the decree of adoption, although valid in the state of the domicil of the child, and, *pro tempore*, of the person adopting her, cannot affect the descent of real property in Illinois; and *McCartney v. Osburn*, 118 Ill. 403, is cited as supporting that contention. This is a misapprehension of the case cited, as well as of the effect of the decree of adoption. In the *Osburn Case*, the courts of Pennsylvania had given construction to clauses of a will, as affecting property situated in that state, and the question was whether the parties were estopped by the construction there given in proceedings in this state affecting real property in this state. It was held that they were not, and that the courts of each state must construe the will, as affecting lands within their respective jurisdictions, for themselves, and might do so, as if the several properties were devised by separate wills. The real property passed under the law of its *situs*, and not by the law of the domicil of the testator, and therefore the will must be construed under the laws of this state, and that construction control its disposition. That case was expressly distinguished from *Hanna v. Read*, 102 Ill. 506, 40 Am. Rep. 608, and like cases, in which it is held that the right to relitigate is concluded by the former adjudication. The proceeding in this case was in the nature of a proceeding *in rem*, the purpose being to change the status of the child, in her relation to said Samuel Sankey. The decree of adoption was a declaration by competent authority, operative to change her status and, *ipso facto*, to render her that which she was declared to be,—the heir-at-law of Samuel Sankey, and capable of inheriting from him, in all respects, as if she had been his child born in lawful wedlock. 2 Black, Judgm. 793 *et seq.* The statute, under which the adoption proceedings were had, provides that the child shall be decreed to take the name of the adopting parents, "and have all the rights of a child and heir of such adopting parents, and be subject to the duties of such child." The decree, by force of this statute, established, *eo instanti* its rendition, the relation of parent and child, imposed upon the parties the reciprocal duties and obligations of that relation, and impressed upon and invested the child with the rights and qualities of a child and heir-at-law of Samuel Sankey. This we understand to be the construction of

the statute by the courts of that state. *Wolf's App. supra*. The status of appellee, having been established under, and existing by virtue of, the *lex domicilii*, is to be recognized and upheld in every other state, unless such status, or the rights flowing therefrom, are inconsistent with, or opposed to, the laws and policy of the state where it is sought to be availed of. This court, in *Keegan v. Geraghty*, 101 Ill. 26, quoted with approval the language of *Mr. Justice Gray*, in *Ross v. Ross*, 129 Mass. 243, 37 Am. Rep. 321, as follows: "It is a general principle that the status or condition of a person, the relation in which he stands to another person, and by which he is qualified or made capable to take certain rights in that other's property, is fixed by the law of the domicile; and that status and capacity are to be recognized and upheld in every other state, so far as they are not inconsistent with its own laws and policy." And the principle announced, with its limitations, was expressly approved. *Roth v. Roth*, *supra*, and cases cited. In the *Keegan Case*, *supra*, the child, adopted under the laws of Wisconsin, sought, in this state, to take, not from the adopting parent, but from collaterals, and by representation. This court expressly recognized the status established in Wisconsin, so far as it related to the right to inherit from the parent by adoption, because consistent with the laws of this state relating to descent to adopted children, but denied the right to take by representation from collateral kindred of the parent, for the reason that such taking was prohibited by, and inconsistent with, the laws of this state. Rev. Stat. § 5, p. 132. No inconsistency with our laws, or their policy, exists in this case. The rights claimed under and by virtue of the adoption in Pennsylvania are those, and none other, that would exist upon the creation of the same artificial relation in this state. We are of opinion, therefore, that, upon the death of Samuel Sankey without other children, the estate in Illinois descended to appellee, Caroline C. Sankey, as his child and heir-at-law, and that the court correctly decreed, in dismissing the original bill.

It remains to consider the errors assigned by appellant *Glos*. He claimed title, as alleged and admitted, under four several tax deeds, to lots 58 and 59 in Mather & Taft's addition, etc., being parcel of the property in controversy. The cross-bill, as amended, alleged the invalidity of these deeds, and set out various defects in the proceedings, precedent to their issue, and prayed that they be severally removed, as clouds, etc. To sustain these allegations, the cross-complaint, among other things, introduced in evidence the affidavits made, under section 217 of the Revenue Act, by the purchaser or his assignee, as compliance with the requirements and conditions prescribed by section 216 of that Act in respect of each of said tax deeds. These several affidavits, in the respect here considered, are the same, and the objection is common to all. By section 216, the purchaser or his assignee is required among other things, as a condition precedent to his right to a deed, to serve the notice therein pre-

scribed "on the owner of, or the parties interested in said land or lot, if they can, upon diligent inquiry be found in the county." And it is further provided that: "If . . . the owners cannot be found in the county," then such purchaser or his assignee shall publish such notice in some newspaper, etc. It is clear that personal service of the notice upon the owner, etc., is required, when, by diligent inquiry, he or she can be found in the county, and resort to publication of the notice can avail, or be held to be sufficient to entitle the purchaser or assignee to a deed, or to authorize the clerk to execute the same, only when the owner cannot, upon such inquiry be there found. This provision requiring personal service, if to be found in the county, was, as said in *Wilson v. McKenna*, 53 Ill. 48, "intended for wise purposes,—to prevent owners of land from being deprived of their titles except upon actual notice, if practicable to give it." And it is only when the presumption that the owner is an absentee from the county is raised by a failure to find him, after diligent inquiry, that constructive notice by publication is authorized. By the next section of the statute (217), the purchaser or assignee, by himself or agent, is required to make and file with the proper officer authorized to execute the deed an affidavit of compliance with the conditions of section 216 stating particularly the facts relied on as such compliance. It is upon this affidavit the clerk acts. If it shows strict compliance with the statute, his act in executing the deed will be lawful. If it does not, it will be unauthorized, and the deed void. *Wilson v. McKenna*, *supra*; *Wisner v. Chamberlin*, 117 Ill. 568; *Stillwell v. Brammell*, 124 Ill. 389. So much of these affidavits as is important here is as follows: That, "during the two months next preceding the last three months prior to the expiration of the time of redemption from said sale, affiant made diligent search and inquiry in said county for said S. Sankey [the person in whose name assessed], and, upon such diligent search and inquiry, was unable to find him in said county," and that affiant, "made diligent search, and inquiry in said county for the owners of said premises, and, upon such diligent search and inquiry, was unable to find any of the said owners, and, upon such diligent search and inquiry, affiant was unable to find the names of any of said owners, except," etc. (naming six persons). There is no other statement in the affidavit, that aids the part quoted. We are of opinion that the affidavit failed to show compliance with the letter or spirit of the statute. The proceeding resulting in the execution of the tax deed is *stricti juris*, and no indulgences in aid of it can be indulged. The act is silent as to where the "diligent inquiry" shall be made, but it must be of such character that it will enable the party to swear that, upon diligent inquiry the owner "cannot be found in the county." The statement that the affiant made diligent inquiry "in the county," and upon such diligent inquiry the owner cannot be found, may be and is, very different from the statement that, upon diligent inquiry, the owner cannot be found in

the county. The first statement may be true, and still, by resorting to those means within the power of the party, and which an ordinarily diligent person would resort to, the place where the owner could be found, in the county, be readily known. "Diligent inquiry," as used in the statute, means such inquiry as a diligent man, intent upon ascertaining a fact, would usually and ordinarily make,—inquiry, with diligence, and in good faith, to ascertain the truth. Undoubtedly, inquiry in the county is proper, and ordinarily, perhaps, if sufficiently extended, in good faith, all that would be required to constitute "diligent inquiry." It is apparent that this affidavit may be entirely true, i. e. that, upon diligent inquiry "in the county," the owners could not be found, and yet the purchaser or his assignee, or his agent making the affidavit, have known that, without expense, inconvenience, or delay, he could readily ascertain the place "in the county" where the owner could be found, by inquiry just across the county line, or in some locality easy of access. Prudent and diligent men, who, in good faith, are seeking to find, pursue those lines of inquiry

open to them, which may lead to the ascertainment of the fact, and exercise at least ordinary diligence therein; and, for aught that is shown, if the person making this affidavit had, with ordinary diligence, pursued inquiry where the fact might have been found, he would have found the owners in the county. As before said, the statute does not prescribe that diligent inquiry in the county will suffice, but requires that the inquiry shall be diligent, so that, *prima facie*, at least, the parties sought cannot be found in the county; so that the party making the proof can state that, upon diligent inquiry, he cannot be found in the county. Other objections are made to the tax deeds, some applying to all, and others to the deeds severally, which we do not deem it necessary to discuss. The objection already examined, which we regard as fatal to their validity, applies to all of them, and was sufficient to authorize the decree setting them aside on the terms imposed.

Finding no error in this record requiring a reversal, *the decrees of the Circuit Court are affirmed.*

Rehearing denied.

WEST VIRGINIA SUPREME COURT OF APPEALS.

Harrison WATTS

v.

NORFOLK & WESTERN R. CO., *Pff. in Err.*

(.....W. Va.....)

- *1. When one grants to a railroad company a strip of land for its use in the construction of its railroad, all damages to the residue of the tract arising from construction which can be taken into consideration in the assessment of compensation under proceedings for condemnation are released, and he cannot recover therefor against the company, nor can his subsequent alienee of such residue.
2. Principles for assessment of compensation in condemnation proceedings discussed.
3. Injury to a private ferry in case of such grant as above supposed, arising from obstruction of one of its approaches by the proper construction of the railroad, cannot be the subject of an action by the landowner against the company.
4. In case of such grant, injury to a private way from such construction is not the subject of an action, but injury to a public road, peculiarly affecting such landowner, is.
5. In case of such grant, injury to a dwelling house upon such residue from the careful blasting of rock in construction is not the subject of an action; but rock so deposited on such land must be removed within a reasonable time, else it will form the basis of an action.

*Headnotes by BRANNON, P.

6. A fill or bar made in a stream by blasting and throwing into it rock and other refuse material in the work of construction of such railroad, which fill is not necessary for the construction and maintenance of the railroad, and which entails injury to a mill situate on such residue, is a private nuisance, and ground of action against the company.

7. Where the cause of injury is in its nature permanent, and a recovery for such injury would confer a license on the defendant to continue it, the entire damage may be recovered in a single action; but where the cause of injury is in the nature of a nuisance, and not permanent in character, but such that it may be supposed that the defendant would remove it rather than suffer at once entire damages, which it might inflict if permanent, then the entire damages, so as to include future damages, cannot be recovered in a single action, but actions may be maintained from time to time as long as the cause of the injury continues.

8. Where an actionable wrong by the defendant is shown, the plaintiff may recover nominal damages from the mere fact of such wrong; but, if compensatory damages are asked, the plaintiff must in some way show, by evidence, data and means by which the jury can ascertain and fix the amount of damages. The jury cannot go by merely arbitrary conjecture.

9. A dam erected in a floatable stream to furnish power to operate a mill useful to the public, under authority duly had from a county court, is not a public nuisance, though without sluice, and though it obstruct navigation; and a railroad company which, by an unlawful act in the construction of its road, inflicts injury upon the mill, cannot excuse itself for the

NOTE.—The above illustrates unusually well the law as to consequential damages caused by railroad construction in several particulars, and also applies the doctrine of condemnation cases to the 23 L. R. A.

case of a voluntary grant or conveyance for railroad purposes, on which the authorities have been very few.

wrong by the plea that such dam is a public nuisance.

10. Public nuisance,—right of private abatement discussed.

11. A new trial will not be allowed because the jury disregarded an instruction erroneous in law.

(March 31, 1894.)

ERROR to the Circuit Court for Wayne County to review a judgment in favor of plaintiff in a proceeding brought to recover damages for injuries alleged to have been wrongfully inflicted upon plaintiff's property by the construction of defendant's road. *Reversed.*

The facts are stated in the opinion.

Messrs. Campbell & Holt, for plaintiff in error:

The company may use its location for all the purposes of a railroad, and may exercise its discretion while keeping within such purposes. *Pierce, Railroads*, pp. 159-161, 496.

Where a railroad is located across a person's land by license such license carries with it full authority to do all necessary acts for the construction of the railway as would have been derived from a condemnation of the land.

2 Wood, *Railway Law*, p. 761; *Babcock v. Western R. Co.* 9 Met. 563, 48 Am. Dec. 411.

Where land is conveyed to a railway company for railway purposes it is presumed that all contingent damages which would have been included in an assessment of damages by commissioners were considered in determining the price.

1 Wood, *Railway Law*, p. 601, and cases cited.

The damages caused by the *débris* if any, should have been confined to the period preceding the suit. The *débris* is in the nature of a continuing nuisance, and every day it is permitted to remain a new cause of action arises, for which as many new suits may be prosecuted.

Wood's *Mayne, Damages*, p. 141; *Sedgw. Damages*, 5th ed. p. 155; 3 *Sutherland, Damages*, §§ 1083, 1089, 1041.

Messrs. Marcum & Peyton for defendant in error.

Brannon, P., delivered the opinion of the court:

In an action of trespass on the case by Harrison Watts against the Norfolk & Western Railroad Company in the circuit court of Wayne county, Watts recovered judgment for \$1,074, and the company brought the case to this court by writ of error. In his declaration Watts complains of several wrongs done him by the company. The first wrong complained of is that the railroad company built a stone wall below his milldam, extending into and above the same, and filled in on both sides of said wall with earth, stones, and other substances, whereby the current of Twelve Pole creek was diverted, impeded, and obstructed, and caused to run against the plaintiff's gristmill and sawmill, and that caused the bank on which the same are built to be cut away and undermined, thereby diminishing and destroying the capacity of the water wheel to operate and propel the ma-

chinery of said mills, and their capacity to grind grain and saw lumber, and injuring his land. Let us take up first this ground of action. By deed dated March 20, 1890, Chapman Fry conveyed to the West Virginia & Ironton Railroad Company a strip of land for the construction of its railroad, which strip was transferred to the Norfolk & Western Railroad Company, being a strip out of land owned by Fry; and afterwards on May 5, 1891, Fry conveyed to the plaintiff, Watts, the said land, reserving and excepting the right of way conveyed to said railroad company by said deed of March 20, 1890. Thus the company had the older and better right to the land conveyed to it for right of way, with all rights and privileges going with it under the law. It had the right, as owner of said strip, to use it as it pleased for the purpose of the construction of its road, so it used it in a prudent, reasonable way, considering the nature of its use, and not in an improper, negligent way, inflicting unnecessary injury on others. It had the right, as against Fry, to build a wall to stay and support its roadway and protect it against the inroads of the stream. Suppose this wall, if built in a proper manner, did entail permanent injury upon Fry in diversion of the stream's current against his mills, lessening their capacity, or injuring the banks, he can recover no damage on that score. If, instead of acquiring the right of way land by purchase, the company had caused it to be condemned for its use, the compensation to Fry would include, not simply pay for the land actually taken, but damages to the residue of the tract. I will not enter upon any elaborate argument to prove that such injuries or damages as are complained of as resulting from said wall would be considered and taken into the assessment of damages upon an inquisition in a condemnation proceeding under section 14, chapter 42, Code 1891, they being such as might be reasonably anticipated from the use to which the land was to be devoted, and naturally, directly, and proximately resulted from such use of the land. I will refer to the following authorities touching the subject of what elements are to be considered in fixing compensation, not for the land taken, but damages to the residue: *Shenandoah Valley R. Co. v. Shepherd*, 26 W. Va. 673; 2 Wood, *Railway Law*, §§ 258, 259. The sum is to cover past, present, and prospective damages to such residue that are the natural, necessary, or reasonable incident to the work. 3 *Sedgw. Damages*, 164. From such damages to the residue, but not from compensation for the land actually taken, may be deducted peculiar benefits to be derived in respect to such residue from the work; not benefits of a general character, shared by the owner of the residue in common with other owners. Authorities bearing on the question of what benefits may be so deducted: *James River & K. Co. v. Turner*, 9 Leigh, 813; *Muir v. Falchner*, 10 Gratt. 18; *Mitchell v. Thornton*, 21 Gratt. 164; *Oheasapeake & O. R. Co. v. Tyree*, 7 W. Va. 693; *Grafton & G. R. Co. v. Foreman*, 24 W. Va. 662. Injury, though unforeseen, is yet presumed to have been considered in the assessment. 3 Wood,

Railway Law, 1034; *Aldrich v. Oheahire R. Co.* 21 N. H. 359, 53 Am. Dec. 212. As Fry could not recover for injury from such wall, neither can Watts, as he purchased from Fry later, and in law, and by the reservation in his deed, in fact subject to the railroad company's right. The fact that the company claims, not under condemnation, but under a purchase or grant, does not alter the case, and entitle Watts to recovery for injury from the wall, because a grant of right of way is a waiver of all such damages as are assessable under an inquisition, as, in such case, if the grantor did not intend to waive damages, he should provide against injury. Opinion in *Hortsmen v. Covington & L. R. Co.* 18 B. Mon. 223; Mills, Em. Dom. § 110; *Norris v. Vermont Cent. R. Co.* 28 Vt. 99; *Babcock v. Western R. Co.* 9 Met. 553, 43 Am. Dec. 411; 1 Wood, Railway Law. 698; *Hatch v. Vermont Cent. R. Co.* 25 Vt. 49, 69; 2 Redf. Railways, 28; Pierce, Railroads, 138; *Conwell v. Springfield & N. W. R. Co.* 81 Ill. 232; *Boothby v. Androscoggin & K. R. Co.* 51 Me. 318. Though, in such case, there be damage, it is *damnum absque injuria*,—damage without violation of a right. *Rood v. New York & E. R. Co.* 18 Barb. 80.

The case of *Chicago, R. I. & P. R. Co. v. Smith*, 111 Ill. 363, is very apt in this case. It held on common-law principles that, "when anything is granted, all the means to attain it, and all the fruits and effects, are granted also, by presumption of law, and will pass inclusive, together with the thing, by the grant of the thing itself, without the words, 'with its appurtenances,' and any like words," that when the grant is for a certain use, neither the grantor nor one claiming under him can object to such use and recover damages resulting therefrom; that "where a person conveys a right of way over his land, it will be conclusively presumed that all the damages to the balance of the land, past, present, and future, were included in the consideration paid him for his conveyance, the same as an assessment of damages on a condemnation would be presumed to embrace." It was a grant of a right of way to a railroad. What can be the difference for present purposes? The one is a voluntary grant, the other is a legislative grant. They both equally divest the owner of his rights. The voluntary alienation should go at least as far as the compulsory one, and be favorably construed in favor of the alienee. In reason, the above proposition must be so, since it would be unreasonable to say that a free and voluntary grant of right of way would not confer immunity against damage incident to its proper use, while a compulsory condemnation would do so. If this wall had been built in a negligent and improper way, imposing injury upon the residue of the land, which, in the exercise of due and proper care, could have been avoided, it would be different; for neither a right of way conferred by grant nor one conferred by condemnation will give exemption from damages consequential upon the improper or negligent exercise of the rights, and not from the fair, proper, and reasonable exercise of it, for the reason that neither in making such grant nor

in the assessment upon an inquisition are damages contemplated or included that are to be solely attributed to such misuse of the right. The grant is a defense as to all acts done within it, not outside of it. *Southside R. Co. v. Daniel*, 20 Gratt. 844, 875; *Lewis, Em. Dom. § 482*; Mills, Em. Dom. § 230; 2 Wood, Railway Law, 1004; 8 Sedgw. Damages, § 100. Authorities that for negligent construction the party is liable outside of the statute by common-law action, unprotected by the condemnation, are found everywhere; and as Mr. Sedgwick says, *ubi supra*, the rule is universal. There is no evidence that such wall was not in itself a prudent construction in building the railroad, or that it was not properly constructed, or that any injury it worked was avoidable. No damage could be recovered on account of it.

The second wrong imputed by the declaration to the defendant is that a private ferry over the milldam in Twelve Pole creek had long existed, used by the patrons of the mill in passing to and from the mill with grain, and its products when ground, and by the construction of the roadbed the approach to it on one side of the creek had been destroyed. The principles above stated apply to this private ferry. Damage to it, as incident to or consequential upon the use of the right of way, was covered by its grant. No recovery could be had for the destruction of this ferry. These principles were not observed in the instructions given in the case, at least as to the wall. In instruction No. 8, given as one of three in lieu of certain ones asked by plaintiff which the court rejected, the court tells the jury that if the defendant in building its road "committed any of the acts set out in the declaration," whereby the channel of the creek was diverted from its natural course, and thereby caused the water to flood the water wheels running the machinery of the mills, diminishing their power and usefulness, they must find for the plaintiff. This included the wall as a factor in the work of injury in the very wide and general statement of the hypothesis of the instruction, and, without regard to the question whether it was properly or improperly constructed under the grant of right of way, seeming to brand it as an unlawful structure imperatively calling for damages. Instruction 10 is that, if the defendant committed "any other act" complained of in the declaration, injuring the plaintiff's property, it was liable. What other acts are referred to? Instruction 9 spoke of injuries to the ferry and to the road below spoken of, and perhaps "other act" refers to acts other than those injuring the ferry and road; but it is indefinite, and not plainly intelligible by a jury. But, give it that construction, and it is wrong, for the additional reason that it includes all other acts, including the wall, propounding unreservedly the proposition of the absolute liability of the company for any act injuring the property.

A third wrong complained of is that a public road crossed said creek just below the mills, affording a crossing to the public, and enabling patrons of the mills to reach them, and that in constructing its road the company

had destroyed this road and crossing. Neither a condemnation by law nor grant of right of way will justify destruction of a public highway in the construction of a railroad. The statute on the subject (clause 6, § 50, chap. 54, Code) provides that, when the work interferes with a highway, it shall be restored to its former condition. *State v. Monongahela R. Co.* 87 W. Va. 108. As the law thus contemplates that the company will provide for the continued usefulness of the highway, of course, at the time of condemnation it is not anticipated that a highway will be destroyed or left materially injured in the work, and nothing is or can be assessed for damages thereto, except the proceeding be to condemn it as a highway under clause 6, § 50, chap. 54, and therefore the condemnation gives no protection against indictment or civil action for its destruction or injury beyond that contemplated by law to a highway. *Gear v. O. O. & D. R. Co.* 43 Iowa, 88. Neither does one who grants right of way contemplate that a highway will be destroyed. In fact, the party whose land is granted or taken does not own the highway. He may own the mere land or soil, but not the way. The public owns that. He has only a citizen's interest in it. By no reasonable argument can it be maintained that he intended to waive his right in the highway. But in the case of a private way it is different. Injury resulting to it from the proper, reasonable, and lawful use of the land granted or condemned is covered by the assessment or grant, unless provided against in the grant. By express provision of section 14, chap. 42, Code 1891, no damages can be assessed for private crossings in condemnation of land for railroad use; but the company must construct and forever maintain them. This is a prudent provision, since, without it, likely the land owner would have no right to cross, as the assessment of compensation would, legally speaking, include the injury resulting from inconvenient access or nonaccess to the divided parts. 2 Wood, Railway Law, 1045; Lewis, Em. Dom. § 496; 3 Sedgw. Damages, § 1165; *Mason v. Kennebec & P. R. Co.* 31 Me. 215. It seems that where there is no such provision, and where the condemnation vests in the applicant only an easement, leaving title in the owner, he may cross by means of crossings made by himself at proper times, and in proper places, so as not to hinder the operation of the railroad; but where the absolute title goes out of the owner, and vests in the applicant, he cannot cross. This distinction is plainly drawn in the two cases of *Housatonic R. Co. v. Waterbury*; 23 Conn. 109, and *Kansas Cent. R. Co. v. Allen*. 22 Kan. 285, 81 Am. Rep. 190, cited in 2 Wood on Railway Law, 908. The grantor must provide for crossings in his grant. So where one conveys to a railroad company the absolute estate in a strip of land, why does it not confer absolute dominion, and what gives him right to exercise a privilege that may seriously detract from the use for which it was required? In this state the entire estate vests in land condemned for railroad purposes. Code 1891, chap. 42, § 18. The grant in this case was of the fee

in the land. Therefore, if the way be private, there can be no recovery of damages for it, as the owner cannot, on his own land, have a private way, independent of his right to the land; and the way goes with the land by condemnation or grant, and injury to it is presumed to have been considered. 2 Wood, Railway Law, p. 1067, § 261; *Clark v. Boston, C. & M. R. Co.*, 24 N. H. 114. There was no evidence that said road was public, other than mere long user by the public, which is insufficient to establish it as a public road. *Talbot v. King*, 82 W. Va. 6. The court gave instruction No. 9, saying that, if the defendant constructed its road upon the location set out in the deed from Fry, then it was not liable for damage to the road or ferry, unless the road and ferry were public, and, if public, it would be liable. This instruction is faulty—First, because it submitted a question of fact not in issue,—that is, whether the ferry was a public ferry, and, if so, directed the jury to award damages for injury to it, when there was no pretense in the declaration that it was a public ferry, and faulty; secondly, because it submitted the question of fact whether the road was public, and, if so, directed the jury to award damages for its injury, when there was no evidence to establish it as a public road save mere user.

A fourth point of complaint in the declaration is that the defendant company, by blasting rock, and throwing them through and into the dwelling house and mills, did damage thereto. Is this a ground of recovery? It is not. The distinguished *Chief Justice Shaw* discussed this subject, saying: "An authority to construct any public work carries with it authority to use the appropriate means. Authority to make a railway is an authority to reduce the line of the road to a level, and for that purpose to make cuts, as well through ledges of rocks as through banks of earth. In a remote and detached place, where due precaution can be taken to prevent danger to persons, blasting by gunpowder is a reasonable and appropriate mode of executing such a work, and, if due precautions are taken to prevent unnecessary damage, is a justifiable mode. It follows that the necessary damage occasioned thereby to a dwelling house or other building, which cannot be removed out of the way of such danger, is one of the natural and unavoidable consequences of executing the work, and within the provisions of the statute. Of course this reasoning will not apply to damage occasioned by carelessness or negligence in executing the work. Such careless or negligent act would be a tort, for which an action at law would lie against him who commits or him who commends it. But where all due precautions are taken, and damage is still necessarily done to fixed property, it is alike within the letter and spirit of the statute, and the county commissioners have a right to assess the damages." *Dodge v. Essex County Comrs.* 3 Met. 880. The damage to buildings, being simply incidental to the construction of the work contemplated in the condemnation or grant of land for right of way, is presumed to have entered into consideration, and recovery is barred thereby, whether in fact

regarded or not. The same doctrine is maintained in 2 Wood on Railway Law, § 260, pp. 1058, 1066; *Brown v. Providence, W. & B. R. Co.* 5 Gray, 35; *Whitehouse v. Andros-coggin R. Co.* 53 Me. 208; *Sabin v. Vermont Cent. R. Co.* 25 Vt. 368; *Dearborn v. Boston, O. & M. Railroad*, 24 N. H. 179. This doctrine is based on the principle above stated, that in condemning entire damages are allowed,—a sum to cover all damages, past, present, and prospective, that are the natural, necessary, or reasonable incidents of the work; but not such as may arise from negligent or otherwise improper construction or use. 3 Sedgw. Damages, § 1164. To avoid misconstruction, I will say that above I speak of damage to lands of an owner, part of whose lands have been condemned by legal process to the public use, not to one whose buildings are injured by blasting, and none of whose land has been condemned; for in the latter case there is no injunction to protect the party doing the injury, and he is liable for such injury. *Hay v. Cohoes Co.* 2 N. Y. 159, 51 Am. Dec. 279; *St. Peter v. Denton*, 58 N. Y. 416, 17 Am. Rep. 258; *Carman v. Steubenville & I. R. Co.* 4 Ohio St. 399; 3 Sutherland, Damages, § 1051.

Another point of complaint in the declaration is that rock and other matter blasted into the creek and there remaining, and rock and other material thrown over the bank, narrowing the creek channel, did injury by diverting the water against the mill and opposite bank, lessening the power of the water wheels, and destroying the bed of said road and the crossing of the creek, and a part of said road. Now, rock blown upon the remaining land of Fry in the creek or elsewhere could not be suffered to remain, though the original casting of them there was lawful, but they must be removed within a reasonable time. *Sabin v. Vermont Cent. R. Co.* 25 Vt. 368; 2 Rorer, Railroads, 784; 2 Wood, Railway Law, § 240, p. 1066. So any *débris* not fairly necessary for the construction and maintenance of the road, inflicting injury, would be actionable, and would sustain this action. It would be negligent, improper exercise of the right granted. Under the record, I see no other ground of recovery; but I think that ground does sustain the action to the extent of recovery for damage attributable to such rock and other *débris*, not necessary as a part of permanent structure. The evidence of the defendant, by its engineer, makes it clear that the "fill" or "bar," as called in the evidence, made up of rock and other material, was not at all necessary for the support or benefit of the railroad, and could not be justified under its authority to build the road if it has injured the plaintiff. But as to injury from such *débris* we think there is error as to instructions. The defendant asked, but was refused, instructions 1, 2, and 4, which announced the position that if there was a liability on that score, recovery could be had for only such damage as resulted from such *débris* prior to the commencement of the suit. The position taken by counsel for defendant before the trial court, as evinced by those instructions, was that any injury flowing from rock, earth, or

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other material cast into the creek, and left there, not necessary in the construction of the railroad, was not permanent in nature, but remediable with the removal of the same, and that in this one suit there could not be a recovery of damages for all time to come as for a lasting and permanent injury; and this position was, I think, correct. The doctrine is exemplified in cases of our own. Take the case of *Hargreaves v. Kimberly*, 26 W. Va. 787, 57 Am. Rep. 121. The syllabus lays down the law conformably to authority generally that, "where the cause of the injury is in its nature permanent, and a recovery for such injury would confer a license on the defendant to continue the cause, the entire damage may be recovered in a single action; but where the cause of the injury is in the nature of a nuisance, and not permanent in character, but of such a character that it may be supposed that the defendant would remove it, rather than suffer at once the entire damage which it might inflict if permanent, then the entire damage cannot be recovered in a single action, but actions may be maintained from time to time as long as the cause of the injury continues." See *Smith v. Point Pleasant & O. R. Co.* 28 W. Va. 451; *McKenzie v. Ohio River R. Co.* 27 W. Va. 306. To recover for permanent injury the declaration must show an intent to claim for permanent injury (cases just cited), and here the declaration, we may say, so claims as to injury wrought by such *débris*; but, the nature of the cause of injury being impermanent, the character of declaration could not entitle the plaintiff to recover for future injury, and thus take away from the defendant the right to remove the source of injury upon a judicial determination that his action was indefensible, and burden him at once and irrevocably for damage in future, not yet accrued. The case of *Hargreaves v. Kimberly*, *supra*, will support the position. All the acts imputed to the defendant, defensible and indefensible, are not permanent causes of injury in nature, and most certainly the *débris* not part of or necessary to the stability of the railway are not.

The two following instructions were refused, and, I think ought to have been given. While no one questions that a jury must judge of the amount of damages, yet to give anything more than merely nominal damages,—to give compensatory damages,—the jury cannot act arbitrarily, but must have data according to the nature of the subject, so as to have some measure or standard to go by. There is some basis for estimation, perhaps, as to the sawmill, but as to the mill there is only evidence to show a certain per cent of diminution of capacity, and what the usual earnings were is not shown, and there is no showing of loss of earnings, and no evidence of how much more time was consumed in grinding for custom from loss of capacity, or what its cost, or how much was the loss incident to the diminution of the mill's capacity. Not even opinion evidence or estimate appears. The jury would have to conjecture in fixing a sum.

"No. 5. The jury are further instructed that the burden is upon the plaintiff to prove

to them the damages, if any, which he has suffered by reason of the alleged wrongful act of defendant, and wherein and what such damages are; and, if the plaintiff has failed to prove any damages, although he proves the wrongful act by defendant whereby his water power was diminished, the jury can give only nominal damages. No. 6. The jury are further instructed by the court that if the plaintiff would recover for loss of profits in operating said mill consequent upon the alleged wrongful act of defendants, it is his duty to prove wherein, when, and what profit he lost, and the amount thereof, as near as may be; and it is not sufficient for him to prove simply that his water power has been diminished, thus lessening the amount of work done in a given time, but he must go further, and show that custom and work were tendered, and refused because of want of capacity to meet the demand, or that it took him so much longer to accommodate the custom so offered, and prove with some degree of certainty or approximation the extra time so required and cost expended."

The court, on defendant's motion, gave the following instruction: "No. 7. If the jury believe from the evidence that plaintiff's milldam extends from shore to shore in Twelve Pole creek, and is of an average height of six feet; that the same is without sluices or flood gates, and is an obstruction to the passage of fish and the navigation of said creek, and that the said creek is a navigable stream,—then they are instructed that said milldam is a public nuisance, and the plaintiff cannot recover for any injury thereto caused by the defendant."

This mill was erected under an inquisition taken in 1839. The dam was nearly all washed away by freshet, and rebuilt between 1870 and 1875, without leave to rebuild, and again washed out in 1884, and rebuilt under leave of county court. It is contended that, as this dam was without sluice or flood gate, it was an obstruction to navigation and the passage of fish, and that the county court was without jurisdiction to authorize its original erection, or the reparation of the dam; and, if so, there is no authority to justify the existence of the mill, and it is a nuisance, and no injury done to it by the defendant is actionable. The county court had jurisdiction to grant leave to erect mills. It would be going far to say that if it authorized a mill in a proper proceeding which would obstruct navigation or fish, or omitted due provision against such obstruction, its action would be utterly void, and confer no authority. But the Mill Act existing when this mill was allowed (Code 1819, chap. 285) required the inquisition to report whether a mansion house would be overflowed, and whether, and in what degree, the passage of fish and navigation would be obstructed, and whether the health of the neighborhood would be annoyed; and, if a mansion should be overflowed, or health of the neighborhood annoyed, there was a positive prohibition against granting authority, but not so as to hindrance of navigation or passage of fish, but as to that the matter was left to the discretion of the court, and, if the leave was

given, it only commanded that the party be put under condition for preventing obstruction of navigation or passage of fish, if the dam would be an obstruction. Would you say that leave to erect would be void for that cause after the court exercised its discretion and judgment? I think not. But if you could possibly say so in such case, you cannot in this instance, for the reason that the inquisition found and reported that the mill would not obstruct navigation or passage of fish. Surely the order of the court would not be void, if afterwards it was found that the inquisition did not speak the truth. This view is expressly held in *Orenshaw v. Slute River Co.*, 6 Rand. (Va.) 245, laying down that, as the law required the inquisition to report whether the passage of fish or navigation would be obstructed by the proposed mill, if it reported that the mill would not obstruct them, "then leave is granted to erect the mill without any condition as to navigation;" and that "such a grant, under such precautionary proceedings, is a perfect one, and vests in the grantee all the public right to the stream, or so much thereof as is necessary to the full enjoyment of the mill erected under such order." Thus it seems that the public right of navigation was subordinate to the right of the mill owner. Mills were of prime necessity, and before the use of steam water power was indispensable; but now, since the wide use of steam power has been adopted, and use of streams for floatage of timber has become more productive of reward, the old water gristmill has been almost relegated to the past, and is denominated a nuisance. But the mill involved in this case had a lawful title under lawful grant in the start, and unto this day that title is preserved by not merely its original force, but by the letter of section 24, chapter 44, Code, providing that any dam or other thing in a watercourse obstructing navigation or passage of fish shall be deemed a nuisance, "unless it be to work a mill, manufactory or other machine or engine useful to the public, and is or has been allowed by law or order of court." Can it be that important mills and manufactories built under due process of law, vesting title and property rights in their owners, can be assailed by any one in collateral proceedings, even if they could be assailed by the state itself, or a citizen personally interested, by a direct proceeding? In *Orenshaw v. Slute River Co. supra*, it was held that even the legislature could not authorize the abatement of such a dam under the constitution. I am expressing no opinion as to the right of the state, or even persons peculiarly interested in navigation, by proper proceedings under reservations as to navigation in the complicated statute law of the present and former years to remove such dams; but I speak of the right of a railroad company, or of any body not so interested in this collateral way, to damage a mill-owner's right, and justify under the plea that the mill is a nuisance. A reference to the opinion by Judge Green in *Gaston v. Mace*, 28 W. Va. 14, 5 L. R. A. 892, will show that the mill-owner's right is fully recognized as co-existing along with

the right of floatage, not as a nuisance, but a lawful right under the law. It is there recognized as a right resident in the riparian proprietor. This dam was rebuilt by leave of court, and the leave was not void. At any rate, it could not justify the defendant for a wrong. *Smart's Case*, 27 Gratt. 950. And, suppose there were no order of court to build the dam, I think with Judge Bouldin in *Field v. Brown*, 24 Gratt. 93, that there may be a dam in a stream without order of court by grant or prescription. And a riparian proprietor may erect a dam and mill under his right of dominion over his own property without order of court, even though the stream be floatable. So spoke Judge Green on pages 25, 26, of 33 W. Va. and page 392 of 5 L. R. A. in *Gaston v. Mace*. The owner may be punishable for taking toll, and his right may be subject to the right of the state or of persons personally interested in navigation; but not as to others. Even one exercising the right of floatage cannot willfully or negligently injure such a dam.

But, for argument, say that this dam is a public nuisance. What then? Suppose the state or an individual having a particular personal interest in the use of the stream for floatage (for the evidence shows it to be a floatable stream, under *Gaston v. Mace*, *supra*), suppose they could by judicial proceedings abate it, it does not follow that the defendant could injure the plaintiff's property, and claim immunity, because the dam is a nuisance. The defendant was not using the stream for floatage, nor shown to be peculiarly interested in it as a floatable stream. Were it a nuisance, there the dam was in fact in possession of the plaintiff as property. Could the defendant, without process, abate it as a nuisance? We must take the statement, often met with in the books, that a public nuisance may be abated by any person, with many grains of allowance. No one can maintain a civil action for a public nuisance, unless he sustain special damage therefrom, different from that sustained by the rest of the public. 3 Bl. Com. 2191; 4 Bl. Com. 167; Wood, Nuisance, § 618; *Talbot v. King*, 32 W. Va. 6, Sedgw. Damages, § 84, p. 946; 3 Sutherland, Damages, § 1057. And it is said that no one can by his own act abate a public nuisance, unless he have such interest as to give him an action. Wood, Nuisance, § 780. There is a grave difference of opinion as to abatement of a purely public nuisance by the mere act of the party. Some contend that no one not interested personally and peculiarly otherwise than other persons can do so, while others hold that any one may do so. Mr. Wood and Judge Cooley hold the former, and Mr. Bishop and Mr. Hilliard the latter, view. Wood, Nuisance, § 729 *et seq.*; Cooley, Torts, 45, 46, 1 Bishop, Crim. L. 828; 1 Hilliard, Torts, 605. It seems to me that, except in particular cases, where emergency of some kind calls for it, and delay is dangerous, or at least inconvenient, the former is the more logical

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and reasonable view looking at the preservation of peace and the security of private property.

It would be endless and useless to pursue this point further here. It cannot be said that there is any absolute general rule on the subject universally applicable, but each instance stands on its own features, as will appear from the many cases enunciating diverse opinions, many of which will be found collected in 16 Am. & Eng. Encyclop. Law, 991, note 4. As to highways, under the decisions, the right of abatement by the mere act of the party prevails. The reason here applies given in 8 Blackstone's Commentaries, 5, as the basis of the right in any one to abate a public nuisance,—that the law allows a summary remedy of abatement of nuisance to do one's self justice, because injuries of this kind, which obstruct or annoy such things as are of daily convenience and use, require an immediate remedy, and cannot wait for the slow progress of the ordinary forms of action. Angell & D. Highways, § 274. The Virginia case of *Dimmitt v. Eskridge*, 6 Munt. 308, sustains this right to any one to abate an obstruction in a highway by exonerating parties tearing out a dam not built at the point where it was authorized, which destroyed a ford which was part of a public road. So it seems to me that if this dam were a nuisance, the railroad company, having no special interest in navigation, could not abate the dam directly. There would be no emergency calling for such action without legal process. If it could not do so directly, it could not do so indirectly by the acts charged against it. Nay, even if it could abate the dam itself directly, it could not go further, and injure the mill building, and tear away the bank of the creek, for the right of abatement vested in it or in citizen's floating rafts would be only to remove the dam itself. But its action in making the fill, if it injured the plaintiff, operated to injure, not the offending dam, but the mill and soil. In the abatement no means could be lawfully used to work such injury. All the authorities agree that where the right of abatement by private act does exist, it must go no further than to remove that which works the nuisance, doing injury no further than is necessary to accomplish that end. Cooley, Torts, 48; Wood, Nuisance, § 834; *Smart's Case*, 27 Gratt. 950; 16 Am. & Eng. Encyclop. Law, 994. So instruction 7 does not state the law correctly. It is said that the jury disregarded it in their verdict, and for that reason the appellant asks that the verdict be set aside. Being incorrect, though the jury found contrary to it, is no ground for new trial. *Armstrong v. Keith*, 3 J. J. Marsh. 153, 20 Am. Dec. 181, and note; *Peck v. Land*, 2 Ga. 1, 46 Am. Dec. 368; *Wellborn v. Weaver*, 17 Ga. 267, 63 Am. Dec. 235; Hilliard, New Trials, § 4.

For these reasons the judgment is reversed, the verdict set aside, a new trial granted, and the case remanded.

OHIO SUPREME COURT.

George REITER, *Ptff. in Err.*,
v.

STATE of Ohio *ex rel.*, John H. DUR-
RELL.

(§1 Ohio St. —.)

*1. By the rules of the common law, a resignation of an office does not take effect, so as to create a vacancy, until such resignation is accepted by the proper authority; but the common law in this regard is not in force in this state, to its full extent, and here a resignation without acceptance creates a vacancy, to the extent at least, of giving jurisdiction to appoint or elect a successor, unless otherwise provided by statute.

2. On February 21, 1893, H., then mayor of P., presented his resignation to the council then in session, to take effect March 1. On March 7, the resignation was accepted. On March 11, R. was appointed to fill the vacancy. At the following election on April 3, D. was elected to fill the unexpired term. In a contest for the office between D. and R.—*Held*, that the vacancy occurred March 1, and more than thirty days having elapsed at the April election, it was lawful then to elect a mayor for the unexpired term, and that D. was entitled to the office.

(February 27, 1894.)

*Headnotes by the COURT.

NOTE.—*Necessity of an acceptance to complete a resignation of an office.*

The limits of the right of a public officer to resign in this country do not seem to be well defined. Under the peculiar character attributed to a public office at common law it was an offense to refuse to serve when duly elected thereto. *Reg. v. Bower*, 1 Barn. & C. 585, 2 Dowl. & R. 842; *Rex v. Burder*, 4 T. R. 778, 1 Nolan, 111; *Rex v. Lone*, 2 Strange, 920; *Rex v. Jones*, 1d. 1146; *Reg. v. Hungerford*, 11 Mod. 142.

So it was held that a by-law imposing a fine for failure to serve in a municipal office is valid. *London v. Vanaacker*, 1 Ld. Raym. 496, Carth. 480.

Even a dissenter could not refuse to serve on the ground that he had failed to comply with the requirements of the established church. *Rex v. Larwood*, 4 Mod. 270.

And in North Carolina it was held that a penalty may be provided for failure to take an office. *State v. McEntyre*, 25 N. C. 171; *London v. Headen*, 76 N. C. 72.

Acceptance necessary.

If it was an offense to refuse to accept an office the natural consequence was that a resignation was of no avail unless it received the assent of the appointing power. So in the Supreme Court of the United States it is decided that at common law acceptance of the resignation is necessary to vacate the office. *Edwards v. United States*, 108 U. S. 471, 26 L. ed. 314; *Thompson v. United States*, 103 U. S. 480, 26 L. ed. 321.

So in Kansas it is held that there must be an acceptance or something equivalent. *State v. Clayton*, 27 Kan. 442, 41 Am. Rep. 418; *Rogers v. Slonaker*, 32 Kan. 193.

In New Hampshire resignation does not divest the officer of his office until it is accepted. *Atty-Gen. v. Marston* (N. H.) 18 L. R. A. 670.

In *State v. Van Buskirk*, 40 N. J. L. 463, an ac-

ERROR to the Circuit Court for Hamilton County to review a judgment in favor of relator in a proceeding by quo warranto to oust defendant from the office of mayor of the village of Pleasant Ridge. *Affirmed*.

Statement by Burket, J.:

The material facts found by the Circuit Court, on the trial of this case, are as follows:

On the 21st day of February, 1893, Amos Hill being the mayor of the village of Pleasant Ridge in Hamilton county, presented to the council while in session the following resignation.

"Pleasant Ridge, February 21, 1893.

"To the Honorable Council of the village of Pleasant Ridge:

"I, Amos Hill, mayor, tender to you my resignation, to take effect March 1, 1893, as I can not take time to attend to this office.

"Yours with respect,

"Amos Hill."

On motion this resignation was laid over to the next meeting March 7 when it was accepted by council to take effect at once, and at an adjourned meeting held March 11, George Reiter, plaintiff in error, was appointed mayor to fill the vacancy caused by the resignation of Mr. Hill, and on the same day Mr. Reiter was qualified and entered upon the duties of his office.

cepted resignation is mentioned as one of the means of terminating an office.

So in *Van Orsdall v. Hazard*, 3 Hill, 242, it is stated that resignation and acceptance will create a vacancy.

In *State v. Boecker*, 56 Mo. 19, where the real point was as to whether or not the resignation had been made, the court said that acceptance is a necessary element of a complete resignation.

In *Hoke v. Henderson*, 15 N. C. 20, 23 Am. Dec. 677, in deciding against the power to discharge an officer, the court held, in answer to an argument of counsel in favor of the power of resignation, that acceptance was necessary to a complete resignation.

Acceptance of a resignation of a register of voters is necessary. *Coleman v. Sands*, 37 Va. 689.

Distinction between public and private interests.

There is a tendency to draw a distinction between the interests of the public and those of the officer in determining whether or not he can resign. If the public interest will be subserved by the resignation, tendering it is sufficient, on the other hand, as shown above, the public cannot be inconvenienced by a resignation. Thus in *Oregon v. Jennings*, 119 U. S. 74, 30 L. ed. 323, it was held in the interest of creditors of a town that resignation created a vacancy, so far at least as to permit proceedings to fill it.

So the resignation may be conclusive against the officer himself. *State v. Haus*, 43 Ind. 105, 13 Am. Rep. 384.

As against himself, one appointed to a police force against his will may sever his connection therewith by resignation without acceptance. *People v. Board of Metropolitan Police*, 26 N. Y. 316.

An unaccepted resignation is not subject to recall. *State v. Fitts*, 40 Ala. 402.

At the following April election John H. Durrell was elected mayor of the village of Pleasant Ridge and in due time gave bond, qualified, and demanded the office, but Mr. Reiter refused to surrender the office to him, and claimed that the election for mayor held in April was not authorized by law, as the election occurred, as he claimed, less than thirty days after the vacancy.

Thereupon Mr. Durrell filed his petition in quo warranto in the circuit court of Hamilton county, to oust Mr. Reiter from the office of mayor.

Upon the above facts the circuit court found in favor of Mr. Durrell, ousted Mr. Reiter and ordered Mr. Durrell to be inducted into the office of mayor; to all of which Mr. Reiter excepted, and filed his petition in this court to reverse the judgment of the circuit court.

Messrs. John J. Acomb and Coppock & Gallagher, for plaintiff in error:

A resignation of an office, to be effective, must be accepted, and until accepted does not create a vacancy in the office, for any purpose whatsoever.

A person who has assumed the duties of an office cannot throw them off at will, but the public, through its representatives, has the right to say that it is willing that he shall be relieved of its duties and responsibilities.

Hoke v. Henderson, 75 N. C. 29, 25 Am. Dec. 677; *Rea v. Rippon*, 1 Ld. Raym. 568; *Reg. v. Lane*, 2 Ld. Raym. 1804.

If such is the rule of the common law, it must be assumed that it prevails here unless the contrary appears.

Edwards v. United States, 108 U. S. 471, 26 L. ed. 814; *State v. Clayton*, 27 Kan. 442, 41 Am. Rep. 418; *Rogers v. Stonaker*, 83 Kan. 191; *State v. Ferguson*, 81 N. J. L. 107; *Waycross*

v. Youmans, 85 Ga. 709; *Hoke v. Henderson*, *supra*; *State v. Boecker*, 56 Mo. 19; *Badger v. United States*, 93 U. S. 599, 23 L. ed. 991; *People v. Barnett* *Trp. Supra*. 100 Ill. 332; *Jones v. Jefferson*, 66 Tex. 576.

Messrs. Matthews & Cleveland and L. C. Black, for defendant in error:

A civil officer has the absolute right to resign his office at pleasure, and it is not within the power of the executive to compel him to remain in office.

McCrory, Elections, § 260; *People v. Porter*, 6 Cal. 36; *United States v. Wright*, McLean, 509; *State v. Clarke*, 8 Nev. 566; *Uimsted v. Dennis*, 77 N. Y. 878; *State v. Lincoln*, 4 Neb. 260; *State v. Pitts*, 49 Ala. 402; *Bunting v. Willis*, 27 Gratt. 144, 21 Am. Rep. 388; *State v. Hauss*, 48 Ind. 105, 18 Am. Rep. 384; *Leach v. State*, 78 Ind. 570; *Gilbert v. Luce*, 11 Barb. 91.

In section 1715 the legislature has provided in certain cases that the removal beyond the limits of a corporation shall work a resignation, evidently meaning by the word "resignation" that they considered a resignation final, and an acceptance not necessary, because in that case there could be no acceptance.

Ratlerman v. State, 44 Ohio St. 641.

Burket, J., delivered the opinion of the court:

Section 1754 of Revised Statutes provides as follows: "In case of the death, resignation, disability, or other vacation of his office, the council may, by the vote of a majority of all the members elected, appoint some suitable person within the corporation to act as mayor, and discharge the duties of the office until the vacancy is filled, or the disability removed: provided that at the next annual municipal election occurring more than thirty days after

Willful negligence or refusal by an officer to perform his duties may, as against himself, amount to a resignation. *Harrison v. People*, 36 Ill. App. 319.

In New Jersey a distinction has been brought out which seems sensible but which has not found its way into the general law of the country.

Thus in *Hoboken v. Gear*, 27 N. J. L. 365, which was a suit to recover salary, and the defense was the discharge or removal of the officer, the court states that if the acceptance of an office is voluntary the officer is not bound to serve during his term, but may resign without a violation of contract.

In accordance with that distinction it was decided that an overseer of highways cannot refuse to accept the office and therefore cannot resign it, unless his resignation is accepted. *State v. Ferguson*, 81 N. J. L. 107. And in that case it is stated that the class of officers who must serve seems to be those who are elected by the people and whose services are absolutely necessary to carry on local government.

Where acceptance is unnecessary.

Some of the states, however, relying in part at least upon the difference in character between a public office in this country and in England, have refused to apply the common law to officers here. These courts hold that—

A resignation needs no acceptance. *People v. Porter*, 6 Cal. 2d.

So the acceptance of a resignation of a municipal officer is not necessary. *State v. Lincoln*, 4 Neb. 260, 23 L. R. A.

In *Philadelphia v. Marcer*, 8 Phila. 319, it is stated that after the resignation of a city treasurer, there is no power to compel him to continue in office.

So officers of the United States government to whom the common law may perhaps be said not to apply are generally permitted to resign at will.

Acceptance of the resignation is not necessary to vacate a United States office. *State v. Clarke*, 8 Nev. 566.

The resignation of an office under the United States government need not be accepted. *Bunting v. Willis*, 27 Gratt. 144, 21 Am. Rep. 388.

So it has been stated that the president of the United States has no power to refuse a resignation and require the officer to continue in office. *United States v. Wright*, 1 McLean, 509.

Effect of statute law.

If the statutes point out a way in which the resignation is to be effected, it must be followed. *Lewis v. Oliver*, 4 Abb. Fr. 151.

Under an act providing that any person elected to a corporate office may resign by paying the fine, a delivery of the resignation and payment of the fine perfects the resignation beyond recall, even with the assent of the corporation. *Reg. v. Wigan*, L. R. 14 Q. B. Div. 908.

If the statute makes the resignation take effect from the time of filing the same, it is conclusive. *Amey v. Watertown*, 120 U. S. 501, 33 L. ed. 948.

A constitutional provision that every officer shall hold his office until his successor is elected or appointed and qualified will prevent mere resignation

such vacancy, a mayor shall be elected for any unexpired term, unless the disability is of a temporary character."

The election was held on the third day of April, 1893. If a vacancy in the office occurred on the first day of March, then the April election occurred more than thirty days after such vacancy and the election of Mr. Durrell was valid; but if the vacancy did not occur until the resignation was accepted on the 7th day of March, then the vacancy occurred less than thirty days before the April election, and in such case the election of Mr. Durrell would be void.

The date at which the vacancy occurred depends upon the question whether the delivery of the resignation to the council to take effect March 1, caused a vacancy on that day, or whether the vacancy occurred upon the acceptance of the resignation on the 7th day of March. It seems to be well settled in England and at common law, that a resignation of an office does not take effect, so as to create a vacancy, until accepted by the proper authority. *Hoke v. Henderson*, 15 N. C. 29, 25 Am. Dec. 677; *Rex v. Rippon*, 1 Ld. Raym. 563; *Reg. v. Lane*, 3 Ld. Raym. 1804; *Edwards v. United States*, 103 U. S. 471, 26 L. ed. 314; *State v. Clayton*, 27 Kan. 442, 41 Am. Rep. 418; *State v. Ferguson*, 81 N. J. L. 107; *Waycross v. Youmans*, 85 Ga. 708; *State v. Boecker*, 56 Mo. 19; *Badger v. United States*, 93 U. S. 590, 23 L. ed. 991; *People v. Barnett Twp.* Supra. 100 Ill. 332; *Jones v. Jefferson*, 66 Tex. 576.

The common law prevails in this state in so far as it is fairly applicable to our institutions and manner of living, unless abrogated, or modified by statute. So that the real question

in this case is, whether the common-law rule as to resignation shall govern in this state, or whether that rule has been abrogated by our legislation, or is inconsistent with our institutions. That there is no statute expressly changing the common law in this respect seems clear; but it seems difficult if not impossible, to reconcile our various statutes with the common-law rule. The doctrine of the common law is that an officer has not the absolute right at his own pleasure to resign his office; that the public are interested as well as the individual incumbent; that an acceptance is necessary to perfect a resignation; and that the public have the right to command the services of any citizen in any official position which they may designate.

This common-law doctrine seems inconsistent with our statute as well as with our practical treatment of official positions.

Section 1449, Revised Statutes, which imposes a fine of two dollars on a person for neglecting or refusing to serve in an office to which he has been elected or appointed under chapter two of title eleven, recognizes the power, if not the right, of a citizen to refuse to hold such office.

Section 19, Revised Statutes, provides that a person who is elected or appointed to an office, and fails to give bond, shall be deemed to have refused to accept the office, and the same shall be considered vacant.

Section 556 provides that a judge failing to transmit a certificate of his having taken the oath required by the constitution and statutes within the time required by law, shall be deemed to have refused the office, and it shall be considered vacant.

Section 557 provides that in case a judge of

from vacating an office. *United States v. Lauder County Justices*, 10 Fed. Rep. 460.

And a constitutional provision that all officers "subject to the right of resignation" shall hold office until their successor shall be qualified does not enable an officer to resign so as to create a vacancy before the election of his successor. *United States v. Green*, 63 Fed. Rep. 769.

Where the statutes provide that one shall hold office until his successor shall be elected and has qualified, mere resignation is not sufficient. *Jones v. Jefferson*, 66 Tex. 576.

The resignation of one elected to hold office until his successor is elected and qualified, even though accompanied by acceptance, is ineffectual prior to such qualification. *People v. Barnett Twp.* Supra. 100 Ill. 332.

And the Supreme Court of the United States has recognized the rule that in Illinois acceptance of resignation is not sufficient to vacate the office. There must also be an appointment of a successor. *Badger v. United States*, 93 U. S. 590, 23 L. ed. 991, affirming *United States v. Badger*, 6 Bias. 308.

In *Waycross v. Youmans*, 85 Ga. 708, an opinion is expressed, which did not become the judgment of the court, that when an officer is elected to hold office until his successor is elected and qualified, a mere resignation does not vacate the office. But the resignation must be accepted and the successor elected and qualified to effect that result.

Under the New York statutes, a deputy sheriff can resign and the office becomes *ipso facto* vacant by the resignation. But in that case it is expressly stated that the resignation was accepted. *Gilbert v. Luce*, 11 Barb. 91.

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Under the New York statutes a drainage commissioner may resign without acceptance. *Olmsted v. Dennis*, 77 N. Y. 378.

What a sufficient acceptance.

In *Gates v. Delaware County*, 12 Iowa, 405, it is intimated that there is no power to refuse to accept a resignation, and it is decided that whether it is necessary or not the receipt of the resignation and placing it upon file is sufficient to create a vacancy.

And the principle of that case was followed in *Pace v. People*, 50 Ill. 432.

In *Rex v. Rippon*, 1 Ld. Raym. 563, where the question was as to the validity of a parol resignation of the office of alderman, the court said acceptance of a parol resignation will vacate the office, or the election of another incumbent will do so.

The appointment of a successor is a sufficient acceptance of a resignation. *McGee v. State*, 108 Ind. 444.

Incompatible offices.

In the note to *Atty-Gen. v. Marston* (N. H.) 13 L. R. A. 670, it is stated that it is well settled that when a person accepts an office incompatible with one which he then holds he thereby impliedly resigns or vacates his former office. This is only an apparent exception to the rule for such doctrine may be put on the ground that the fact of the second appointment may be considered as an agreement to accept the resignation. *State v. Brinkerhoff*, 66 Tex. 45.

H. P. F.

the supreme court removes his residence out of this state, or a circuit judge out of his circuit, or a common pleas judge out of his subdivision, or a judge of a superior court out of his county, he shall be considered to have resigned and vacated his office, whereupon the vacancy shall be filled according to law.

No acceptance of such resignation seems to be contemplated, and certainly none is provided for.

Section 843 provides that the absence of a county commissioner from his county for six months shall be deemed a resignation of his office, and section 1715 provides that the removal of a municipal officer beyond the limits of the corporation, shall be deemed a resignation of his office. In such case there can be no acceptance of the resignation.

Section 570 provides that all resignation of justices of the peace shall be made to the clerk of the court of common pleas, and the justice so resigning shall at the same time give notice to the township clerk, who shall within three days notify the township trustees, who shall proceed as in other cases of vacancy.

By this section all steps toward filling the vacancy begin with the resignation of the clerk, and nothing is said about an acceptance of the resignation. At the same time of the resignation the township clerk is to be notified. Within three days thereafter the trustees are to receive notice, and they are then to proceed as in other cases of vacancy. Here is a clear recognition that the vacancy is produced by the resignation alone, without an acceptance by the clerk, or any one else.

Section 152 provides, that a policeman shall not resign unless he gives two weeks notice thereof in writing, under penalty of forfeiting all pay due him. This section recognizes the right of a policeman to resign at once and without notice, by forfeiting the pay due him. At common law no such statute would be necessary, because the same object could be attained by simply refusing to accept his resignation.

Section 37 provides that the resignation of a senator or representative, which is tendered during any session of the general assembly, shall not take effect until the branch of which the person tendering it is a member has accepted the same by a vote of a majority of the members elected to such branch, exclusive of the person tendering his resignation.

The provision in this section, that the resignation shall not take effect until accepted, recognizes the law to be, that but for such provision the resignation would take effect at once.

It is therefore clear that the legislature has had its attention called to this subject, and has seen fit to provide that as to members of the general assembly only, shall an acceptance be required to give validity to a resignation.

In cases of assignees (sec. 6237), executors and administrators (sec. 6015), guardians (sec. 6274), commissioners of insolvents (sec. 6360), and trustees of insolvent estates (sec. 6384) provisions are made for the acceptance of resignations, but nowhere is any provision made for the acceptance of the resignation of an elected officer, except members of the general assembly.

33 L. R. A.

By the statutes referred to, a clear intention is evinced that acceptance shall not be necessary to the validity of a resignation, except as to members of the general assembly, and persons appointed to certain positions of trust, and these exceptions only tend to make more clear the intention. These statutes also show that office holding is not regarded as compulsory in this state. It is, therefore, clear, that the common-law rule as to acceptance of resignations has been abrogated in Ohio, to the extent at least of authorizing the filling of the vacancy.

In many of the states, it is held that a resignation of an officer takes effect at once without acceptance by any one, and that the holding of office is not compulsory. This is said to be the modern doctrine on this subject. *United States v. Wright*, 1 McLean, 509; *McCrary*, Elections, § 270; *People v. Porter*, 6 Cal. 26; *Stute v. Clark*, 3 Nev. 566; *Olmsted v. Dennis*, 77 N. Y. 378; *State v. Lincoln*, 4 Neb. 260; *Bunting v. Willis*, 27 Gratt. 144, 21 Am. Rep. 838; *State v. Hauss*, 43 Ind. 105, 18 Am. Rep. 884; *Gilbert v. Luce*, 11 Barb. 91; *Leech v. State*, 78 Ind. 570.

In this last case, *Leech v. State*, a school trustee on March 1, 1880, presented his resignation of that date to take effect from and after March 5 of the same year. On the same first day of March a successor was appointed to fill out the unexpired term of the resigning trustee. In a contest over the office it was claimed that the appointment was void, because made on March 1, when the vacancy did not occur by the terms of the resignation until from and after March 5. The court held that the resignation made the office so far vacant on March 1, as to give jurisdiction to appoint a successor to fill out the unexpired term, the appointee's term to begin from and after March 5.

The policy of the state, as shown by our statutes, favors the filling of vacancies in office by election as soon after a vacancy occurs as is consistent with proper care and consideration on part of the public. A proper regard for the rights of the people requires that it shall not be in the power of any officer, or body of men, to refuse to accept a resignation, and thereby prevent an election at the proper time to fill the vacancy. Such power, if conceded to exist, might tempt a partisan officer to delay the acceptance of a resignation until too late to fill a vacancy at the succeeding election, and thereby lengthen, by one year, the term of office of his own appointee. More harm is to be feared from this source, than from a *hiatus* in office, an event not likely to occur in this state where men able and willing to fill office are so numerous.

The responsibility of a *hiatus* in office, should rest upon the person or body holding the appointing power, rather than upon the resigning officer. If the appointing power properly performs its official duties, no harm is to be feared from a *hiatus* in office.

It is therefore clear, on principles of public policy, as well as a proper construction of our statutes, that acceptance is not necessary to the validity of a resignation, in so far at least as to authorize the filling of the vacancy; and that the resignation in question in this case took

effect on the first day of March, 1893, so as to create a vacancy which could be lawfully filled at the following April election.

What the rights of the public, or the duties of the resigning officer, may be for the protection of public interests and property from the date of the resignation to the filling of the va-

cancy, is not involved in this case, and need not now be decided. Should any danger be apprehended from that source, the proper remedy can be supplied by the law-making power.

The judgment of the Circuit Court is *affirmed*.

NEW JERSEY SUPREME COURT.

STATE of New Jersey, A. B. AVIS, Prosecutor,
v.

Mayor, etc., of VINELAND.

(.....N. J.)

*1. **An ordinance of the borough of Vineland**, passed under Borough Act 1878, p. 407, declaring healthy growing trees, which had been planted over twenty-five years ago, by the owner of land, on or near the edge of the roadway of a street in that borough, a nuisance and obstruction, and directing their removal as such,—*Held*, void.

*2. **Quere, as to powers of borough** under Act 1888, p. 94, and as to fact of dedication of street *cum onere* in this case.

(March 27, 1894.)

CERTIORARI to review an ordinance of the Borough of Vineland passed to compel the removal of alleged obstructions from Landis avenue. *Ordinance set aside*.

The facts are stated in the opinion.

Before Dixon and Abbott, JJ.

Messrs. Howard Carroll and Charles K. Landis for prosecutor.

Mr. Royal P. Teller for defendant.

Abbott, J., delivered the opinion of the court:

The writ of certiorari in this case removed into this court an ordinance passed by the mayor and council of the borough of Vineland, May 9, 1893, entitled "An ordinance for the removal of obstructions from Landis avenue, and to declare what are nuisances therein, between Eighth street and East avenue, within the borough of Vineland." This ordinance declared that certain trees on the northern and southern border of Landis avenue, between Eighth street and East avenue, and the grassy portions of said avenue on each side, were obstructions and nuisances in said avenue, and the road committee was directed to remove the same May 18, 1893. The borough claims the right to pass this ordinance and remove the trees and grass plots in question under paragraph 2, subd. 1, of section 12 of "An Act for the Formation of Borough Governments," approved April 5, 1878. Laws of 1878, p. 407 (Supp. Rev. p. 46, § 14, par. 1). This paragraph gives the mayor and council of said

borough power to pass, enforce, alter, or repeal ordinances to take effect within the limits of said borough for the following purposes, to wit: "(1) To declare what shall be considered nuisances in the streets, roads, lots, and places in said borough, and to prevent and remove all obstructions, incumbrances, and nuisances in and upon any street, road, lot, sidewalk, inclosure or other place in said borough." This language does not authorize municipal authorities to declare anything to be a nuisance which cannot be detrimental to the health of the city, or dangerous to its citizens, or a public inconvenience. *State v. Jersey City*, 29 N. J. L. 170, 175. An ordinance passed without notice to the prosecutor, directing a committee to remove certain objects upon lands which had been occupied by the prosecutor for twenty-five years, because they were encroachments upon a street, held void. The power to prevent and remove all encroachments in or upon any street is only a police power, and does not extend to cases of a doubtful or uncertain nature, and which require to be first lawfully determined. *State v. Hightstown*, 45 N. J. L. 127, 129. See also *Newark & S. O. H. C. R. Co. v. Hunt*, 50 N. J. L. 808, 814, 816. The power to declare what is to be considered nuisances in streets, and to remove encroachments and nuisances from highways, is a police power, ministerial in its nature, and designed to relieve the public from such obstructions in streets as are apparent or readily ascertainable, without the necessity of adjudication. The power is capable of exercise only to the extent that the right is clear or reasonably known, and not so as to invade rights which, from their doubtful or uncertain nature, require a lawful determination. *State v. Hightstown*, 45 N. J. L. 501, 503, 504. To say to a man that he shall not use his property as he pleases, under certain conditions, is to deprive him *pro tanto* of the enjoyment of such property. To find conclusively against him that a state of facts exists, with respect to the use of his property, or the pursuit of his business, which subjects him to the condemnation of the law, is to affect his rights in a vital point. The right to abate nuisances, whether we regard it as existing in the municipalities or in the community or in the land of the individual, is a common-law right, and is derived in every instance of its exercise from the same source,—that of necessity; but the neces-

*Headnotes by **ABBOTT, J.**

NOTE.—The ownership and control of trees in a highway are shown in a *note* to *Chase v. Oshkosh (Wis.)* 15 L. R. A. 553, in which case the decision of the common council of a city that trees within the limits of a sidewalk must be removed was held not subject to review by the courts in the absence of any evidence to show an abuse of discretion, and it was held that such trees might be cut down 23 L. R. A.

without notice as a nuisance. But the present case has a material difference in the fact that the trees in question were on the street when dedicated and the dedication subject to them with only the strip between them intended for actual use as a driveway.

As to trees on boundary line, see *note* to *Hickey v. Michigan Central R. Co.* (Mich.) 21 L. R. A. 729.

ality must be present to justify the exercise of the right, and, whether present or not, must, in ordinary cases, be submitted to a jury under the guidance of a court. The finding of a municipal body can have no effect whatever for any purpose upon the ultimate disposition of a matter of this kind. It is for the courts, *Hutton v. Camden*, 39 N. J. L. 122, 180, 181, 28 Am. Rep. 208.

A thrifty tree in a public highway, the fee of the soil of which is in the abutting landowner, belongs to the abutting landowner (unless it has been planted by the public authorities), and he may have trespass against any person who cuts down any such trees growing on the side of the road, and left there for shade or ornament; for the freehold remains, subject only to the easement or right of passage in the public. Nothing is more common everywhere in our villages and agricultural districts than for the owners and occupiers of the soil to have fruit, shade, and ornamental trees along the line of the public roads, sometimes in the line of the roads, sometimes on each side of the line; and it has been held that a road overseer cannot arbitrarily cut them down, and, if he did it in an improper case and maliciously, he was held liable to exemplary damages upon suit of the owner of the fee of the soil. *Winter v. Peterson*, 24 N. J. L. 524, 527, 529, 61 Am. Dec. 678, cited with approval in *Wuesthoff v. Seymour*, 23 N. J. Eq. 66, 70; *State v. Stenner*, 50 N. J. L. 59, 60. These standing trees were part of the inheritance, and a sale of them would have been a sale of an interest in land under the statute of frauds. *Slocum v. Seymour*, 36 N. J. L. 188, 18 Am. Rep. 482. If these trees were nuisances, trespass would not lie for their destruction by municipal authority. It is clear that these thrifty, ornamental shade trees are neither obstructions nor nuisances to Landis avenue, and the attempt to abate them as such is an exercise of arbitrary power, unwarranted in law, under the act invoked by the borough authorities.

There is also a serious question in this case as to the extent of the dedication of that part of Landis avenue referred to in the ordinance. Charles K. Landis, the owner of lands at Vine-land, and its founder, laid out the lands in question (with other lands), and he testifies that his surveys and survey books show the line of shade trees and grass plots, and the lands show it, as they have been in use for about thirty years in that section. He says that the trees sought to be removed are fine, handsome trees that have been growing there for twenty-five years or more. That they were set out in accordance with stipulations under which he sold the property, and that his surveyors, under his directions, gave the stakes to each settler where trees should be planted in accordance with the general system. That Landis avenue was of the width of 100 feet, to wit, a double row of shade trees upon that portion of Landis avenue. That the reason why he laid the avenue out 100 feet wide was not to have the whole 100 feet used as a roadway, but that it might serve the purpose of beauty and ornamentation; and that the central part only, which he dedicated for a roadway, should be used for that purpose. That his contracts for

the lots in this section stipulated for the planting of a double row of shade trees on the sides of the road at proper distances apart. That the width of the avenue which he dedicated to the public, under the restriction mentioned, is 100 feet. The map on file in the county clerk's office appears to have been filed by Landis township, and not by Landis himself. When Marcus Fry, surveyor, was examined, a map or plan was put in evidence. He testifies that this map or plan was made from actual surveys; that these trees were planted according to the agreement under which these lands were sold; that the roadway has always existed as it is now, between these two rows of trees; that the map offered in evidence shows the measurement of the streets, the sidewalks, and the position of the grass plot and trees; . . . that on the original survey of Landis avenue there is something showing the dedication as shown on the map or plan offered in evidence; that the original surveys show that the trees were to be set out as shown on this plan. Dedication of a street must arise from some act of the owner of the land, and may be made *cum onere*. *State v. Society for Establishing Useful Mfrs.* 44 N. J. L. 503; *Ayres v. Pennsylvania R. Co.* 48 N. J. L. 44, 48, 57 Am. Rep. 538, 53 N. J. L. 405, 410.

The public cannot get anything more than he gives; and if he dedicates a street 100 feet wide, subject to the restrictions and use as mentioned, the public takes subject to the restrictions. The filing of a map and selling lands thereby would be evidence of a dedication, but, if he did not file the map, and did not adopt it, by reference thereto in his deeds, the filed map would not be conclusive evidence against him; and, if the map he made and sold lots by showed the trees set out to be as testified to by the surveyor, it would be a question of fact to be determined by judicial authority as to whether this dedication of Landis avenue was not subject to the setting out and existence of these trees in accordance with Mr. Landis' scheme of ornamentation and use of this avenue. See *State v. Society for Establishing Useful Mfrs.* 44 N. J. L. 504, 507, as to existence of these trees from the beginning, as evidence of the making of dedication, and acceptance thereof, subject thereto. These trees are 16 feet apart; are all live and thrifty trees, from 20 to 40 feet high and from 6 to 20 inches in diameter (page 18); they do not interfere with the roadway, or obstruct any of the passageways on the avenue. It cannot be claimed with any show of reason or justice that these trees, under these circumstances, are nuisances or obstructions in Landis avenue which may be summarily removed as such by the borough authorities.

It is not meant to intimate in this case what power is given to the borough under the act entitled "A supplement to an Act Entitled 'An Act for the Formation of Borough Governments,' approved April 8, 1878," approved March 13, 1883. Laws 1883, p. 96 (Supp. Revision, p. 49, § 80). That act gives the borough authorities "general supervision, management, and control of the streets, avenues, roads, public places and sidewalks within the borough." The destruction of these trees as nuisances or obstructions cannot be justified

under this act. Should the borough attempt to exercise absolute control over Landis avenue under this act, the question will then properly arise as to whether or not the dedication of Landis avenue was not a restricted dedication, contemplating the existence of these trees as part of the design and plan of the dedicatrix.

If the dedication was thus restricted, it would then be a question as to whether any such change in the street in removing these trees is not a taking of property, for which the owner of the soil is entitled to damages.

The ordinance is set aside, with costs to the prosecutor.

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

Robert G. DUN *et al.*, *Plffs. in Err.*,
v.

CITY NATIONAL BANK OF BIRMINGHAM, Ala.

(68 Fed. Rep. 175.)

1. A mercantile agency which agrees to transmit information to subscribers who may wish to contract with outside parties under a condition that it is not to be responsible for loss by the negligence of said agents and in no manner guarantees the actual verity or correctness of the information given is not liable to a subscribing bank for loss upon commercial paper bought by it in reliance upon information furnished by one of its subagents as to a party to such paper, although such agent being connected in business with such party knowingly gave false information and such bank purchased the paper in reliance thereon.

2. A mercantile agency is not liable for damages for a false report made by a subagent whose employment is contemplated by the contract of subscription under which the agency merely agrees to transmit the information obtained by such subagent where it has exercised due care in the selection of such subagent, since the latter is the agent of the subscriber.

(October 17, 1893.)

ERROR to the Circuit Court of the United States for the Southern District of New York to review a judgment in favor of plaintiff in an action brought to recover damages for the alleged fraud of defendant's agent, which resulted in loss to plaintiff. *Reversed.*

The facts are stated in the opinion.

Argued before Wallace and Lacombe, Circuit Judges, and Townsend, District Judge.

Messrs. W. W. McFarland and Samuel Wagner, with *Messrs. Douglass & Minton*, for plaintiffs in error:

The contract of subscription defines the rights and obligations of the respective parties, and it precludes the maintenance of this action.

Duncan v. Dun, 7 W. N. C. 246.

When it is decided that under the provisions of a particular contract a principal is not liable for the gross negligence of an agent whose employment is contemplated and provided for, it is necessarily decided that the principal

NOTE.—A new phase of the question of liability of a mercantile agency is presented in the present case, and the briefs of counsel are unusually interesting in their marshaling of analogous authorities.

See, in connection with present case, that of *Crew v. Bradstreet Co. (Pa.)* 7 L. R. A. 661.
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is not liable for the fraud of such agent, for in the case of representations in regard to property or character and credit gross negligence and fraud mean the same thing in law.

Cooley, Torts, 2d ed. p. 585.

The principle is pointedly affirmed in *Ben-nett v. Judson*, 21 N. Y. 238; *Marah v. Fulker*, 40 N. Y. 562; *Lynch v. Mercantile Trust Co.* 18 Fed. Rep. 486, and in a multitude of cases cited in *Alvarez v. Brannan*, 7 Cal. 508, 68 Am. Dec. 274; *Munroe v. Pritchett*, 16 Ala. 785, 50 Am. Dec. 208; *Tryon v. Whitmarsh*, 1 Met. 1, 35 Am. Dec. 848; *Saunders v. Hatterman*, 24 N. C. 32, 37 Am. Dec. 404; and 8 Am. & Eng. Encyclop. Law, p. 636, *et seq.*

The plaintiff therefore does not change the nature of his cause of action, nor in any way strengthen it by charging fraud instead of negligence.

Fraud in a judicial proceeding can never be predicated of a mere emotion of the mind.

People v. Cook, 8 N. Y. 79, 59 Am. Dec. 451; *Taylor*, Jurisp. p. 89; *Y. B.* 4 Edw. IV. 8, 9.

If an untrue report is made it is that act that causes the damage and not the state of mind back of it. And beyond question the agent is directly responsible to the party injured, although the report may not have been made to him.

Eaton v. Avery, 88 N. Y. 31, 38 Am. Rep. 389; Cooley, Torts, pp. 88, 578, and cases cited.

When an agent has authority to employ subagents, he will not be liable for the negligence or misconduct of his subagent; he will be liable however for negligence or fraud in the appointment.

1 Am. & Eng. Encyclop. Law, p. 394 and cases cited in *note*; *Story*, Ag. 224; *Parsons*, Cont. 7th ed. pp. 90, 91; *White v. Germania F. Ins. Co.* 76 N. Y. 415, 82 Am. Rep. 380; *Sanger v. Dun*, 47 Wis. 615, 32 Am. Rep. 789.

Proof of fraud on the part of the agent Bur-chard will not sustain an action of deceit against the defendants upon the facts in this case.

Fraud and deceit are the gist of the action and in order to recover it must be proved against the defendants.

Lord v. Goddard, 54 U. S. 18 How. 198, 14 L. ed. 111.

One cannot be punished vicariously, but only for one's own torts.

Cooley, Torts, 2d ed. 156.

Evans' Law of Agency says that in every single case, from *Hern v. Nichols*, 1 Salk. 289, downwards, in which a principal has been held liable, two elements were present: (a) The fraud was committed by the agent in the course

of his duty; and (b) it was committed for the benefit of the principal.

See *British Mut. Bkg. Co. v. Charnwood Forest R. Co.* L. R. 18 Q. B. Div. 714.

The elements necessary to sustain an action for deceit against an innocent principal, for the fraud of an agent, do not exist in this case.

Story, Ag. §§ 139, 452; 1 Parsons, Cont. 7th ed. p. 78; *Jeffrey v. Bigelow*, 13 Wend. 518, 28 Am. Dec. 476; *Mackay v. Commercial Bank of New Brunswick*, L. R. 5 P. C. 894; *Alexander v. Gibson*, 3 Campb. 556; *Cornfoot v. Fouke*, 6 Mees. & W. 858; *Fuller v. Wilson*, 3 Q. B. 58; *Moens v. Heyworth*, 10 Mees. & W. 147; *Barwick v. English Joint Stock Bank*, L. R. 2 Exch. 259; *Swift v. Winterbotham*, L. R. 8 Q. B. 244; *Swift v. Jawsbury*, L. R. 9 Q. B. 801; *Western Bank of Scotland v. Addie*, L. R. 1 Sc. App. 146; *British Mut. Bkg. Co. v. Charnwood Forest R. Co. supra*.

The principal is not liable where an agent commits a willful wrong.

Ewell's Evans, Principal & Agent, 578.

If the persons whom, in the common course of administration, the trustee may employ as brokers, wharfingers, carriers, etc., should embezzle or lose the effects of the bankrupt, the trustee will not be responsible, provided he has bona fide employed persons deemed responsible at the time.

2 Bell, Commentaries of the Law of Scotland, 7th ed. p. 323.

Messrs. Roger Foster and Lorenzo Sample, for defendants in error:

S. B. Burchard was the manager of the mercantile agency of R. G. Dun & Co. at Oswego, and in making the reports in question acted within the scope of his authority as manager, and in the regular and usual course of the business of his agency.

Whatever the rule of law may be as to the liability of a principal for a fraud committed by his agent for his own benefit in a case where the principal is under no contractual obligations to the party cheated, any decisions holding the negative in such a case do not apply to the case at bar, where the principal furnished the fraudulent information under a contract with the plaintiff.

The contract of subscription does not exempt the plaintiffs in error from liability for the fraud of their employé.

Even where a carrier may by express contract relieve himself from liability for his own negligence; a contract which by its terms is sufficiently broad to relieve him from liability for the negligence of his employé will not be so construed when negligence is not specifically mentioned and excepted.

Mynard v. Syracuse, B. & N. Y. R. Co. 71 N. Y. 180, 27 Am. Rep. 28; *New Jersey Steam Nav. Co. v. Merchants Bank of Boston*, 47 U. S. 6 How. 844, 12 L. ed. 465; *The New Orleans*, 26 Fed. Rep. 44; *Magnin v. Dinamore*, 56 N. Y. 168; *Westcott v. Fargo*, 61 N. Y. 542, 19 Am. Rep. 800.

How much stronger is the case when negligence is specifically excepted and fraud not mentioned.

The plaintiffs in error, exercising as they did a public employment, could not exempt themselves from liability for negligence.

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New York Cent. R. Co. v. Lockwood, 84 U. S. 17 Wall. 357, 21 L. ed. 637; *Liverpool & G. W. Steam Co. v. Phoenix Ins. Co.* 129 U. S. 397, 32 L. ed. 788.

This doctrine is not limited to common carriers. It has been held in the case of the owners of grain elevators.

Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77. The operators of telephones.

Delaware & A. Teleg. & Teleph. Co. v. State, 8 U. S. App. 80, 60 Fed. Rep. 677; *Hockett v. State*, 105 Ind. 250.

Gas companies.

State v. Ironton Gas Co. 87 Ohio St. 45; *Williams v. Mutual Gas Co.* 53 Mich. 490, 50 Am. Rep. 286; *Sickles v. Manhattan Gas-Light Co.* 66 How. Pr. 305.

Water companies.

Spring Valley Waterworks v. Schottler, 110 U. S. 347, 28 L. ed. 178; *McCrory v. Beaudry*, 67 Cal. 120; *Ernst v. New Orleans Waterworks Co.* 39 La. Ann. 550.

Telegraph companies.

Western U. Teleg. Co. v. Adams, 87 Ind. 598, 44 Am. Rep. 776.

Exchanges and transmitters of stock quotations.

Friedman v. Gold & Stock Teleg. Co. 23 Hun, 4.

Burchard was by his acts and the acts of the plaintiff in error, their agent in making the false reports—their agent at least *pro hac vice*—notwithstanding the subagent clause in the contract.

A clause similar to this is frequently found in fire insurance policies, and according to the overwhelming weight of authority must be construed as contended by defendants in error.

May, Ins. 8d ed. § 140, p. 250; *Bassell v. American F. Ins. Co.* 3 Hughes, C. C. 531; *Commercial Ins. Co. v. Ives*, 56 Ill. 403; *Union Ins. Co. v. Chipp*, 38 Ill. 96; *Eilenberger v. Protective Mut. F. Ins. Co.* 89 Pa. 464; *Andes F. Ins. Co. v. Lochr*, 6 Daly, 105; *Planters Ins. Co. v. Myers*, 55 Miss. 479, 80 Am. Rep. 521. See also *Commercial F. Ins. Co. v. Allen*, 80 Ala. 571; *Susquehanna Mut. F. Ins. Co. v. Ousick*, 109 Pa. 157; Insurance Agents, 5 So. L. Rev. N. S. 863, 862.

This is a question of general commercial law as to which the United States courts establish their own rule, which governs all federal courts throughout the United States and is independent of any special rule of the courts of the forum.

Swift v. Tyson, 41 U. S. 16 Pet. 1, 10 L. ed. 865; *Burgess v. Seligman*, 107 U. S. 20, 27 L. ed. 359; *Hough v. Texas & P. R. Co.* 100 U. S. 218, 25 L. ed. 612.

A principal is civilly liable for the frauds and deceit of his agent committed in the course of and as a part of the agent's employment and within the scope of his authority as agent.

New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30; Bigelow, Fraud, p. 235, Pollock, Torts, p. 68; 1 Story, Eq. 13th ed. p. 214; *Mapple v. Cincinnati, H. & D. R. Co.* 40 Ohio St. 313, 48 Am. Rep. 685; *Erie City Iron Works v. Barber*, 106 Pa. 125, 51 Am. Rep. 508; *Lee v. Sandy Hill*, 60 N. Y. 442; Story, Ag. pp. 139, 452; 1 Parsons, Cont. 62; *Locks v. Stearns*, 1 Met. 560, 35 Am. Dec. 833; *Olmsted v. Holtsling*, 1 Rihl, 317; *White v. Sawyer*, 16 Gray, 686;

Bennett v. Judson, 21 N. Y. 238; *Butler v. Watkins*, 80 U. S. 18 Wall. 456, 20 L. ed. 629; *Farmers & M. Bank of Kent County v. Butchers & D. Bank*, 16 N. Y. 125, 69 Am. Dec. 678; *Fishkill Sav. Inst. v. National Bank of Fishkill*, 80 N. Y. 162, 36 Am. Rep. 595; *Hern v. Nichols*, 1 Salk. 2-9; *Fuller v. Wilson*, 3 Q. B. 58; *Ormrod v. Huth*, 14 Mees. & W. 651; *Murray v. Mann*, 2 Exch. 588; *Mackay v. Commercial Bank of New Brunswick*, L. R. 5 P. C. 394; *Barwick v. English Joint Stock Bank*, L. R. 2 Exch. 259.

In the first and most obvious view of an agency of any description, the principal is bound by such acts as he has authorized.

1 Parsons, Cont. 7th ed. pp. 39, 44.

The weight of authority is in favor of the principle that a principal is not only liable for the authorized acts of his agent, but that he is also liable for the acts of his agent which by his acts he has induced a third party to believe were within the scope of the authority of the agent.

Farmers & M. Bank of Kent County v. Butchers & D. Bank, and *New York & N. E. R. Co. v. Schuyler*, *supra*.

For losses occasioned by the willful fraud and not by the mere carelessness or ignorance of the agents in communicating information known by them to be untrue and with intent to mislead the inquirer, the defendants are liable.

Mynard v. Syracuse, B. & N. Y. R. Co. 71 N. Y. 170, 27 Am. Rep. 28; *New Jersey Steam Nav. Co. v. Merchants Bank of Boston*, 47 U. S. 6 How. 344, 12 L. ed. 465; *Magnin v. Dinmore*, 56 N. Y. 168; *Westcott v. Fargo*, 61 N. Y. 542, 19 Am. Rep. 800.

Townsend, District Judge, delivered the opinion of the court:

The defendants are partners, doing business as a mercantile agency, under the firm name of R. G. Dun & Co. The plaintiff is a national bank, located at Birmingham, Ala. In April, 1889, the plaintiff became a subscriber to said agency, under a written agreement, the material portions of which are as follows:

"Terms of Subscription to the Mercantile Agency.

"Memorandum of the agreement between R. G. Dun & Co., proprietors of the mercantile agency, on the one part, and the undersigned, subscribers to the said agency, on the other part, viz.:

"The said proprietors are to communicate to us, on request, for our use in our business, as an aid to us in determining the propriety of giving credit, such information as they may possess concerning the mercantile standing and credit of merchants, traders, manufacturers, etc., throughout the United States and in the dominion of Canada. It is agreed that such information has mainly been, and shall mainly be, obtained and communicated by servants, clerks, attorneys, and employes, appointed as our subagents, in our behalf, by the said R. G. Dun & Co. The said information to be communicated by the said R. G. Dun & Co. in accordance with the following rules and stipulations,

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with which we, subscribers to the agency as aforesaid, agree to comply faithfully, to wit: (1) All verbal, written, or printed information communicated to us, or to such confidential clerk as may be authorized by us to receive the same, and all use of the reference book, hereinafter named, and the notification sheet of corrections of said book, shall be strictly confidential, and shall never, under any circumstances, be communicated to the persons reported, but shall be exclusively confined to the business of our establishment. (2) The said R. G. Dun & Co. shall not be responsible for any loss caused by the neglect of any of the said servants, attorneys, clerks, and employes in procuring, collecting, and communicating the said information; and the actual verity or correctness of the said information is in no manner guaranteed by the said R. G. Dun & Co. The action of said agency being of necessity almost entirely confidential in all its departments and details, the said R. G. Dun & Co. shall never, under any circumstances, be required by the subscriber to disclose the name of any such servant, clerk, attorney, or employe, or any fact whatever concerning him or her, or concerning the means or sources by or from which any information so possessed or communicated was obtained. (3) The said R. G. Dun & Co. are hereby requested to place in our keeping, for our exclusive use, a printed copy of a reference book, containing ratings or markings of estimated capital and relative credit standing of such business men, as aforesaid, prepared by them or the servants, clerks, attorneys, and employes aforesaid, together with notification sheet of corrections. We further agree that upon the delivery to us of any subsequent edition of the reference book, the one now placed in our hands shall be surrendered to them, and also that upon the termination of our relations as subscribers the copy then remaining in our hands shall be given up to the said R. G. Dun & Co., it being clearly understood and agreed upon that the title to said reference book is vested and remains in said R. G. Dun & Co."

Plaintiff paid \$75 in advance for services to be rendered under said agreement till July 1, 1890. Shortly after the making of said agreement, one Rollins, a customer of the plaintiff, applied to it to discount certain drafts drawn by him, and accepted by, W. A. Kitts, of Oswego, N. Y. Before discounting the drafts, the plaintiff presented an inquiry slip at defendants' agency, at said Birmingham, asking, as a subscriber, for such information as defendants had respecting the standing and responsibility of said Kitts. The inquiry was sent from Birmingham to the office of defendants in New York city, and thence to one Burchard, their agent at Oswego, N. Y. Burchard and Kitts were connected in business, and Burchard, in order, apparently, to promote his own interests, sent false reports as to the standing and responsibility of Kitts to the defendants. These reports were pasted on printed forms, and delivered by defendants to the plaintiff. Said printed forms were as follows:

"The Mercantile Agency of R. G. Dun & Co., Dun, Wiman & Co., and E. Russell & Co.

"The information given on this sheet is an answer to an inquiry made by a subscriber to the mercantile agency, who asks for the same as an aid to determine the propriety of giving credit. The information is communicated under the conditions of an agreement signed by the said subscriber, which expressly stipulates that the said information is obtained by the servants, clerks, attorneys, and employes of the said subscriber, and on his behalf. The said agreement also expressly stipulates that the said mercantile agency shall not be responsible for any loss caused by the neglect of any of the said subscriber's servants, clerks, attorneys, and employes in procuring, collecting, and communicating the said information; and the actual verity of the said information is in no manner guaranteed. The agreement further provides that the information thus communicated shall be strictly confidential, shall never be communicated to the persons to whom it refers, and that all inquiries made shall be confined to the legitimate business of the subscriber's establishment."

The plaintiff, relying on said reports, discounted the acceptances of said Kitts to the amount of \$5,264.48, which have never been paid, and are of no value. The plaintiff thereupon brought an action at law for damages by reason of said false and fraudulent representations, and the jury rendered a verdict in favor of the plaintiff. The defendants moved for a new trial, which motion was denied, and the case comes before this court upon a bill of exceptions.

The defendants' counsel, at the close of the testimony, moved the court to direct a verdict in favor of the defendants, which motion was denied. Among other requests, they requested the court to charge the jury as follows: "If Burchard knew the reports to be false in any respect, and, so knowing them to be false, made them to the defendants, to advance, promote, or carry out some private end of his own in connection with his agency and the duties thereof, then the defendants are not liable for his false reports, and are not liable to the plaintiff by reason thereof."

The court refused so to charge, but charged the jury as follows: "The contract between the plaintiff and defendants in regard to the reciprocal obligations of the two parties to a certain extent has been placed in evidence. It is stated in the contract that the information is to be mainly obtained by the servants, clerks, and employes appointed by the defendants, and characterized in the contract as appointed by the R. G. Dun & Co., as the subagents of the plaintiff. For any loss occasioned by the neglect of these employes in seeking and obtaining accurate information Dun & Co. are not responsible. For losses occasioned by the indolence or carelessness of the employe, which causes the information to be inaccurate, Dun & Co. are not liable. Neither do they guarantee the actual truth or correctness of the information. But, notwithstanding that these employes are the

subagents of the persons who seek the information, they are also employed by, and are paid by, and are legally, as well as in popular language, the agents of Dun & Co. For losses occasioned by the willful fraud, and not by the mere carelessness or ignorance of the agents in communicating information known by them to be untrue, and with intent to mislead the inquirer, the defendants are liable if the plaintiffs, having placed reliance upon the fraudulent misrepresentations, gave credit in consequence of such fraud, and were lured thereby to their pecuniary loss and damage.

"In this case the business of the firm of R. G. Dun & Co. was to furnish information to subscribers who had employed them for that purpose for a pecuniary consideration. If, in the discharge of the duties of an employe, and in undertaking to furnish information in reply to an inquirer, and acting in the business of the agency, Mr. Burchard knowingly gave false information with intent to deceive the inquirer, the defendant is liable, although Burchard's private inducement to commit the fraud was desire to help Kitts.

"The questions of fact in contested case become at least three in number:

"(1) Were the statements untrue at the time they were made?

"(2) Were they known by the agent to be untrue at the time, and did he then act fraudulently, with intent to mislead the inquirer, for that he knew that the information was sought for the purpose of aiding the inquirer to determine the propriety of giving credit to the person inquired about, is palpable? and

"(3) Did the plaintiff, relying upon the truth of the information give credit upon the faith of the untrue representations and thereby incur a loss?"

The briefs and arguments of counsel on the appeal were largely devoted to a discussion of the liability of an innocent principal for the frauds and deceit of his agent, causing damage to a third party. That the decisions are not altogether harmonious must be conceded, but the apparent conflict is one not as to the principle, but as to its application. As is said by the learned judge who heard the cause in the court below, "the cases turned upon the question whether the alleged agent was, under the circumstances in each case, acting within the scope of his authority." And the law laid down in said cases seems generally to be, as is stated by him in his opinion, denying the motion for a new trial, "that the principal is liable whenever his agent, who is at the time acting within the scope of his authority, and for the principal, makes a fraudulent misrepresentation which influences and is acted upon by the plaintiff to his injury." Most of the decisions relied on by counsel for plaintiffs were rendered in cases where an agent was intrusted by his principal to effect a sale, and where it appeared that the principal had ratified the act of the agent by having accepted and retained the benefit derived from the fraudulent representations of the agent, acting for the principal. In the other cases notably that of

New York & N. H. R. Co. v. Schuyler, 84 N. Y. 80, the deceit was practiced by an officer of a corporation.

But, as is said by *Mr. Justice Miller* in *Pollard v. Vinton*, 105 U. S. 12, 26 L. ed. 1000, referring to the *Schuyler Case*: "Whatever may be the true rule which characterizes actions of officers of a corporation who are placed in control as the governing force of the corporation, which actions are at once a fraud on the corporation and the parties with whom they deal, and how far courts may yet decide to hold the corporations liable for such exercise of power by their officers, they can have no controlling influence over cases like the present. In the one before us it is a question of pure agency, and depends solely on the power confided to the agent. In the other case the officer is the corporation for many purposes. Certainly a corporation can be charged with no intelligent action, or with entertaining any purpose, or committing any fraud, except as this intelligence, this purpose, this fraud, is evidenced by the actions of its officers. And while it may be conceded that for many purposes they are agents, and are to be treated as the agents of the corporation or of the corporators, it is also true that for some purposes they are the corporation, and their acts as such officers are its acts. We do not think that case presents a rule for this case."

A careful examination of the agreement between the parties and of their respective rights and obligations thereunder, shows that Burchard, the agent of plaintiff and of defendants, did not stand in the same relation to the parties as the agents in the cases referred to. There was no contract between plaintiff and defendants for a sale of commercial paper. This is not a case of deceit in a sale, where an agent, within the scope of his authority, and acting for his principal, has made false statements, or suppressed the truth, to effect the contract of sale. The agreement in the case at bar was purely and simply an agreement by defendants to transmit information to subscribers who might wish to contract with outside parties. The defendants, as proprietors of the mercantile agency, agree to communicate such information as they may possess, as an aid to the subscribers in determining the propriety of giving credit, such information to be mainly obtained and communicated by subagents. Defendants are not to be responsible for loss by negligence of such subagents, "and the actual verity or correctness of the said information is in no manner guaranteed."

A consideration of the objects which the parties respectively had in view in connection with the provisions of the agreement seems to show that it could not have been intended that Dun & Co. should be responsible in a case like the present. They were expressly exempted from any obligation to disclose the sources of information. It was not intended that they should themselves obtain information, but it was agreed that they should transmit to the inquirer information, necessarily obtained, mainly by subagents, concerning which they had no knowledge, and over the obtaining of which they had no

control. They were engaged in the preparation of a reference book containing ratings of estimated capital and relative credit standing of business men throughout the United States and Canada. While the subagents appointed by Dun & Co. were their agents in the preparation of said book, and the general business of the agency, they were, by the express terms of the agreement, subagents, appointed on behalf of the subscribers, to obtain and communicate information in response to their requests. In this case the defendants were the agents of the plaintiff to transmit such information as they might receive. Their failure to transmit the information would have been a violation of their agreement. They did transmit it, together with a notice that they did not in any manner guarantee its truth. So far as these defendants are concerned, they completely fulfilled the terms of their contract with the plaintiff. They did nothing more nor less. The deceit and fraud were committed by the subagent. It is not claimed that there was any negligence either in his selection or in the transmission of the information by the defendants. The false information was not obtained for Dun & Co. to aid them in a contract to sell or buy commercial paper, for Dun & Co. were not a party to any such contract, but was furnished by the subagent for the purpose of having it transmitted to the plaintiff, his real principal, through the defendants, who acted as intermediary agents, in order that, by the fraud of said subagent, Kitts, one of the parties to the contract of the sale of the paper, might be assisted, and the other party, this plaintiff, might be defrauded. To accomplish this purpose the subagent perpetrated a fraud upon the plaintiff and the defendants. Burchard was not employed as the agent of either party in reference to the contract of sale which he caused to be affected by his deceit. He was only an agent under the agreement of subscription to furnish information.

The vital distinction upon which the question turns is to be found in the fact that neither the defendants nor Burchard were parties to the contract in which the alleged fraud was committed. That contract was between one Rollins, a customer of the plaintiff, and the plaintiff, for a sale of his commercial paper to the plaintiff. Burchard did not know to whom the information was to be furnished. Neither he nor the defendants knew the terms of the proposed contract, or the parties to it, or even that such contract was to be made. They had no means of knowing the amount involved in the proposed transaction between Rollins and the plaintiff, and no opportunity to protect themselves from liability for false information. No case has been cited where a stranger to a contract has, under such circumstances, been held liable for damages for fraud. The reason, apart from the exemption provided for by the subscription agreement, would seem to be that, as the defendants had no knowledge, and no notice of the character of the transaction, and were not parties or privies thereto, they could not be expected to assume any liability, except for negligence or fraud,

provided they transmitted such information as they possessed, in accordance with the terms of the contract.

But plaintiff's counsel claim that defendants are estopped to make these claims, because, although they were innocent, yet the plaintiff has acted on the faith of these representations, to its prejudice. They seek to apply to this case the principle that, where one of two innocent persons must suffer for the wrongful act of a third person, the principal who has placed the agent in the position of trust should suffer, rather than the stranger. But here the plaintiff was no stranger. The subagent was his agent as well as the agent of the defendants. He was the subscriber to an agreement which from its character implied, and in its terms expressed, that the defendants could not and did not insure in any manner the verity of information to be furnished. By the use of the terms "the actual verity," etc., "is in no manner guaranteed," they provide for exemption from liability for untruthful information from whatever cause, whether received through the fraud of an outsider or of the subagent. The irresistible inference to be drawn from the agreement seems to be that the accuracy of the information is to be at the risk of the subscriber.

In *Friedlander v. Texas & P. R. Co.* 190 U. S. 425, 82 L. ed. 994, where an innocent purchaser of a bill of lading, fraudulently issued by one Easton, the station agent of the defendant, sought to hold it liable thereon, Mr. Chief Justice Fuller, referring to the principle above stated, says: "Easton, disregarding the object for which he was employed, and not intending by his act to execute it, but wholly for a purpose of his own and of Lahnstein, became *particeps criminis* with the latter in the commission of the fraud upon Friedlander & Co., and it would be going too far to hold the company, under such circumstances, estopped from denying that it had clothed this agent with apparent authority to do an act so utterly outside the scope of his employment and of its own business. The defendant cannot be held on contract as a common carrier, in the absence of goods, shipment, and shipper; nor is the action maintainable on the ground of tort. 'The general rule,' said Willes, J., in *Barwick v. English Joint Stock Bank*, L. R. 2 Exch. 259, 265, 'is that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved.' See also *Limpus v. London General Omnibus Co.* 1 Hurlst. & C. 526. The fraud was in respect to a matter within the scope of Eaton's employment or outside of it. It was not within it, for bills of lading could only be issued for merchandise delivered; and, being without it, the company, which derived and could derive no benefit from the unauthorized and fraudulent act, cannot be made responsible. *British Mut. Bkg. Co. v. Charnwood Forest R. Co.* L. R. 18 Q. B. Div. 714."

In this latter case Lord Esher, master of the rolls, says: "But, although what the 28 L. R. A.

secretary stated related to matters in which he was authorized to give answers, he did not make the statements for the defendants, but for himself. He had a friend whom he desired to assist, and could assist by making the false statements, and, as he made them in his own interest, or to assist his friend, he was not acting for the defendants. The rule has often been expressed in the terms that to bind the principal the agent must be acting 'for the benefit' of the principal. This, in my opinion, is equivalent to saying that he must be acting 'for' the principal; since, if there is authority to do the act, it does not matter if the principal is benefited by it. I know of no case where the employer has been held liable when his servant has made statements, not for his employer, but in his own interest."

See also *Pollard v. Vinton*, *supra*.

There is another aspect of the case which leads to the same conclusion. It appears from the agreement that the services demanded by the principal—the obtaining of information—cannot be rendered by the agent, but must be mainly rendered by subagents. In such cases the agent will not be liable for the negligence or misconduct of his subagent, provided there was no negligence in his selection. 1 Am. & Eng. Encyclop. Law, 394, and cases cited; Story, Ag. 224. The rule is stated by Judge Dewey in *Warren Bank v. Suffolk Bank*, 10 Cush. 585, as follows: "Where the nature of the business in which an agent is engaged requires for its proper and reasonable execution the employment of a subagent, the principal agent is not responsible for the defaults of the subagent, provided a proper subagent was selected. This latter rule was sanctioned and applied by this court in *Mubens v. Mercantile Bank*, 23 Pick. 332, 34 Am. Dec. 59; *Dorchester & M. Bank v. New England Bank*, 1 Cush. 177."

When the business entrusted to an agent is to be performed at a distance, or requires or justifies the delegation of an agent's authority to a subagent who is not his own servant, the original agent is not liable for the errors or misconduct of the subagent if he has used due care in his selection. *Darling v. Stanwood*, 14 Allen, 507; *Dorchester & M. Bank v. New England Bank*, *supra*; *Barnard v. Coffin*, 141 Mass. 37, 55 Am. Rep. 448.

In the case at bar the inquiry in Birmingham, Ala., for information as to the standing of a person in Oswego, N. Y., necessarily required the employment of a subagent in the latter place. The plaintiff, under its subscription agreement, authorized the employment of a subagent to obtain such information. In collecting special information the subagent was acting in consequence of the special request of the plaintiff, and he was the agent of the plaintiff, selected by the defendants in accordance with a rule fixed by the subscription agreement. The defendants did not undertake to do this part of the business; they declined to do it, but agreed that they would transmit the information so obtained to the plaintiff.

For these reasons we think the court erred in that portion of his charge to the jury in

which he stated that "for losses occasioned by the willful fraud and not by the mere carelessness or ignorance of the agents in communicating information known by them to be untrue, and with intent to mislead the inquirer, the defendants are liable, if the

plaintiffs, having placed reliance upon the fraudulent misrepresentations, gave credit in consequence of such fraud, and were lured thereby to their pecuniary loss and damage." *The judgment is reversed.*

MICHIGAN SUPREME COURT.

Mary E. MULLEN, *Pf. in Err.*,

v.

City of OWOSSO.

(....Mich....)

The negligence of the driver of a private carriage is imputable to a woman of the age of discretion who voluntarily rides with him.

(April 17, 1894.)

ERROR to the Circuit Court for Shiawassee County to review a judgment in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinions.

Mr. John T. McCurdy, with *Mr. George L. Keeler*, for appellant.
Mr. Odell Chapman for appellee.

Long, J., delivered the opinion of the court: The plaintiff, a woman about thirty-four years of age, was riding with Mr. Pond in a private carriage drawn by one horse along a public street in the city of Owosso. Overtaking Mr. Sanders, who was driving in the same direction, Mr. Pond attempted to pass him. Sanders was driving at a rapid rate, and Mr. Pond, in attempting to pass, started his horse rapidly forward. The parties raced for a distance, when Mr. Pond ran over a pile of sand in the highway. His carriage was overturned, and plaintiff thrown out and injured. The proofs are clear that Mr. Pond knew that a building was being erected by the side of this street, and that a mortar box and other materials were out in the street, in front of it. He stated that on a former trial he testified that he knew the street was incumbered by such materials, and thought that somebody was liable to get hurt there. Yet, in view of this knowledge, he carelessly drove his horse at the rate of more than six miles an hour in the street, contrary to the ordinances of the city. The court directed the jury: "If you find from the evidence in this case that the plaintiff would not have been injured but for the neglect of the city to give proper warning, then the plaintiff would be entitled to recover, unless you find that Mr. Pond knew of the obstruction to a portion of this street, and heedlessly drove over the obstruction; then he would be guilty of gross negligence, and plaintiff could not recover." Again the court said: "If the plain-

tiff in this case voluntarily entered the private conveyance of Mr. Pond, and voluntarily trusted her person and safety, in that conveyance, to him, by voluntarily entering into the private conveyance of Mr. Pond, she adopted the conveyance, for the time being, as her own, and assumed the risk of the skill and care of the person guiding it. So, if you find that Mr. Pond was negligent, in driving fast, the plaintiff could not recover." The jury returned a verdict in favor of the defendant.

The only question presented by the brief of plaintiff's counsel is whether the negligence of Mr. Pond is imputable to the plaintiff. This question was settled in the affirmative in *Lake Shore & M. S. R. Co. v. Miller*, 25 Mich. 274 (decided by this court in 1872), and has not since been departed from. Counsel claims that some doubt has been cast upon this doctrine by some of the later decisions, and cites *Battishill v. Humphreys*, 64 Mich. 508. In that case a child three years of age was run over by an engine upon a railroad operated by defendant, as receiver. The question was raised whether the negligence of the parents in permitting the child to go upon the track was imputable to the child. *Mr. Justice Morse* held that such negligence was not imputable to the child. The other justices expressed no opinion upon that point. In *Shippy v. Au Sable*, 85 Mich. 280, the question whether the negligence of the parents was imputable to a child three years of age was again presented; and, upon a full hearing, it was the unanimous opinion of the court that such negligence was not imputable to the child. Other cases of like character have been presented to this court, involving that question; and the rule is now established that, when the child brings the action for negligent injuries, the negligence of the parents cannot be imputed to it. But the present case presents quite a different question. Here a person of the age of discretion voluntarily enters a private conveyance of another, to ride, and by the carelessness of that person is injured. The rule laid down in the *Miller Case*, cited above, excludes a recovery. It has been too long settled to be now disturbed. In *Schindler v. Milwaukee, L. S. & W. R. Co.* 87 Mich. 410, the rule was recognized. It was there said of the *Miller Case*: "This is the general rule, and has since been followed in this state." The rule was also recognized by this court in *Cowan v. Muskegon R. Co.* 84 Mich. 583.

Judgment is affirmed.

NOTE.—The imputation of the negligence of a driver of a private carriage to an adult person voluntarily riding with him as decided in the above case is repudiated in most of the modern decisions as shown in *Nisbet v. Garner* (Iowa), 1 L. R. A. 152, and *note*; *Dean v. Pennsylvania R. Co.* (Pa.) 6 L. 23 L. R. A.

R. A. 142, and *note*; *Beck v. Missouri Pac. R. Co.* (Mo.) 9 L. R. A. 157, and *note*; *Union Pac. R. Co. v. Lapsley* (C. C. App. 8th C.) 16 L. R. A. 800.

Some other modern cases not collected in these notes are generally to the same effect.

Grant and Montgomery, JJ., concurred with Long, J.

Hooker, J., dissenting:

The plaintiff was riding in a carriage, with, and upon the invitation of, a Mr. Pond, in the city of Owosso. In attempting to pass another vehicle, the carriage was overturned, by reason of its being driven upon a pile of sand or rubbish in the street, and plaintiff was injured. The defense is made that the driver, Mr. Pond, was negligent, and that such negligence should be imputed to the plaintiff. The cases are not harmonious upon this question, but the great weight of authority is against the defendant's contention; the case of *Thorogood v. Bryan* (decided in 1849) 8 C. B. 115, which is considered the leading case sustaining the defendant's proposition, having been overruled in England, and repudiated in this country, generally, though followed in some states. That was a case of the collision of two omnibuses. The action against the owner of one by a passenger of the other was defeated upon the ground of contributory negligence, upon the theory that the passenger was so identified with the driver of his vehicle as to be chargeable with his negligence. This decision seems to rest upon an inference that the driver is the agent of the passenger, or at least that he is under the direction and control of the passenger. The case was disregarded in *Rigby v. Hewitt*, 5 Exch. 289, and distinctly overruled in *The Bernina*, L. R. 12 Prob. Div. 58; *Mills v. Armstrong*, 13 App. Cas. 1. In the last case, Lord Herschell commented as follows upon the case of *Thorogood v. Bryan*: "In short, as far as I can see, the identification appears to be effective only to the extent of enabling another person, whose servants have been guilty of negligence, to defend himself by the allegation of contributory negligence on the part of the person injured. But the very question that had to be determined was whether the contributory negligence of the driver of the vehicle was a defense, as against the passenger, when suing another wrongdoer. To say that it is a defense, because the passenger is identified with the driver appears to me to beg the question, when it is not suggested that this identification results from any recognized principles of law, or has any other effect than to furnish that defense, the validity of which was the very point in issue." In *Little v. Hackett*, 116 U. S. 360, 29 L. ed. 652, Mr. Justice Field uses the following language: "The truth is, the decision of *Thorogood v. Bryan* rests upon indefensible grounds. The identification of the passenger with the negligent driver or the owner, without his co-operation or encouragement, is a gratuitous assumption. There is no such identity. The parties are not in the same position. The owner of a public conveyance is a carrier, and the driver, or the person managing it, is his servant. Neither of them is the servant of the passenger, and his asserted identity with them is contradicted by the daily experience of the world." The doctrine of *Thorogood v. Bryan* has met with similar treatment in most of the state courts of last resort, and, as to public conveyances, may be said not to state the law correctly. The reasons upon which these cases rest are equally conclusive in cases where the

injured party was riding in a hired carriage with a driver from a livery stable; in cases where the passenger does not, as a matter of fact, exercise such control over the driver as to make him his servant. See *Little v. Hackett*, *supra*; *Missouri Pac. R. Co. v. Texas Pac. R. Co.* 41 Fed. Rep. 316; *Larkin v. Burlington, C. R. & N. E. R. Co.* 65 Iowa, 492; *New York, L. E. & W. R. Co. v. Steinbrenner*, 47 N. J. L. 161, 54 Am. Rep. 126; *Randolph v. O'Riorden*, 155 Mass. 331. In cases like the present the question becomes one of fact; the test of the passenger's responsibility for the negligence of the driver depending upon the passenger's control, or right of control, of the driver, so as to constitute the relation of master and servant between them. *Galveston, H. & S. A. R. Co. v. Kutac*, 72 Tex. 643; *Gahill v. Cincinnati, N. O. & T. P. R. Co.* 93 Ky. 845; *Neabit v. Garner*, 75 Iowa, 814, 1 L. R. A. 152; *Dean v. Pennsylvania R. Co.* 129 Pa. 514, 6 L. R. A. 143; *McCaffrey v. Delaware & H. Canal Co.* 16 N. Y. Supp. 495; *Masteron v. New York Cent. & H. R. R. Co.* 84 N. Y. 247, 33 Am. Rep. 510; *Noyes v. Boscawen*, 64 N. H. 361; *Follman v. Mankato*, 35 Minn. 522; *Philadelphia, W. & R. R. Co. v. Hogeland*, 66 Md. 149, 59 Am. Rep. 159; *State v. Boston & M. R. Co.* 80 Me. 430; *Knightstown v. Musgrove*, 116 Ind. 121; *Chicago, St. L. & P. R. Co. v. Spilker*, 134 Ind. 330.

It should not be inferred that a passenger can shelter himself behind the fact that another is driving the vehicle in which he rides, and relieve himself from his own personal negligence. What degree of care should be required in the selection of a driver, or in observing and calling attention to the dangers unnoticed by the driver, must depend upon the circumstances of each case.

It remains to inquire whether this question can be considered an open one in this state. The question before us is doubtless supposed by many to have been settled in the case of *Lake Shore & M. S. R. Co. v. Miller*, 25 Mich. 274, and it cannot be denied that the syllabus of that case would confirm the opinion. The facts in that case were these: The plaintiff, a woman, was riding with Eldridge, leeing in his employ. The wagon was struck upon a railway crossing, near which was a wood pile belonging to the defendant, which obscured the view of the railroad. The only allusion to the question here discussed arose as follows: The court said: "So that the only negligence which can be claimed in the mode of running the train must rest upon the ground that the company, having obscured the view and deadened the sound of the approaching train by the mode of piling their wood, were bound, for that reason, to run at much less than their usual rate of speed in approaching that crossing, or to keep a flagman there, or use some other extra means to warn people traveling the highway of the approach of trains from the west. The materiality of this question must depend upon another,—whether the plaintiff's own negligence, or that of Eldridge, who was driving the team, contributed to the injury, within the meaning of the generally settled rule upon this subject; for, as she was riding with Eldridge, the owner and driver of the team, any negligence of Eldridge equally affects her rights in this suit, as was properly

held by the court." It will be noticed that the subject is passed without discussion and the court proceeds with a lengthy review of the doctrine of contributory and comparative negligence. On page 286 the court states the established facts, among which are the following: "Eldridge was slightly deaf, but the plaintiff herself was not." "They kept on, still upon the walk (the train in sight), not stopping to listen, and looking neither to the right nor the left, neither up nor down the track. They are almost upon it. He (the witness) still thinks they will stop, but they move steadily on," etc. Again, "no logic can find in it, or extract from it [the evidence], the faintest manifestation of common prudence, which the circumstances demanded, in approaching the crossing." The court finds from the testimony of the plaintiff herself that neither Eldridge nor herself used any caution whatever. One of two things must be admitted, under the facts stated, viz. (1) that plaintiff was relieved from all responsibility by the fact that she was riding with Eldridge, and was under no obligation to look for the train; or (2) that the failure to do so was contributory negligence upon her part, which should have precluded a recovery by her, in which case the question of imputed negligence was unimportant. The opinion apparently takes the latter view, so far as plaintiff's own negligence is concerned, where it says, "I think the evidence tended affirmatively to prove actual and gross negligence on their part, which contributed directly to produce the injury complained of." From the finding, I think it may be said that the question before us was not necessarily involved in the *Miller Case*, and that it was not considered the controlling point.

If it is to be treated as conclusive, against the overwhelming weight of authority in the United States and England, we shall apparently accept an incidental remark in an opinion as decisive upon an important principle, which deserved a full discussion before being settled.

An examination will show that this decision has never since been applied, beyond a recognition of the doctrine in cases where it was not involved in the decision. It was mentioned and recognized in *Cuddy v. Horn*, 46 Mich. 596, 41 Am. Rep. 178, but the court disposed of the case upon the ground that the passenger upon a yacht had not control of the management.

In *Schindler v. Milwaukee, L. S. & W. R. Co.* 87 Mich. 411, the court again recognized the rule; saying that it was settled in *Lake Shore & M. S. R. Co. v. Miller*, but that it did not apply, because the defendant was guilty of wantonness. The plaintiff was a child riding with a neighbor. *Mr. Justice Champlin*, in a dissenting opinion, protested against the doctrine. 87 Mich. 419. In *Battisbill v. Humphreys*, 64 Mich. 509, *Mr. Justice Morse* uses the following language: "I am not content to let the question pass as a settled one in this state. At least, I am not willing to assent to the proposition that the negligence of any other person can become the contributory negligence of a plaintiff without his fault. Id. 508. In the case of *Shippy v. Au Sable*, 85 Mich. 393, *Mr. Justice Morse* expressed satisfaction with the views in the *Battisbill Case*, and added, "I am also satisfied that the great weight of authority in this country is opposed to the contention of the defendants." In neither of these cases was the doctrine of *Lake Shore & M. S. R. Co. v. Miller* applied. It seems, therefore, that the authority of the case of *Lake Shore & M. S. R. Co. v. Miller* has been repeatedly questioned. The time has arrived when the question must be settled. I think it should be in conformity to the weight of authority, and the better rule. The judgment should be reversed, and a new trial ordered.

McGrath, C. J., concurred with **Hooker, J.**

PENNSYLVANIA SUPREME COURT.

AMERICAN SUNDAY SCHOOL UNION.

Appt.,
v.

John TAYLOR, Receiver of Taxes, et al.

(161 Pa. 307.)

An institution of purely public charity, such as the American Sunday School Union, is not exempt from taxation on property used in carrying on a book store in which are sold not only its own publications but other standard works in order to aid in making the business self-supporting, although the profits of the business are devoted to the purpose of the charity.

(*Williams, J., dissents.*)

NOTE.—The question presented in the above case has been annotated with the case of *Book Agents of M. E. Church, South v. Hinton* (Tenn.) 19 L. R. A. 289, in which the decision sustained the exemption.

28 L. R. A.

(April 30, 1894.)

APPEAL by plaintiff from a decree of the A Court of Common Pleas, No. 4, for Philadelphia County in favor of defendant in a proceeding brought to enjoin the collection of certain taxes which had been assessed against complainant. *Affirmed.*

The facts are stated in the opinions.

Messrs. Rowland Evans and R. L. Ashurst, for appellant:

There would seem to be no doubt that this is a charitable institution.

Episcopal Academy v. Philadelphia, 150 Pa. 572; *Bispham, Eq.* §§ 121, 122; *Perry, Tr.* § 700; *Atty-Gen. v. Stepmey*, 10 Ves. Jr. 23; *Winslow v. Cummings*, 3 Cush. 359; *Bliss v. American Bible Soc.* 2 Allen. 335; *Domestic & Foreign Missionary Soc's App.* 80 Pa. 425; *Charitable Soc. of the Evangelical Assn's App.* 85 Pa. 816; *Pickering v. Shotwell*, 10 Pa. 26; *Donahugh's App.* 86 Pa. 306.

It cannot be alleged or pretended that any element of personal profit to any one entered into our chartered purpose or was inherent in the design of the corporate life.

A charitable institution does not lose its character as a charity—in the purview of the law relating to taxation—by dispensing a part of its charitable work for a pecuniary return sufficient to cover expenses, any occasional excess of receipts over disbursements being applied to general purposes of the society, so that there is no element of private or corporate gain.

Episcopal Academy v. Philadelphia and Donohugh's App. supra; Young Men's Christian Assn. v. Donohugh, 7 W. N. C. 208; *Philadelphia v. Women's Christian Assn.* 125 Pa. 573.

Members. Charles F. Warwick and E. Spencer Miller, for appellee:

The American Sunday School Union, so far as that part of its business carried on in the store is concerned, is practically a trading corporation. It is engaged in mercantile business for the purpose of deriving revenue.

Young Men's Christian Assn. v. Donohugh, 7 W. N. C. 208; *Philadelphia v. Barber*, 160 Pa. 123.

It would seem to be a gross wrong that two book stores, perhaps adjoining each other, should be discriminated so seriously as they might be if appellant's contention were sustained.

That furnishing support to a charity would be free of taxation. The one next door would be always subject to this obligation. At critical seasons when prices are cut very closely, this consideration might be very serious, enabling one establishment to ruinously underbid the other.

Dean, J., delivered the opinion of the court:

The corporation known as the American Sunday-School Union has its principal place of business in the city of Philadelphia. It occupies No. 1,122 Chestnut street, the lot fronting on the street 85 feet, and extending back to Sansom street, 235 feet. The building is large and valuable, and covers the whole lot. The society was incorporated by special act of assembly in 1845. Its purpose, as declared in the second section of the act, is "the erection and maintenance of Sunday schools, and the publication and circulation of moral and religious publications." It is a corporation with no capital stock, declares no dividends, and divides no profits. It is carried on for benevolent and religious purposes. The board of revision of taxes on the city of Philadelphia rated its property on Chestnut street at \$158,000. Of this valuation, \$28,000 was stricken off as exempt from taxation; the remainder, \$130,000, was assessed at the city rate, \$1.85 per \$100, making \$2,408, for each of the years 1891 and 1892. The Sunday-School Union, the plaintiff, filed this bill to enjoin the defendant, the receiver of taxes, from collecting this assessment, averring that its purpose as disclosed by its charter, and, as carried out in the building on 1,122 Chestnut street, was that of a purely public charity, and it was therefore exempt from all taxation. The de-

fendant denies that plaintiff is such charitable institution as is by law exempt from taxation, and avers that the premises described are occupied and used mainly in carrying on the business of manufacturing and selling books and other articles of merchandise. W. W. McKeehan, Esq., was appointed master, whose finding of facts and conclusions of law, in a very concise and clear report, are with the plaintiff. On exceptions being filed by the city, the learned judge of the court below differed with the master in his legal conclusion from the facts, and dismissed the bill. From this decree, plaintiff brings this appeal.

The master finds these material facts, on which he bases his opinion that the society is exempt from taxation: "For many years the society issued its publications, and sold them to Sunday schools and to the public below the cost of production, in order to bring them within the reach of all. Subsequently, the contributions of the public being insufficient to continue the plan, the managers were compelled to place the public operations of the society upon a basis that would be self-supporting. This is now the policy of the association; but it is not its aim to make money, and, if any profits are realized beyond what are absolutely necessary to maintain the public operations, the surplus is used in promoting the missionary work and establishing Sunday schools in needy communities, and in the gratuitous distribution of its literature." Then, further, he finds that the first floor of the Chestnut street end of the society's building "is devoted to retail and wholesale sales; and the south part, towards Sansom street, is used for stock in large quantities, kept there for filling orders, and where it is packed and shipped." And, further, in the salesroom on Chestnut street, publications of the society and publications other than those of the society are sold at the prices at which they are sold by the other booksellers of the city of Philadelphia. No publications are allowed to be sold which are not of a high moral character, but such standard works as Webster's Dictionary and similar publications are kept by the society, and sold to their regular trade, although, as a rule, persons asking for standard publications are referred to other booksellers. The publications not issued by the society, but sold by it, are so sold in order to aid it in making its business self-supporting. The master, on these facts, concluded the society was wholly exempt from taxation; the court, that it was not. Which was right?

Conceding the fact that the society is an "institution of purely public charity," and, as such, exempt from taxation, it seems to us such an institution may, as an aid to the accomplishment of its primary object, carry on a business, or use part of its property for a business purpose, which renders such business or such part of its property taxable. The first floor of the society's Chestnut street building was used for purely business purposes, and its business was conducted in that location for the avowed purpose of profit. As the master finds, in the first years of the society's operations it sold its books at less

than cost, but, finding this plan was not on the whole successful, "the managers were compelled to place the public operations of the society upon a basis that would be self-supporting;" that is, they established and maintain upon one of the most eligible and valuable sites of the city a book store for profit. In this they sell, not only the society's own publications, but others. While they confine their trade to "publications of a high moral character, and such standard works as Webster's Dictionary and like works," this in no way negatives the business character of the enterprise. There are but few reputable booksellers anywhere who would wish a trade in immoral books, or in publications other than meritorious. Nor does the fact that the profits gathered on the counter of the book store are devoted to the primary object of the charity, which is purely public, in any degree affect the character of the trading for commercial enterprise. Every dollar the society expends is some charitable contributor's gains or profits from some business not charitable. If such contributor devoted the whole of his profits from the sale of dry goods, groceries, or books to promote this particular charity, that fact would not make the source of such profit a purely public charity; and if, as the master has found, the society was compelled to put a part of its operations on a basis that was self-supporting, by starting a book store to sell books only of a high moral character and standard publications, that is trade. That the entire profits of this branch of the business are devoted to the purposes of the charity no more changes its business nature than if, instead of a book store, the society had established and carried on a shoe store. It might have operated a farm or a rolling mill with the same end in view,—to put the society, as the master aptly says, on a basis that was self-supporting; but the end would not have exempted the business from taxation.

It is clear from the evidence here, that the city did not tax any portion of the funds paid by pious and benevolent contributors. It sought only to collect a tax from that part of the business which was purely commercial. And there is no injustice in this, nor any harshness. The commercial operations occupy 35 by 235 feet of the most valuable ground in the city. Its location is peculiarly favorable to the business carried on there. The large municipal expenditures in the past have greatly increased its value. The millions now being expended and that will be expended in the future will still further enhance the price of the land, and increase the profits of the business. The taxable property of other dealers and real-estate owners in the city can claim no exemption. Why should not this business pay its fair proportion of the taxes necessary to the paving of streets, construction of sewers, furnishing of light and water, maintaining a fire department, supporting a police force, and other municipal objects? To exempt this book store from a taxation to the amount of \$2,408 each year is, in effect, a shifting of that much of an individual's burden to the shoulders of the public. If the society does not pay it, the

general public must. Another individual dealer in the same business must pay his full share of taxation, and then his share of what his rival ought to pay. Nor is this conclusion a novel one. The board of revision of taxes has, in the case of all other institutions of a like character, for years followed a system of taxation whereby the mercantile part of the business was taxed, and the "purely public charity" part exempted. The Presbyterian Board of Publication is assessed at \$360,000, whereof \$60,000 is exempted; the American Baptist Publication Society is assessed \$225,000, and \$20,000 is exempt; the Board of Church Extension of the Methodist Church is assessed at \$25,000, and \$7,000 is exempt; the Young Men's Christian Association is assessed at \$400,000, of which \$210,000 is exempt. The board of revision of taxes, in the performance of their manifest duty in these cases, as in the one in hand, seem to have carefully separated that in each institution which was a "purely public charity" from that which was commercial in its character, and determined the liability to taxation accordingly. In all cases of this kind, the tendency naturally is to an excessively liberal construction of the constitutional exemption; a construction not warranted, perhaps, by its plain restriction. The people knew what they meant when, in 1874, they said by an overwhelming majority: "The general assembly may by general laws exempt from taxation public property used for public purposes, actual places of religious worship, places of burial not used or held for private or corporate profit, and institutions of purely public charity." They meant nothing else should be exempt from taxation. By no judicial rule of construction can these words be made to mean that a commercial enterprise is exempt because the whole profit of it goes into the treasury of, and it is carried on by, a purely public charity. In so far as the institution is charitable, and its revenues are derived from the contributions of the charitable, it is protected by the constitution. But if such institution sees fit to engage in trade for the purpose of increasing its revenue, or making any part of its business self-supporting, the trade part of its business can be taxed, and ought to be.

The authorities cited by the learned counsel for appellant on their facts are not in conflict with what is here decided. In *Donohugh's App.*, 86 Pa. 306, the opinion is by our Brother Mitchell, then sitting in the common pleas, which, on affirmance, was adopted as the opinion of this court. The Library Company of Philadelphia claimed exemption, on the ground that it was a "purely public charity." It appeared that the use of the books was without charge to all who used them in the library building; to all members, within certain limitations, who took them away for use; and to all persons, for a small compensation, who took them away for use, and gave security for their return. It was held that the privilege of taking away for a small compensation was a mere regulation, and not part of the fundamental law of the corporation; but that, even if this privilege was repugnant to the nature of the

charity, the privilege would be void, and the public character of the charity was not thereby changed. In *Philadelphia v. Women's Christian Assn.*, 125 Pa. 572, meals and lodging were furnished to all women dependent on their own labor for support. To those able to pay, a small charge was made, but there was no element of gain or profit, the entire revenue not nearly equaling the expenditure. On the facts it was declared a "purely public charity," because, whatever revenue it received by charges was wholly from the recipients of the institution's bounty; the payment made by no one of the beneficiaries equaling in value the cost of the lodging and meals obtained by her. The case was decided on its special facts, and was rested on *Donohugh's App.* In the case of *Episcopal Academy v. Philadelphia*, 150 Pa. 565, this court went to the outside limit of liberality in construction of the constitution. The school was founded and endowed by public and private charity. The rates of tuition were adjusted with a view to make the school self-sustaining. A majority of the pupils paid full rates, a small number half rates, and a still smaller number nothing. It was held to be a purely public charity, because its revenues only made it self-supporting, but it was distinctly intimated that, if the revenues had gone beyond the line of self-support, it would not have been exempt. The decision was rested on *Donohugh's App.* and *Philadelphia v. Women's Christian Assn.*

We are not required to question the judgments in these cases. They differ essentially from the one before us in their facts. If the Women's Christian Association had carried on a bakery, meat shop, or grocery, that the profits therefrom might make the public charity—the lodging and boarding house—self-supporting, the bakery and meat shop would not have been exempt from taxation; or, if the Episcopal Academy had carried on a coal yard or school-book store in conjunction with their school, to make it self-supporting, the coal yard and book store would not have been exempt. In neither of the cases cited was the business outside of or dissociated from the charity. In each case it was so blended with the "purely public charity," that on its facts it was difficult to draw a distinction, and the exemption claimed was sustained by this court on the special facts. But we hold in this case that carrying on a book store, or any business, for profit, subjects such business to taxation, even although the whole profit therefrom goes to the principal institution for purposes of "purely public charity."

As to whether the proportions exempt and taxable have been correctly determined, that is a question with which we, in this proceeding, have nothing to do. Any complaint on that score can only be heard on appeal from the decision of "the board of revision of taxes."

The judgment is affirmed, and the appeal is dismissed, at costs of appellant.

Williams, J., dissenting:

I regret that I am constrained to dissent once more from a judgment in which a ma-

majority of my brethren seem fully to concur. The American Sunday-School Union is by common consent a purely public charity. Its work is as wide as our country. It is undenominational in its spirit, its organization, and its methods. It has no stock, and no possibility of personal or corporate gain. It is dependent from year to year on voluntary contributions from churches, Sunday schools, and individuals. Whenever the stream of money which now pours from these sources into its treasury shall cease, its beneficent work must be discontinued. All this seems to be conceded by this court, and the exemption of the property of the union from taxation would not be questioned, as we understand, but for the fact that it sells books to those who are willing to pay for them, in addition to giving them to those who are not able to buy. This, it is held, puts the union in the position of stepping outside its legitimate work, and embarking in a business enterprise for profit. What is its legitimate work? It is to send its workers or missionaries along our frontiers, and into sparsely settled or destitute neighborhoods wherever they may be found, to gather the young into Sunday schools for moral and religious instruction, and to provide for them a wholesome literature. Many of these books are suitable for the use of adults, and the society seeks to supply the needs of individuals and families by gift where that is necessary, but by a sale whenever a sale is practicable. The price received, whatever it may be, makes a gift to needy persons possible, to the amount so received, beyond what the society could otherwise give. This is their general plan of work. The building now subjected to taxation has been paid for out of donations made for that purpose. It is the headquarters of the society. The editorial work, correspondence, and office work are done in this building. Its publications are stored there. From it shipments are made to its colporteurs, missionaries, and agents in every part of the United States. The room fronting on Chestnut street is fitted up as a salesroom, and in it the various books and periodicals of the society are offered for sale, together with a few standard books like Webster's Dictionary. This is one of the methods employed to put the publications of the society before the public, and so extend their usefulness. This does not seem to me to be entering upon a new business, but a natural and desirable department of its proper work. It is easy to see that, if the union should open a baker's or a butcher's shop, that would be entering upon a new and unrelated business. The fact that the profits made were turned over to charitable work would make no difference. It is not the use to be made of the profits, but the nature of the business done, that is to be considered in deciding upon the question of liability to taxation. The business done by the union is divisible into two departments, viz., the organization of Sunday schools, and household visitations by its missionaries, and the supply of Sunday schools and families with a moral and religious literature. Its missionaries sell the books and periodicals of the society when they can.

They give them when this seems to be necessary. Precisely the same thing is done at their building on Chestnut street. They make donations of books and they make sales. The more sales made, the more donations can be made out of the same general stock. The entire profits from sales at their building appear to be about \$2,000 per annum. This sum should go to increase their gifts to the destitute. By this decision, however, it is subjected to taxation on \$180,000 of the valuation of its property. The taxation on this sum at the rate of 2 per cent—which is not far from the average rate of taxation in this city—will swallow up these profits, and take five or six hundred dollars more out of the gifts made by the benevolent to the work of the society. Every dollar thus expended is taken from the destitute, who would otherwise be the recipients of it; and the religious and benevolent work of the society is diminished to that extent. The application of this rule to the Women's Christian Association would subject its property to taxation, for it receives for the food and lodging it provides nearly or quite enough to meet its expenses; but we held that its property was exempt notwithstanding. *Philadelphia v. Women's Christian Assn.* 125 Pa. 572. Both Lafayette College and the Episcopal Academy received tuition fees from those able to pay, but these institutions were also held to be exempt from taxation. *Northampton County v. Lafayette College*, 128 Pa. 182; *Episcopal Academy v. Philadelphia*, 150 Pa. 585.

The great hospitals of this city charge those who are able to pay for their care and treatment, and use the money so received to help sustain the institutions; but under the rule laid down in this case it is not easy to see why the hospital that does this should not be

taxed. The same basis for taxation exists in both cases. Most of the business done by both is done gratuitously. Some services are rendered by the hospital, some books are furnished by the union, to those who are able and willing to pay for what they get. The money so received helps to pay for services rendered and books furnished to those who cannot pay, and the capacity of both the hospital and the union to extend its benefactions is increased correspondingly. The Young Men's Christian Association building stands on wholly different ground. The first floor of this building was not built for use in the work of the association, but for rent to merchants, and is in the actual occupancy of tenants who pay rent. The building of the Sunday-School Union is occupied wholly with its own appropriate work. It produces no income. The sales of publications made there, whether at a profit, at actual cost, or half cost, are in aid of the gratuitous distribution of the same publications among those who are unable to buy them. I cannot bring myself to doubt that the judgment of the court below should be reversed and this property held to be exempt from all taxation. But, if I found myself in doubt, I would resolve that doubt in favor of a society devoted to a work of the purest and broadest Christian charity. Notwithstanding the wail of a modern poet, Christian charity is not a rarity "under the sun," but one of the crowning excellencies of the civilization of our age and country; and the institutions and agencies it has organized for the relief of suffering and for the moral uplifting of society should receive the fullest measure of the protection which our constitution and laws provide for them. I would reverse the judgment appealed from, and grant the relief prayed for.

MICHIGAN SUPREME COURT.

ATTORNEY-GENERAL, *ex rel.* John T. RICH, Governor,

John W. JOCHIM.

(.....Mich.....)

1. A public office is not property within the provision of the Federal Constitution against deprivation of property without due process of law, and therefore that provision is not violated by a clause in a state constitution giving the governor power to remove officers for gross neglect or misfeasance.
2. Due process of law in respect to the removal of an officer does not mean a trial by a constitutional judiciary, but is furnished by the governor's investigation authorized by a state constitution, although he is given the power not only to decide on the removal, but to present the charges and employ counsel in the investigation.

3. Gross neglect for which members of the board of canvassers may be removed from office may exist without wilful misconduct, where they signed grossly incorrect returns, which they signed without examination, having turned over their preparation to an irresponsible clerk having no official relation to the canvass.

4. Canvassing the returns of an election is a part of the duty of the secretary of state, for gross neglect of which he may be removed under the Michigan constitution, where he is one of three officers who *ex officio* constitute a board of canvassers.

5. An express constitutional provision for the removal of officers by the governor for gross neglect is not nullified by the fact that the power of impeachment by the legislature does not extend to such cases.

6. A notice by the governor to an officer of an investigation of grounds for his

NOTE.—The power of summary removal of officers is considered on a full review of authorities in a note to *Trainor v. Wayne County Auditors* (Mich.) 15 L. R. A. 95, which includes a question as to the 28 L. R. A.

nature of the proceeding. The present case considers that proceeding with reference to the constitutional requirement of due process of law and is an important addition to the subject.

removal is not a judicial writ which must be in the name of the people, nor such an official act as needs authentication by the great seal,—especially when directed to the officer who is in charge of the seal.

(March 20, 1894.)

APPPLICATION for a writ of quo warranto to oust defendant from the office of secretary of state in accordance with an order of the governor removing him therefrom. *Judgment of ouster entered.*

The facts are stated in the opinion.

Messrs. Cahill & Ostrander and Geor & Williams, for relator:

If the governor has acted within his jurisdiction, his conclusions would be, upon well-settled principles, final as to all questions of fact, even in a direct proceeding to review his action, if such a review were possible; but in a collateral proceeding, like the present, the judgment of the governor, like that of any other court, officer, or body, acting within a lawful jurisdiction, is conclusive as to law and fact.

Throop, Pub. Off. 896.

Section 8 of article 12 of our Constitution is not in conflict with the 14th Amendment to the Federal Constitution.

People v. Stuart, 74 Mich. 411; *Sullivan v. Paug*, 10 L. R. A. 268, 82 Mich. 548; *Kennard v. Louisiana*, 92 U. S. 480, 23 L. ed. 478; *Bowman v. Lewis*, 101 U. S. 80, 25 L. ed. 992; *Hurtado v. California*, 110 U. S. 516, 28 L. ed. 282.

It is a common provision in national, state, and municipal governments, that the president, governor, or mayor shall have the power of removal for cause. Such a power is absolutely essential to the proper exercise of public functions, and is clearly within the authority of the sovereign power.

People v. Whitlock, 92 N. Y. 191; *Dullam v. Willson*, 58 Mich. 392, 51 Am. Rep. 128.

In *Gager v. Chippewa County Suprs.* 47 Mich. 168, this court, speaking of a similar proceeding before the board of supervisors, said: "So far as time and notice of hearing are concerned the board of supervisors do not act in strictness as a court, but as a public board authorized to use their own times and methods subject only to the condition that no one shall be removed without charges and reasonable notice, nor without full opportunity to be heard."

It was claimed on the hearing before the governor, that the charges and specifications were defective in that they did not allege that respondent's neglect of duty was willful.

The charge is in the language of the constitution, and it has been many times held in this state that a criminal offense charged in the language of the statute is sufficient.

People v. Kent, 1 Dougl. (Mich.) 42; *Rice v. People*, 15 Mich. 9; *Durand v. People*, 47 Mich. 832; Wharton, Crim. Pl. & Pr. § 220.

Negligence in a legal sense is a failure to observe for the protection of the interests of another, that degree of care, precaution, and vigilance which the circumstances demand.

Ray, Negligence of Imposed Duties, p. 361.

Negligence is the absence of care, according to circumstances.

23 L. R. A.

Frankford & B. Turnp. Co. v. Philadelphia & T. R. Co. 54 Pa. 845.

Negligence consists in, (1) legal duty to use care; (2) a breach of that duty; (3) the absence of distinct intention to produce the precise damage, if any, which follows.

Shearm. & Redf. Neg. §§ 5, 6.

Negligence excludes the idea of willful intention to do the wrong accomplished.

The distinction between negligence and gross negligence is one of degree, and not of kind.

Wilson v. Brett, 11 Mees. & W. 113; *Milwaukee & St. P. R. Co. v. Arms*, 91 U. S. 494, 23 L. ed. 376.

Gross neglect is the want of that care which every man of common sense, under the circumstances, takes of his own property.

2 Kent, Com. 560.

Some writers classify negligence as gross negligence, ordinary negligence and slight negligence; but this classification only indicates this: that under the special circumstances great care and caution were required, or only ordinary care, or only slight care.

Cooley, Torts, *630.

Gross negligence is an entire failure to exercise care or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the interests and welfare of others.

International & G. N. R. Co. v. Cocks, 64 Tex. 151.

So far as it is possible to define gross negligence it may be said to be such absence of care,—when the consequence of such want of care would appear probable, if the slightest thought were given, but where it is not given,—as will charge the person so negligent, not necessarily, with an intention to inflict the injury resulting from his negligence, but with the same responsibility as though he had actually intended it.

Ray, Negligence of Imposed Duties, 363.

Misconduct, willful maladministration, or breach of good behavior, in office, do not necessarily imply corruption or criminal intention. The official doing of a wrongful act, or the official neglect to do an act which ought to have been done, will constitute the offense, although there was no corrupt or malicious motive.

Mechem, Pub. Off. 457, 458, and cases cited: Throop, Pub. Off. 868, 869.

The language of section 1, article 12, is broad enough to cover gross neglect of duty, and if respondent was on trial before the senate upon articles of impeachment containing the charges here made, he could properly be convicted.

Pom. Const. Law, 725-727; *Judge Lawrence*, on Law of Impeachment, in 6 Am. L. Reg. N. S. 641.

The duty which the respondent is charged with neglecting is one expressly imposed by statute.

How. Stat. § 214.

Disobedience of such a statute is neglect of official duty.

Was it gross neglect?

This is purely a question of fact as is the question of ordinary negligence.

Cooley, Torts, 632.

The object of art. 12, section 8, was to pro-

vide a means for removing a public officer, who was not properly discharging the duties of his office, when the legislature was not in session. If it had been intended that the power should only be exercised in cases of willful or corrupt acts, it would have been easy to omit, "for gross neglect of duty."

The board of state canvassers were not acting judicially, but ministerially, and respondent cannot invoke the rule which makes judicial officers liable only for willful or corrupt acts as laid down in *State v. Hastings*, 37 Neb.

— They are liable to removal for gross neglect of duty. That the board of state commissioners do act ministerially in canvassing the returns see,

May v. Wayne County Canvassers, 94 Mich. 512; *Andrews v. Otsego County Judge of Probate*, 74 Mich. 285; *Coll v. City Election Canvassers*, 83 Mich. 871; *Roemer v. Detroit Canvassers*, 90 Mich. 37; *Luce v. Mayhew*, 18 Gray, 88; *Clark v. Hampden County Board of Examiners*, 126 Mass. 284.

The claim of counsel that the 14th Amendment to the Constitution of the United States nullifies section 8, article 12, of the State Constitution is not tenable. The incumbent of a public office has no property right in or title to the office.

State v. Hawkins, 44 Ohio St. 98, and cases cited; *Donahue v. Will County*, 100 Ill. 94.

The term "due process of law" is not confined to those proceedings which are had in the courts.

Weimer v. Bunbury, 30 Mich. 211; *Stuart v. Palmer*, 74 N. Y. 190, 30 Am. Rep. 289; Cooley, Const. Lim. p. 855.

This judicial power to determine whether a state officer has been guilty of gross neglect of duty and to remove him from office if found guilty is expressly reserved to the governor under section 12, article 8. The exercise of this power has been upheld in numerous cases.

People v. Stuart, 74 Mich. 411; *Dullam v. Willson*, 53 Mich. 898, 51 Am. Rep. 128.

The constitutionality of the act giving the power to remove from office to others than those connected with the judicial departments of the government has been repeatedly determined by this court.

Fuller v. Ellis, 98 Mich. 96.

Messrs. John Atkinson and Fred A. Baker for respondent.

Hooker, J., delivered the opinion of the court:

By Const., art. 8, § 4, and by Statute (How. Stat. § 202), the board of state canvassers is made to consist of the secretary of state, state treasurer, and commissioner of the state land office. It is the duty of this board to canvass the returns from the various counties of the state, and declare the result of election, for state officers, and upon constitutional amendments. At the spring election in the year 1893, three amendments to the constitution were voted upon by the electors of the state, one of which provided for an increase of the salaries of several of the state officers, including the three mentioned. These amendments were, by the board of canvassers, declared carried. Subsequently,

the returns were canvassed by the board, in obedience to a writ of mandamus issued by this court, when it was found and declared that the amendment relating to salaries was defeated. Proceedings were then taken by the governor, which culminated in an order by him removing each of said officers from his office, and declaring the same vacant; and, respondents refusing to surrender their respective offices, informations in the nature of quo warranto were filed in the name of the attorney-general, upon relation of the governor, to try their right to such offices. This is the proceeding against the secretary of state.

The questions in the case are raised by the replication and the demurrer of respondent thereto. In answer to the plea which asserts respondent's election and accession to the office of the secretary of state, the replication sets up in detail the facts upon which the relator's claim is based, viz.: That relator was the duly elected and acting governor of this state; that, as such, it became and was his duty, under section 8 of article 12 of the Constitution, to inquire into the condition and administration of the office of secretary of state, and the manner in which respondent performed the duties of such office, for the purpose of determining whether said respondent had been guilty of gross neglect of duty in relation to his duties as a member of the board of state canvassers, and to remove respondent from said office for gross neglect of duty, if he should be found guilty thereof; that, a charge of that kind having come to the knowledge of the relator, he caused written notice to be served upon the respondent, which notice required him to appear before the relator, and show cause why he should not be removed from his office of secretary of state, for gross neglect of duty, in connection with the canvass of the returns in relation to said amendment relating to salaries of state officers, such notice containing specific charges of neglect, as shown by the appended copy.* The replication further alleged that

*Executive Office, Lansing, February 6, 1894. To John W. Jochim, Secretary of State, Joseph F. Hamblitzer, State Treasurer, and John G. Berry, Commissioner of the State Land Office, Composing the Board of State Canvassers—Gentlemen: Public charges have been made, and have come to my knowledge, that gross errors were made in the canvass of the returns of votes given in the various counties at the election held in this state on the first Monday in April, A. D. 1893, for and against the adoption of "Joint Resolution No. 10, approved March 9, 1893, entitled 'Joint resolution proposing an amendment to section one (1), article nine (9), of the Constitution of this state, relative to the salaries of state officers,'" by which it was made to appear that such amendment to the Constitution had been ratified and approved by a majority of the electors voting thereon, whereas, it is alleged that, by a true and correct canvass of the returns of such votes, the said amendment was defeated. Under the power granted and duty imposed upon me, as governor of this state, by section eight (8) of article twelve (12) of the Constitution, it became necessary to inquire into the administration and condition of your several offices, and especially into the manner in which you have, severally and collectively, performed the duties of the board of state canvassers, of which you are *ex officio* members, for the purpose of determining whether you have been guilty of gross neglect of duty in the matter of canvassing the said returns. You are therefore severally cited and required to appear before me, at the executive office in the city of Lansing, on the

the respondent appeared by counsel before relator, and moved to vacate the notice and dismiss the charges, for reasons mentioned therein;* that the motion was denied; that evidence was introduced in support of the information, as follows: (1) The returns from the several counties showing the vote upon said amendment. (2) The canvass of said returns purporting to have been made by respondent and other members of the board of state canvassers upon May 16, 1893, from which it appears that the said amendment was carried by a majority of 1,821 votes. (3) The canvass of said returns subsequently made by said officers, under the order of the supreme court, showing the defeat of said amendment by 11,455 votes. (4) Vouchers showing the amounts paid to respondent and other members of said board for their expenses in making said canvasses. (5) A stipulation by counsel that a short time prior to May 16, 1893, respondent was notified by his clerks that a tabulated statement showing the votes for and against said amendment had been prepared, and was ready to be signed by the members of the state board of canvassers; that thereupon respondent notified the other members of said board by telegram, in response to which they came to Lansing, and signed said tabulated statement prepared by their clerks; that neither of them compared or examined the returns from any county, nor did they compare them with the tabulated statement aforesaid; that

they relied upon what their clerks stated about such statement being correct, and, believing it to be so, signed it; and that was all that they had to do with it. The replication further stated that no evidence was offered upon the part of respondent; that an order adjudging respondent guilty, and removing him from his said office, was thereupon made, and duly served upon said respondent, upon the 19th day of February, 1893. As stated, a demurrer to this replication was filed.

The important questions presented by this record are (1) the power of the governor to remove respondent; (2) the sufficiency of the cause alleged. The jurisdiction of this court to review or pass upon the official acts of a co-ordinate branch of government was not discussed. It was referred to in the brief of counsel for the relator, with an express disavowal of a desire to raise the question. We shall therefore omit a discussion of that subject.

Whatever authority the governor has to remove respondent must be found in section 8 of article 12 of the Constitution, which reads as follows: "The governor shall have power and it shall be his duty, except at such time as the legislature may be in session, to examine into the condition and administration of any public office, and the acts of any public officer, elective or appointed, to remove from office for gross neglect of duty, or for corrupt conduct in office, or any other mis-

administration, on the fifteenth day of February, 1894, at one o'clock in the afternoon, then and there to answer to the following specific charges, viz.: (1) That you, the said John W. Jochim, secretary of state, Joseph F. Hamblitz, state treasurer, and John G. Berry, commissioner of the state land office, who are the board of state canvassers, under the constitution and laws of this state, were, each and every one of you, guilty of gross neglect of duty, in this: that you did not, nor did either of you, examine the statements or returns of votes from the several counties, filed in the office of the secretary of state, showing the number of votes cast for and against said proposed amendment to the constitution relative to the salaries of state officers, by the electors in this state at the election in April, 1893. (2) That you were severally guilty of gross neglect of duty in this: that you did not, nor did either of you, ascertain and determine the result of such vote, nor perform with due and proper care the duties relating to canvassing the statements and returns

from the several counties of the votes given at such election for and against said proposed amendment to the constitution, required of and imposed upon you as members of said board of state canvassers, by the constitution and laws of this state. (3) That you were severally guilty of gross neglect of duty, in this: that you made, and suffered to be made, gross errors in the canvass of the statements and returns filed in the office of the secretary of state of the votes given in the several counties at said election in April, 1893, for and against said proposed amendment to the constitution, by which it was falsely made to appear that such proposed amendment had been approved and ratified by a majority of the electors voting thereon, whereas, by a true and correct canvass of the said statements and returns, the said proposed amendment was defeated. (4) You are further required, then and there, to show cause why you, and each of you, should not be removed from office for gross neglect of duty. John T. Rich, Governor.

* Reasons. (1) The governor has no power, under section eight of article twelve, or any other provisions of the Constitution, to remove the respondents, or either of them, from their respective offices, for any misconduct on their part, or on the part of either of them, as members of the board of state canvassers. (2) The power of the governor under section eight, article twelve, of the Constitution, is confined to the official misconduct of the officers therein named, in the performance of the duties appertaining to each of said officers, separately and severally considered; and it does not include such duties as are performed by such officers jointly with others, as members of constitutional or statutory bodies or boards. (3) The house of representatives, under sections 1, 2, and 3, article 12, of the Constitution, has the sole power to direct an impeachment of these respondents for misconduct in the performance of their duties when acting as a board of state canvassers, and the senate has exclusive jurisdiction to try any such impeachment. (4) The charges set forth in the notice served upon these respondents are wholly insufficient, and factually defective, for the reason that it is not alleged therein that the neglect of these respondents, or any of them, was intentional, or that they, or either of them, have knowingly and designedly neglected any official duty, or that they, or either of them,

have neglected to perform any duty with an evil intent, or for any improper, illegal, or culpable purpose. (5) The charges contained in said notice do not make or state a case of gross neglect of duty, within the meaning of section eight, article twelve, of the Constitution; and the governor, sitting as a court of impeachment, has no jurisdiction or power to render judgment or removal thereon. (6) The notice served on respondents is void because it is not "in the name of the people of the state of Michigan," as required by section thirty-five of article six of the Constitution, and it is not authenticated by the great seal of the state, as required by section eighteen of article five of the Constitution. (7) The board of state canvassers is created by the constitution of this state, and, in the performance of their duties and functions, the members of said board, in the absence of conduct on their part amounting to a criminal offense, are not subject to the control or interference of the governor of the state, or of any other branch or department of the government; and, excepting the power of the legislature to determine any cause where the decision of the state board of canvassers is contested, they are answerable or amenable only to the people of the state, by whom they were elected to their respective offices.

feissance or malfeasance therein, either of the following state officers, to wit: The attorney-general, state treasurer, commissioner of land office, secretary of state, auditor general, superintendent of public instruction, or members of the state board of education, or any other officer of the state, except legislative and judicial, elective or appointed, and to appoint a successor for the remainder of their respective unexpired terms of office, and report the causes of such removal to the legislature at its next session." It is contended that this section is in violation of the amendment of the Constitution of the United States which provides that "no state shall deprive any person of life, liberty, or property, without due process of law." U. S. Const. Amend. 14, § 1. As the constitution of this state contains the same provision (sec. 82, art. 6), no new right was conferred upon officeholders, nor was any modification of the power of the governor to remove officers under section 8, article 12, consequent upon the adoption of the 14th Amendment. Any question that can now be raised upon the latter could have been raised under the former at any time since section 8, article 12, was adopted; and all decisions upon section 82, article 6, are applicable to this provision of the 14th Amendment, unless in contravention of federal decisions thereon. To sustain this point it must appear (1) that the removal from office is a deprivation of the respondent of his property; and (2) that it was sought to be accomplished without due process of law. A public office cannot be called "property," within the meaning of these constitutional provisions. If it could be, it would follow that every public officer, no matter how insignificant the office, would have a vested right to hold his office until the expiration of the term. Public officers are created for the purposes of government. They are delegations of portions of the sovereign power for the welfare of the public. They are not the subjects of contract, but they are agencies for the state, revocable at pleasure by the authority creating them, unless such authority be limited by the power which conferred it. In the case of *Wyandotte v. Drennan*, 46 Mich. 480, *Mr. Justice Cooley*, in giving the opinion of the court, said: "It is claimed, however, that, when the salary is fixed at the time when the office is accepted, the acceptance is presumed to have the salary in view, and a contract is thereby effected between the officer and the city, which neither can change without the consent of the other. This is a position that has frequently been taken, and almost as often overruled. Nothing seems better settled than that an appointment or election to a public office does not establish contract relations between the person appointed or elected and the public. The leading case of *Butler v. Pennsylvania*, 51 U. S. 10 How. 402, 13 L. ed. 472, has been universally regarded as having settled that question, and it has been followed by decisions in numerous cases. The salary or other compensation is therefore at the discretion of the legislative authority of the state, or of such other authority as the legislature has seen fit to intrust it to. This

was indirectly recognized in *People v. Detroit*, 38 Mich. 636,—a case which is in point here. It is said on behalf of the defendant in error that the principle above stated rests on the right of the officer to resign and give up his office at any time; and it is further said that this right did not exist in the case of the officer, because he could only resign to the common council,—the very body that reduced the salary,—and the council might keep him in by refusing to accept his resignation. Whether the council could in this way compel the recorder to continue in the performance of his duties, we do not care to consider in this case, because we think the legislative authority over the subject does not depend upon the existence or nonexistence of any such power. Officers are created for the public good, at the will of the legislative power, with such powers, privileges, and emoluments attached as are believed to be necessary or important to make them accomplish the purposes designed. But, except as it may be restrained by the constitution, the legislature has the same inherent authority to modify or abolish that it has to create; and it will exercise it with the like considerations in view. Whoever accepts a public office must accept it with this principle of constitutional law in view; and, if his compensation is reduced below what seems to him reasonable, it may be a hardship, but it is not a legal wrong. The legislative power is ample, and he is supposed to know when he takes the office that it is liable to be exercised." The legislature may remove officers, not only by abolishing the office, but by an act declaring it vacant, as was done by Act 140, § 18, of the Laws of 1891. *People v. Langdon*, 40 Mich. 678; *Wayne County Auditors v. Benoit*, 20 Mich. 184. And it may lodge the power to remove from statutory offices in boards or other officers, subject to statutory regulations. And, while it cannot remove incumbents of constitutional offices, it is not because of an inherent difference in the qualities of the office, but because the power to remove is limited to the power that creates. The constitutional officer is an agent of government. There is the same lack of the ingredients of contract, and the same power to abolish the office or remove the officer by amendment of the constitution. *Augusta v. Sweeney*, 44 Ga. 468, 9 Am. Rep. 172; *Butler v. Pennsylvania*, 51 U. S. 10 How. 414, 13 L. ed. 477. The fact that some cases hold that removals from office cannot, in some instances, be made, except upon cause shown, upon notice, specific charges, and after a hearing in its nature judicial, does not militate against this doctrine. These cases simply hold that removals are limited by the power of the people or legislature, through the constitution or statute, not that a vested property right is involved in the holding of office, or that removal is beyond the power which creates the office and the officer. Nor does it follow that removal from office is a deprivation of the officer of property, because it must be for cause, upon specific charges, and after an opportunity to be heard. Many cases may be found that speak of the disgrace of removals, and the right to hold an office

under election. Of these the case of *Page v. Hardin*, 8 B. Mon. 672, perhaps, goes the furthest. The case of *Dullam v. Willson*, 53 Mich. 393, 51 Am. Rep. 128, discusses section 8, article 12, holding that it was not designed to confer upon the governor a power to remove without charges and hearing; but it recognizes the power of the people over public offices, and sustains the authority of the governor, under this section, to remove for cause. Mr. Justice Champlin says: "That under the amendment the governor was vested with the power of determining whether the specified causes exist, appears to me too plain for serious contradiction. I fully concur in the views expressed upon this point by the learned counsel for the respondent (*Judge Christianity*), wherein he says: 'It was competent, by constitutional amendment, to authorize him to exercise such judicial power. And while this amendment gives the power of removal only for the causes which it specifies (which, though similar in character, are not identical with those specified in the statute), and the question of the officer's guilt is one judicial in its nature, yet the amendment imposes a duty and confers upon the governor the power "to examine into the condition and administration of the office and public acts of the officers" to which it applies, and to remove them from office for the causes there enumerated; thus, in effect, giving him the right to try the question whether the officer is guilty or not, and to remove him from his office.' The counsel for the respondent, while granting this, insist that such removal cannot be made without charges, notice, and an opportunity for defense, and this I consider the important question in the case. Unless it is the manifest intention of the section under consideration that the proceedings should be *ex parte* as well as summary, a removal without charges, notice, and opportunity for defense, cannot be upheld." Again, as all statutory offices are taken subject to legislative action, so all constitutional offices are taken subject to constitutional changes, and both are upon the terms and subject to the conditions existing by law. One of the constitutional conditions upon which the respondent took his office was that he would be subject to removal by the governor, under article 12, section 8. *Frey v. Michie*, 68 Mich. 328; *Fuller v. Ellis*, 98 Mich. 96.

2. But conceding, for the argument, that the office is a vested property right, what is the "due process of law" to which the respondent is entitled, under the constitutions of this state and the United States? Counsel contend that it can mean nothing less than a trial by the constitutional judiciary, and perhaps a jury. If so, it must be because the constitutional office differs from the statutory office, as several cases hold that removals may be made without the intervention of courts. *Dullam v. Willson*, *supra*; *People v. Stuart*, 74 Mich. 415; *Wellman v. Detroit Board of Metropolitan Police*, 84 Mich. 558, 91 Mich. 427; *Fuller v. Ellis*, *supra*. But this language of the constitutions means less than that. The words "due process of law," as used in the constitution (art. 6, § 32), mean

the law of the land, by which are to be understood laws which are general in their operation, and not special acts of legislation passed to affect the rights of particular individuals against their will, and in a way in which the same rights of other persons are not affected by existing law. *Sears v. Cottrell*, 5 Mich. 251. "Due process is not necessarily judicial process. Administrative process, which has been regarded as necessary in government, and sanctioned by long usage, is as much due process as any other." *Weimer v. Bunbury*, 30 Mich. 201. In this case the treasurer of the city of Niles did not collect and pay over to the county treasurer certain taxes, whereupon, in accordance with the statute, the county treasurer issued a warrant to the sheriff, commanding him to levy and collect the amount from the property of the city treasurer. It was held not to invade article 6, section 32. The federal decisions also qualify the claim of respondent's counsel. In *Ex parte Wall*, 107 U. S. 265, 27 L. ed. 552, it is said that: "What is due process of law in the states is regulated by the law of the state." "The requirement of the constitution that a person cannot be deprived of his property without due process of law does not imply that all trials in the state courts, affecting property, must be by jury." "Due process of law does not require a plenary suit and trial by jury in all cases where property or personal rights are involved. It is, in all cases, that kind of procedure which is suitable and proper to the nature of the case, and sanctioned by the established customs and usages of the courts." See also *New York & N. E. R. Co. v. Bristol*, 151 U. S. 556, 33 L. ed. 269. In *Den v. Hoboken Land & Imp. Co.* 59 U. S. 18 How. 272, 15 L. ed. 872, Curtis, J., says: "For, though 'due process of law,' generally implies and includes *actor, reus, judge*, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings, yet this is not universally true." This case, by an exhaustive review of English and American authorities, vindicates summary methods on the part of government to obtain its due from a tax collector, analogous to the proceedings in the case of *Weimer v. Bunbury*. Certainly, the resort to similar proceedings by government to reclaim its offices may be equally necessary and justifiable. In a discussion of this subject in the case of *Davidson v. New Orleans*, 96 U. S. 103, 24 L. ed. 619, Mr. Justice Miller said: "The history of the English mode of dealing with public debtors, and enforcing its revenue laws, is reviewed, with the result of showing that the rights of the crown, in these cases, had always been enforced by summary remedies, without the aid of the usual course of judicial proceedings, though the latter were resorted to in the exchequer court when the officers of the government deemed it advisable. And it was held that such a course was 'due process of law,' within the meaning of that phrase, as derived from our ancestors, and found in our constitution. It is not a little remarkable that while this provision has been in the Constitution of the

United States, as a restraint upon the authority of the federal government, for nearly a century, and while, during all that time, the manner in which the powers of that government have been exercised has been watched with jealousy, and subject to the most rigid criticism in all its branches, this special limitation upon its powers has rarely been invoked in the judicial forum or the more enlarged theater of public discussion. But while it has been a part of the Constitution, as a restraint upon the power of the states, only a few years, the docket of this court is crowded with cases in which we are asked to hold that state courts and state legislatures have deprived their own citizens of life, liberty, or property without due process of law. There is here abundant evidence that there exists some strange misconception of the scope of this provision, as found in the 14th Amendment. In fact, it would seem from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a state court, of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded." See also *Springer v. United States*, 102 U. S. 586, 26 L. ed. 253; *Hilton v. Merritt*, 110 U. S. 97, 28 L. ed. 88; *Campbell v. Holt*, 115 U. S. 620, 29 L. ed. 483; *Missouri Pac. R. Co. v. Humes*, 115 U. S. 512, 29 L. ed. 463; *Provident Inst. for Savings v. Jersey City*, 118 U. S. 506, 28 L. ed. 1103; *Garrison v. New York*, 88 U. S. 21 Wall. 196, 22 L. ed. 612.

From these authorities, it appears that the state is not so bound by the term "due process of law," in the constitutions, that it is impossible for it to invest its agents with its offices without subjecting itself to the delays and uncertainties of strict judicial action in cases of emergency. While in many cases (and, under the decision in the case of *Dullam v. Willson*, perhaps in this) the power of removal is a limited and restricted one, to be exercised along given lines, and with prescribed formalities, as already stated, it is not by reason of an inherent right of property in the officer, bringing him within the protection of the 14th Amendment, but because of the limitations of the law. The Michigan cases already cited settle for this state the authority of the governor, under the Constitution.

It is said, however, that the governor, in this case, made his own charges and employed his own counsel, and is therefore to sit as judge in his own case. One of the duties of the governor, under section 8, is to investigate the state offices. He is given inquisitorial power, that he may ascertain their condition, for the public welfare. No other means is provided for acquiring the necessary information. If he discovers irregularities of any particular character, it is his duty to remove the officer, and supply his place by appointment, reporting his action to the legislature at the next session. *Dullam v. Willson* is authority for the proposition that the incumbent is entitled to notice of the

charge, and an opportunity to be heard in his defense. This necessarily implies that the governor's action is, in a sense, judicial. But it does not follow that the investigation must be made by some other person or officer, who must make complaint to the governor; that the complainant must procure counsel; or that the governor is necessarily interested, and thereby disqualified from hearing and determining, because he performs the other duties which are specifically imposed upon him by this section of the Constitution. It is no uncommon thing for judges to order arrests and prosecution for acts committed in their presence, such as contempts, perjury, and perhaps other offenses, and they are not thereby disqualified. There is nothing in the record to show any interest upon the part of the governor, further than to ascertain the condition of the office, and to act upon the information obtained as the Constitution requires. It is the duty of the governor to investigate, using all lawful means to go to the bottom of any real or supposed irregularity. To that end, he may use clerks and expert accountants, if necessary,—and it is fair to presume that the state would recognize the expenses as legitimate obligations. The law does not require a complainant, nor prevent the governor from committing the interests of the state to competent lawyers, official or otherwise. Finally, the governor acts judicially upon the accumulated evidence, and such explanations by way of defense as the respondent may offer. In this respect his action is similar to that discussed in *Fuller v. Ellis*, which discussion it is unnecessary to repeat.

We come next to the charges. It is contended that they are insufficient, because the act is not alleged to have been intentional, and because it was not gross neglect to permit an erroneous canvass by clerks; further, that the act was not within the provision of section 8, because it was an act done as a member of the board of canvassers, and not as secretary of state, and that the only remedy was by impeachment by the legislature. To these is impliedly added, and strenuously argued, that the legislature could not impeach for gross neglect, and that, therefore, the governor could not remove for such neglect. It is true that before the defalcation of the state treasurer, in 1860, the governor could not remove a constitutional officer, and that a defrauding treasurer had the lawful authority to continue to receive the public funds until the legislature should convene, and proceed by impeachment to secure his removal. Doubtless, this condition of affairs, as counsel asserts, led to the adoption of the Amendment of 1862, viz., article 12, section 8. It is also true that section 1, article 12, gives to the legislature the sole power to impeach civil officers for corrupt conduct in office, or for crimes and misdemeanors. If no further power of impeachment existed than as mentioned in section 1, it must be conceded to follow that the governor was granted a broader power of removal than the legislature had by way of impeachment. But the people had the undoubted power to authorize removals by the governor

for causes not theretofore mentioned as a ground for impeachment. They certainly made it his duty to remove for gross neglect, and we cannot accept the proposition that the amendment was not intended to include that which it especially mentions in terms unmistakable to the common understanding. Nor do we think there is any merit in the point that the duty of canvassing the returns is not the official duty of the secretary of state. By virtue of his office, he is one of three who constitute a board. Without his office, he could not act, and we think the part performed by him is an official act of the secretary of state.

It remains to discuss the character of the charges made. The only duties of the board of state canvassers are to canvass the returns, and determine and certify the result of elections. Theirs is the culminating act of the army of persons who have had to do with the receiving and counting, recording and transmitting, the votes which signify the will of the people. Section 202 of Howell's Statutes makes it the duty of these officers to attend, and form the board of state canvassers. Their duties are specifically pointed out. The times when they are to meet are provided by law. No provision is made for deputies or clerks, but all go to show that this important duty is to be performed by them in person, as the certificate signed by them asserts. It is not confided to inferior officials, but to three of the state officers of greatest dignity and importance. It appears to have been the design of the lawmakers to place the votes of the people in the keeping of the most responsible officers of the state; and no argument ought to be necessary to show that it was not expected that the returns would, upon their arrival, be turned over to an irresponsible clerk in the secretary's office, having no official relation to the canvass, whose tabulation should be the canvass, and that the mere signing of their three names to his production should constitute a full compliance on the part of these officers with the law prescribing the duties of the state canvassers. Section 208 requires an examination by the board of the several statements of the votes, and that they make a statement of the whole number of votes cast for each office, while section 209 makes it their duty to certify such statement to be correct. A mere failure to certify could be called "neglect." What shall be said of it when the certificate is made without knowledge of, or any attempt to ascertain the fact? An officer is elected for two years. Who shall count and keep the money of the state, or keep its great seal, for a couple of years, is not a matter of vital importance; but an amendment of the constitution changes, perhaps for all time, the fundamental law, releasing or reclaiming by the people some right or power over the legislature and officers, the consequence of which may be stupendous. In the present instance, it was a matter of money,—several thousand dollars a year; and, while many may feel that the defeat of this amendment was

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unfortunate, it is vastly more unfortunate to have the will of the people thwarted, though it be the result of carelessness only, or neglect on the part of the board to perform the only duty imposed upon them by law. Looking at the circumstances from his official standpoint, the governor may well have said this, though not willful, was only possible by reason of the grossest neglect of official duty. It certainly was some one's duty to move at once with a view to the correction of the error, and the prevention of its recurrence. While there is an inclination upon the part of the average American to accept good intentions as an excuse for mistakes, it is not for the general public good that responsible public offices shall be confided to, or remain in, the custody of those whose duties and responsibilities rest so lightly upon them as to permit the public interests to be injured or endangered through neglect; and when such neglect, from the gravity of the case, or the frequency of the instances, becomes so serious in its character as to endanger or threaten the public welfare, it is gross, within the meaning of the law, and justifies the interference of the executive, upon whom is placed, by this amendment, the responsibility of keeping the affairs of state in a proper condition. We cannot think that the term "gross neglect" means only intentional official wrongdoing. Such acts would hardly be described by the word "neglect."

It is said that this section confides great power to the governor. This is true, but the governorship is an exalted office,—one which ought to carry with it a presumption of integrity of character and breadth of mind commensurate to its importance. It would be a sad commentary upon free government if it were otherwise. But the powers of the governor are carefully restricted, and there is no occasion to pursue the illusive phantoms of possibility. When abuses arise, they will doubtless be speedily and effectively met.

It remains to notice the sixth objection raised. It is as follows: "The notice served on respondents is void because it is not 'in the name of the people of the state of Michigan,' as required by section 35 of article 6 of the Constitution, and it is not authenticated by the great seal of the state, as required by section 18 of article 5 of the Constitution." It is enough to say that the provision (sec. 35, art. 6) applies to the judicial department only, while the other provision (sec. 18) certainly ought not to apply to a case where the governor is citing the custodian of the great seal before him upon charges. But such citation is not such an official act as needs authentication. It has no importance, and is of no personal interest to others than those cited, and falls within the multitude of daily acts, which, while official in a sense, do not require authentication of the great seal.

The demurrer must be overruled, and judgment of ouster entered against the respondent. The other Justices concurred.

MASSACHUSETTS SUPREME JUDICIAL COURT

Michael J. DRUMMOND

v.

Marie L. CRANE *et al.*, Adms. of Cyrus R. Crane, Deceased.

(189 Mass. 577.)

1. An explicit agreement to take and pay for a certain quantity of water per annum for ten years is not terminated by the death of the promisor, although he wanted the water, as the other party knew, for use in a mill held under a lease, and the lease was rightfully terminated by the lessor after his death,—especially where the contract was procured by the other party as a basis for making an investment in the waterworks.
2. The fact that an express contract contemplates another more formal contract with a corporation, in which the contractee is largely interested, does not affect its binding powers.

3. The measure of damages recoverable on a contract by the promisee is not affected by the fact that it was for the benefit of a corporation of which he is a stockholder.

4. A contract to take a supply of water for a term of years, though not specifying any building to which it should be supplied, does not require a personal taking of the water for the whole period, but is satisfied by a taking by other parties at the place contemplated by the parties to the contract.

(October 20, 1898.)

REPORT by the Superior Court for Berkshire County for the opinion of the Supreme Judicial Court in an action brought to recover damages for the alleged breach of a contract, after findings by the court in favor of plaintiff. *Judgment on the findings.*

The contract on which the action was founded is set out in the opinion. The plain-

NOTE.—Effect on contract of the death of a party thereto.

Generally.

Generally the death of a party to a contract does not extinguish the contract if it is capable of being completed by the personal representatives and is not one of a personal nature. *Morgan v. Hovey*, 6 Hurlst. & N. 255; *Wills v. Murray*, 4 Exch. 844, 19 L. J. Exch. 200; *Nield v. Smith*, 14 Ves. Jr. 491; *Church v. King*, 2 Myl. & C. 220; *McLaughlin v. McLaughlin*, 145 Pa. 552; *Jacobson v. La Grange*, 8 Johns. 199; *Cortelyou v. Lansing*, 2 Cal. Cas. 200; *Fidelity Title & T. Co. v. Weitzel*, 152 Pa. 498.

And a contract in settlement of a bastardy proceeding is not extinguished by the death of the promisor. *Stumpf's App.* 116 Pa. 83.

A claim for damages for the breach of a contract by the testator is not extinguished by his death. *Fowler v. Kelly*, 3 W. Va. 71.

But a subscription contract is revoked by the death of the promisor, before it has been accepted and acted upon. *Wallace v. Townsend*, 43 Ohio St. 337, 54 Am. Rep. 329; *Grand Lodge L. O. G. T. v. Farnham*, 70 Cal. 153; *Pouet v. Board of Publication*, 8 Lea. 552; *Pratt v. Trustees of Baptist Soc. of Elgin*, 93 Ill. 475, 34 Am. Rep. 187; *Heifenstein's Estate*, 77 Pa. 323, 18 Am. Rep. 449.

And under a Pennsylvania Act of 1855 rendering invalid a conveyance to a charity within one month after the death of the alienor, unless made for a valuable consideration, a charitable subscription is invalid if the promisor dies within one month after date. *Reimensnyder v. Gans*, 110 Pa. 17.

Generally a contract to marry is extinguished by the death of the promisor. *Weeks v. Mays*, 37 Tenn. 442; *Wade v. Kalbfleisch*, 16 Abb. Pr. N. S. 104; *Stebbins v. Palmer*, 1 Pick. 71, 11 Am. Dec. 140; *Lattimore v. Simmons*, 13 Serg. & R. 153; *Hayden v. Vreeland*, 37 N. J. L. 372, 18 Am. Rep. 723.

And is extinguished by the death of the promisor where no special damage is alleged. *Chamberlain v. Williamson*, 2 Maule & S. 408; *Grubb v. Sult*, 33 Gratt. 208, 34 Am. Rep. 765.

But in *Shuler v. Millsaps*, 71 N. C. 207, under N. C. Const., art. 10, § 6, providing that the personal property of a female is her sole and separate estate, and Bat. Rev., chap. 17, providing that no action shall abate by the death of a party, it was held that the death of the promisor did not extinguish the liability for a breach of a promise to marry.

And the same was held in *Allen v. Baker*, 86 N. C. 91, 41 Am. Rep. 144, 23 L. R. A.

A contract to pay a party a certain amount if he would marry the promisor's cousin is not extinguished by the death of the promisor. *Berisford v. Woodroff*, Oro. Jac. 404.

Generally a personal representative may perform a contract made by the decedent, or release the other party, subject to the approval of court. *Gray v. Hawkins*, 8 Ohio St. 449, 72 Am. Dec. 600; *Dougherty v. Stephenson*, 20 Pa. 210.

But a contract by adjoining owners to repair a partition fence is extinguished by the death of one of them. *Bland v. Umstead*, 23 Pa. 316.

And a contract for an uncertain time to support a person whom the promisor is not bound to support, is extinguished by the death of the promisor. *Browne v. McDonald*, 129 Mass. 66.

Equity will relieve the creditors and enforce the original agreement against the testator's estate where it is insolvent and an agreement is made to take collateral security on property, and by mistake a power of attorney only is taken and the party dies. *Hunt v. Rousmanier*, 2 Mason, 244.

An agreement executed at the request of G to deliver to him obligations of a company, on payment of certain sums not accepted or acted upon by G until after the insolvency and death of one of the signers, is not binding on the estate of such signer. *Paüzé v. Senécal*, Mont. L. Rep. 5 Q. B. 461.

And before a pledgor is entitled to the collateral where the creditor has died, he must pay the debt. *Henry v. Eddy*, 34 Ill. 508.

Landlord and tenant.

An ordinary contract of a lease is not such a personal contract as is extinguished by the death of the lessor or lessee. *Coppel's Estate*, 4 Phila. 373; *Keating v. Condon*, 63 Pa. 75; *Walker's Estate*, 6 Pa. Co. Ct. Rep. 515; *Alsop v. Banks*, 13 L. R. A. 598, 68 Miss. 664; *Traylor v. Cabanne*, 8 Mo. App. 131; *Enys v. Donnithorne*, 2 Burr. 1193; *Becker v. Walworth*, 45 Ohio St. 189.

A lease became absolute on the death of the lessor, who reserved the right to redeem the premises from the lease, during the term, but died before the privilege was exercised. *Trammell v. Craddock* (Ala.) Nov. 7, 1898.

A tenancy from year to year is considered assets and devolves to the executors or administrators. *James v. Dean*, 15 Ves. Jr. 241; *Doe v. Porter*, 8 T. R. 13; *Wiley's App.* 8 Watts & S. 244.

The same was held in *Hunter v. Frost*, 47 Minn. 1.

tiff induced by such contract accepted the undertaking and the Housatonic Water Company was organized and a contract entered into between plaintiff and the company for the construction of its works. The work was completed and the company issued to the plaintiff the stock and bonds which it agreed to pay for his labor and has become able and ready to deliver to defendants' intestate the water for which the contract provided. After the death of the intestate his administrators refused to comply with the contract, in consequence of which refusal this action was brought. It appeared in evidence that the occupants of some of decedent's tenant houses took water and also that the lessee of the Monument Mills took some water. The court ruled that the contract did not terminate by the death of the intestate, but was binding on his legal representatives; that the rule of damages for its breach was the present value of each yearly payment due at

the end of the year in which, by the agreement, it was to be earned, after deducting from the same the cost of delivering the water for that year, upon the basis and terms of the agreement; and that from such yearly payments defendants had a right to have deducted, in mitigation of damages, such sums as the water company had received during the year, or ought to have received, for water furnished by it for use upon the premises occupied by decedent at the time of his death, and thereafter such further sums as said corporation may hereafter receive for such water during the contract period.

Further facts appear in the opinion.

Messrs. Pingree, Dawes, Jr., & Burke, for plaintiff:

The agreement is enforceable against the defendant administrators, and they are liable in damages for its breach.

On June 19 or at the latest June 21, the time

and is not terminated by the death of either party, but was not the question involved in this case.

A right of renewal or right to a lease is not extinguished by the death of either party. *Macartney v. Blundell*, 2 Rldgw. P. C. 118; *Hyde v. Skinner*, 3 P. Wms. 198; *Stephens v. Hotham*, 1 Kay & J. 571, 1 Jur. N. S. 845, 24 L. J. Ch. 686; *Phillips v. Evcrard*, 5 Sim. 102.

And in *Copeland v. Stephens*, 1 Barn. & Ald. 598, it was said that the death of the lessor in a lease for years does not prevent the lessee from perfecting it by an entry into the land, but this was not the question involved in this case.

These cases fully sustain the position taken in the main case which holds that a lease of water for a mill is not terminated by the death of the lessor.

A contract by which the lessee was to furnish labor and to have one half the profits of the farm for a term of years, is not terminated by the death of the lessor. *Lookart v. Forsythe*, 49 Mo. App. 654.

But where the lessee was to take care of the lessor during a term, for the use of a farm, the lessee is not liable for rent, after the death of the lessor. *Re Williams' Estate*, 1 Misc. 85.

Under Mass. Gen. Stat., chap. 99, the lessor is entitled to rent from the insolvent estate of a deceased lessee, but is not entitled to rent payable in the future. *Deane v. Caldwell*, 127 Mass. 242.

A tenancy at will is terminated by the death of either landlord or tenant. *Ellis v. Paige*, 1 Pick. 43; *Cody v. Quarterman*, 12 Ga. 386; *Robie v. Smith*, 21 Me. 114; *Reed v. Reed*, 48 Me. 388; *Say v. Stoddard*, 27 Ohio St. 478; *Rising v. Stannard*, 17 Mass. 284; *Ferrin v. Kenney*, 10 Met. 294; *Cummings v. Watson*, 149 Mass. 262.

A tenant at will retaining possession for fifty-seven years after the death of the lessor will be presumed to have acquired a title. *Camp v. Camp*, 5 Conn. 291, 13 Am. Dec. 60.

And after the death of a tenant holding under a term lease, made without authority, which is only a tenancy at will, the landlord cannot then change the liability of the estate of a tenant on notice of surrender, by ratifying the agent's authority. *Loran's Estate*, 10 Pa. Co. Ct. Rep. 554.

A covenant to repair or rebuild is not extinguished by the death of the covenantor or of the other party. *Morley v. Polhill*, 2 Ventr. 56; *Chamberlain v. Dunlop*, 126 N. Y. 45; *Lougher v. Williams*, 3 Lev. 92; *Tilney v. Norris*, 1 Ld. Raym. 558.

And a tenant cannot claim compensation for repairs made after the death of a landlord. *Wilson v. Edmonds*, 24 N. H. 617.
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A lease made by a life tenant terminates at the death of such life tenant. *Lowrey v. Reef*, 1 Ind. App. 244; *Page v. Wight*, 14 Allen, 188; *Hoagland v. Crum*, 113 Ill. 385, 55 Am. Rep. 424; *McIntyre v. Clark*, 6 Misc. 877.

And a lease for the life of the lessor passes to the lessee's administrators at the death of lessee. *Cunningham v. Baxley*, 96 Ind. 367.

A covenant that the lessor shall pay quit-rent during the term does not extend to his executors, as it is a personal covenant, which dies with the person. *Ingers v. Hyde, Dyer*, 114a.

On the death of the lessee, a surrender by his administrators and an acceptance terminates the liability of the estate. *Deane v. Caldwell*, 127 Mass. 242; *Greenleaf v. Allen*, Id. 248.

And the question of forfeiture is for the jury where the administrator of the lessor declared a lease to be at an end on the nonpayment of rent, and the lessee abandoned the premises. *Heinouer v. Jones*, 159 Pa. 223.

An administrator is not liable for rents subsequent to the death of lessee, where land held under a perpetual lease goes to the heirs. *Quain's App.* 23 Pa. 510.

It was stated in *Martin v. Black*, 9 Paige, 641, 4 L. ed. 548, 38 Am. Dec. 574, that an executor cannot be charged as the assignee of a lease if he waives the term, the income of which is not sufficient to pay the rent, although the estate of the testator may be liable for the rent in the due course of administration, if the landlord refuses to enter; but this was not the question involved in that case.

The rule that a tenant cannot dispute his landlord's title is not affected by the death of the landlord, and the descent of the land to his heirs. *Fowler v. Simpson*, 79 Tex. 611.

Sale.

A contract to deliver a certain amount of goods, in a certain time, is not extinguished by the death of the purchaser. *Smith v. Wilmington Coal Min. & Mfg. Co.* 83 Ill. 498; *Wentworth v. Cook*, 10 Ad. 8 El. 42, 2 Perry & D. 251, 3 Jur. 340; *Maotier v. Frith*, 6 Wend. 108, 21 Am. Dec. 262.

Nor by the death of the vendor. *Sabre v. Smith*, 63 N. H. 663.

So where the vendor contracts that the purchase price should be paid to his wife, her right is not affected by his death. *Scruggs v. Alexander*, 13 Mo. 124.

But a sale of corn in the crib that is not measured or delivered until after the death of the vendor,

had arrived for Mr. Crane to enter into the contract with the water company in fulfillment of his agreement with the plaintiff, but he died a month later without fulfilling his agreement.

"When a party," says *Mr. Justice Metcalf in Hayden v. Bradley*, 6 Gray, 426, 66 Am. Dec. 421 (quoting *Lord Abinger*) "stipulated to do a certain thing in a certain specific event which may become known to him, or with which he can make himself acquainted, he is not entitled to any notice unless he stipulates for it; but when he is to do a thing which lies within the peculiar knowledge of the opposite party, then notice ought to be given him."

See also *Vyse v. Wakefield*, 6 Mees. & W. 452; *Punderson v. Shepherd*, 8 Pick. 379; *Dyer v. Rich*, 1 Met. 180; *Brackett v. Beans*, 1 Cush. 81; *Johnston v. Glancy*, 4 Blackf. 94, 28 Am. Dec. 47.

It would seem, therefore, that there was a breach of the agreement in the intestate's lifetime.

does not pass title. *Cleveland v. Williams*, 29 Tex. 204, 94 Am. Dec. 274.

The liability of a warranty is not extinguished by the death of the vendee. *Booth v. Northrop*, 27 Conn. 323.

So the death of a purchaser before a foreclosure sale was consummated, does not extinguish the contract made by the bidder. *Denton v. Sanford*, 103 N. Y. 607.

Upon the death of a purchaser of realty before payment, his heirs may require the payments to be made out of the personalty. *Chamberlain v. Dunlop*, 126 N. Y. 45.

A contract for heating apparatus constructed mostly after the death of the purchaser, is not extinguished by his death. *McKeown v. Harvey*, 40 Mich. 233.

But a contract not to carry on a trade is not binding on the executors of the vendor. *Cooke v. Colcraft*, 2 W. Bl. 856, 3 Wils. 380.

Sections 4398, 4399, Ark. Mansfield's Dig., providing that in an action to collect a debt for personalty an order may be had for the sheriff to hold it, subject to the order of the court, does not apply where the vendee has died. *Blass v. Hood*, 57 Ark. 13.

A contract to pay for all the hemp that can be raised by a certain farmer in six years on certain land "of his own raising," ceases on the death of the farmer. *Shultz v. Johnson*, 5 B. Mon. 500.

And a contract by a lumber manufacturer to sell all the lumber sawed at his mill for five years, to average a certain amount per year, is extinguished by the death of either party. *Dickinson v. Calahan*, 19 Pa. 227.

In *Fuller v. Dempster* (Pa.) Nov. 11, 1887, an administrator was allowed to exercise the option of rescission of purchase of mine reserved in contract of sale to his testator.

For other decisions on sale, see subhead, *Agency*.

Guaranty.

Generally the liability of a guarantor on a direct contract of a guaranty, is not extinguished by his death, where advances are made in good faith. *Hightower v. Moore*, 46 Ala. 387; *Janin v. Browne*, 89 Cal. 37.

The liability of one of two joint and several guarantors is not extinguished by the death of the guarantor. *Fennell v. McGuire*, 21 U. C. C. P. 134; *Carter v. Hampton*, 77 Va. 681.

So where the guaranty is to remain in force until revoked by a notice, it is not terminated by the 23 L. R. A.

The paper writing declared upon was made, not as a contract with the Housatonic Water Company, that was to be made later, but this was with the plaintiff to cover from its date the intermediate time between the organization of the Housatonic Water Company and the construction of the aqueduct, and to be of force from its date and covering the time from the aqueduct company's organization until the making of the formal contract, and was the purpose and object both parties had in mind and their intent. It was senseless and valueless unless to be binding and operative upon the defendant's intestate from and after the organization of the Housatonic Water Company until the formal contract was made, because the intestate who was the promoter of the enterprise, in earnest of his confidence, had to bind himself to be a consumer, before he could induce the organization of the Housatonic Water Company into a corporation and the plaintiff to contract to build its aqueduct—which is brought about by this paper writing contain-

death of the guarantor. *Knotts v. Butler*, 10 Rich. Eq. 143; *Bradbury v. Morgan*, 1 Hurlst. & C. 249, 8 Jur. N. S. 218, 31 L. J. Exch. 422, 3 L. T. N. S. 104; *Menard v. Soudder*, 7 La. Ann. 335, 55 Am. Dec. 610.

And under a guaranty for admission at Lloyds, as an underwriter broker "hold myself responsible for all his engagements in that capacity," is not extinguished by the death of the guarantor. *Lloyds v. Harper*, L. R. 16 Ch. Div. 290-314, 50 L. J. C. H. 140, 43 L. T. N. S. 431, 29 Week. Rep. 452.

The liability of a guarantor on bonds given in return for public aid is not extinguished by the death of the guarantor. *Richardson v. Draper*, 37 N. Y. 337.

But a general guarantee of payment by another, of liability to be created in the future, terminates on the death of the guarantor. *Hyland v. Habich*, 6 L. R. A. 333, 150 Mass. 112; *Jordon v. Dobbins*, 129 Mass. 163, 23 Am. Rep. 305.

And the guaranty to continue in force until after six months' notice in writing, is determined by the death of the guarantor. *Harris v. Fawcett*, L. R. 8 Ch. App. Cas. 365, 42 L. J. Ch. 502, 29 L. T. N. S. 84, 21 Week. Rep. 742, affirming L. R. 15 Eq. Cas. 311, 23 L. T. N. S. 132, 21 Week. Rep. 504.

The guaranty is released by the bank renewing a note, which fell due after the death of the guarantor. *National Eagle Bank v. Hunt*, 16 R. I. 143.

Or by extending the time of payment after the guarantor's death. *Home National Bank of Chicago v. Waterman*, 30 Ill. App. 535.

Agency.

Generally the power and authority of an agent to contract for or in behalf of his principal, is terminated by the death of the principal.

A contract authorizing a purchase or sale between a principal and agent is usually terminated by the death of either party. *Adrianse v. Rutherford*, 57 Mich. 170; *Howe Sewing Mach. Co. v. Roensteel*, 24 Fed. Rep. 583; *Watson v. King*, 4 Campb. 272, 1 Stark. 121; *Rigs v. Cage*, 2 Humph. 350, 37 Am. Dec. 559; *Shiff v. Lesseps' Succession*, 22 La. Ann. 185; *McDonald v. Black*, 20 Ohio, 185; *Campanari v. Woodburn*, 15 C. B. 400, 24 L. J. C. P. 13, 3 C. L. Rep. 140, 1 Jur. N. S. 17.

But where the power to make a sale or transfer is coupled with an interest in the agent, it is not invalidated by the death of the principal. *Knapp v. Alvord*, 10 Paige, 205, 5 L. ed. 1108, 40 Am. Dec. 241; *Merry v. Lynch*, 98 Me. 94; *White v. Allen*, 139 Mass. 423; *Wilson v. Stewart*, 5 Pa. L. J. 450.

ing an agreement for the formal contract with the Housatonic Water Company when organized—which has never been performed.

It was an agreement which survived, and the defendants are liable in damages for its breach.

Kernochan v. Murray, 2 L. R. A. 183, 111 N. Y. 808; 2 Parsons, Cont. 5th ed. 550, 581; *Bradbury v. Morgan*, 1 Hurlst. & C. *255; *Hye v. Skinner*, 2 P. Wms. *197; *Siboni v. Kirkman*, 1 Mees. & W. 428; 8 Comyn, Dig. *Covenant* C. 1. See also *Martin v. Hunt*, 1 Allen, 418; *Hawkins v. Ball*, 18 B. Mon. 816, 68 Am. Dec. 755, note; *Chamberlain v. Dunlop*, 126 N. Y. 45.

The executors are responsible on all the contracts of the testator broken in his lifetime, and there is only one exception with regard to their liability for contracts broken after his death; that is this, that they are not liable in those cases where personal skill or taste is required.

Siboni v. Kirkman, *supra*; 2 Parsons, Cont. 5th ed. 553; *Bradbury v. Morgan*, *supra*; 2 Wms. Exrs. *1487; *Stumpff's App.* 116 Pa. 33; Chitty, Cont. 10th Am. ed. 101; *Chamberlain v. Dunlop*, *supra*; *Janin v. Browne*, 59 Cal. 87.

This is not an agreement calling for personal skill or taste, and is not within exception to the general rule that parties to a contract bind their personal representatives in the absence of express words to the contrary.

Wentworth v. Cook, 10 Ad. & El. 42; *White v. Allen*, 183 Mass. 428; *Martin v. Hunt*, and *Chamberlain v. Dunlop*, *supra*; *Billings's App.* 106 Pa. 558.

The executors of every person are implied in himself; and bound without naming.

Hyde v. Skinner, *supra*.

The part Mr. Crane was to perform called for no exercise of personal skill or taste; it did not call even for anything analogous to the sawing of lumber or the cutting of timber, as in *Dickinson v. Calahan*, 19 Pa. 227, and *Bil-*

Gordon v. Stubbs, 36 La. Ann. 625; *Fisher v. New York & M. Coal Field R. Co.* 31 W. N. C. 502; *Hess v. Rau*, 17 Jones & S. 324.

And the delivery of notes by an agent to creditors after the death of the principal was sustained, when the agent had the power to obtain securities for them, and to turn the securities over to the principal's creditors. *Nicolet v. Pillot*, 24 Wend. 240.

An agent authorized to sell goods and pay debts with the proceeds has only a qualified interest in the goods, but his executors may hold the goods for his lien. *Gage v. Allison*, 1 Brev. 495.

An attorney in fact authorized to convey land cannot make a valid deed after the death of his principal, where the power to convey is not coupled with an interest. *Harris v. Irving*, 28 Cal. 645; *Hunt v. Rousmanier*, 21 U. S. 8 Wheat. 201, 5 L. ed. 506; *Travers v. Crane*, 15 Cal. 12; *Sorugus v. Driver*, 31 Ala. 274; *Lewis v. Kerr*, 17 Iowa, 73; *Jenkins v. Atkins*, 1 Humph. 294, 34 Am. Dec. 648; *Primm v. Stewart*, 7 Tex. 178; *Harper v. Little*, 3 Me. 14, 11 Am. Dec. 25; *Shisler's Estate*, 2 Pa. Dist. Rep. 588.

On a sale of land by an agent after the death of the principal which was unknown to the agent, he is liable to the estate of the principal for the money. The purchaser's rights were not decided as he was not a party. *Carriger v. Whittington*, 26 Mo. 311, 73 Am. Dec. 212.

In *lah v. Crane*, 8 Ohio St. 521, it was held that a contract for the sale of land by an agent without knowledge of the death of the principal, is binding where he accounts to the heirs for the purchase money and puts the purchaser in possession, the court claiming that if the power of the agent had been actually revoked in the life of the principal and he had consummated the sale before such revocation came to his knowledge it would be the same; and the court held that under the authority given in this case the sale did not have to be made in the name of the principal, and was not a power to convey but power to sell.

The authority to receive money or collect the same where the agent has no interest in the subject-matter is revoked by the death of the principal. *Davis v. Windsor Sav. Bank*, 46 Vt. 723; *Johnson v. Johnson*, *Wright* (Ohio) 594; *Farmers Loan & T. Co. v. Wilson*, 64 Hun, 194; *Houghtaling v. Marvin*, 7 Barb. 412; *Lepard v. Vernon*, 3 Ves. & B. 51; *Weber v. Bridgman*, 113 N. Y. 600.

But in *Cassiday v. McKennie*, 4 Watts & S. 232, 39 Am. Dec. 76, it was held that a payment by the debtor, received by the agent in good faith after the principal is dead, of which fact they were ignorant, is binding upon the parties.

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A contract to perform personal labor by an agent for his principal, is terminated by the death of the principal. *Ross v. Hardin*, 79 N. Y. 84; *Krumdick v. White*, 32 Cal. 143.

If a consignee elects to hold goods as consignee, his executors, after his death, cannot elect to hold the same as a purchase. *Bacon v. Sondley*, 3 Strobb. L. 642, 51 Am. Dec. 644.

Under an arrangement for the principal to supply goods during the year, the authority of the agent is not revoked by the death of the principal during the year. *Garrett v. Trabue*, 33 Ala. 227; *Davis v. Davis*, 36 Ala. 173.

In *Smout v. Ilbery*, 10 Mees. & W. 1, it was held that a wife was not liable for goods supplied to her, after her husband's death in a foreign land, before information was received.

And the estate of a man is not liable for goods furnished after his death, to a woman who had cohabited with him as his wife. *Blades v. Free*, 9 Barn. & C. 107, 4 Mann. & R. 282.

Under a commission vesting an agency in two persons without words of survivorship where one of them dies and the other has not been recognized subsequently by the principal, he cannot bind the principal. *Hartford F. Ins. Co. v. Wilcox*, 57 Ill. 180.

But an employment of an agent by two joint contractors to sell articles under a patent is not discharged by the death of one joint contractor. *Martin v. Hunt*, 1 Allen, 418.

The death of an agent under the power of attorney is a revocation of the power of the sub-agent. *Lehigh Coal & Nav. Co. v. Mohr*, 33 Pa. 223, 24 Am. Rep. 161; *Watt v. Watt*, 2 Barb. Ch. 371, 5 L. ed. 768.

And on the death of a factor shipping goods to a subagent in his own name, the proceeds from the sale of the goods belong to the principal. *Jackson Ins. Co. v. Partee*, 9 Helsk. 266.

But in *Smith v. White*, 5 Dana, 276, it was held that the authority of the subagent is not revoked by the death of the agent, where the subagent acted in good faith for more than twenty years with a knowledge of the principal's attorney-at-law, as acquiescence is evidence of authority.

A purchase by the trustee having the power of sale, made after the death of the owner, is invalid as the trustee could not be the purchaser. *Middlesex Bank v. Minot*, 4 Met. 325.

For other cases on agency, see *Bromage v. Lloyd*, 61 Gale v. Tappan; *Charleston v. Duncan*; *Burdliff v. Smith*; and *Perry v. Crammond*, *infra*.

Attorney.

The authority of an attorney-at-law in regard to

Idings's App. supra. It was, in effect, a contract for the payment of money, a guaranty to the plaintiff. The entering into another contract was merely formal.

Pratt v. Hudson River R. Co. 21 N. Y. 805.

Even in Pennsylvania prior to the decision of *Billings's App. supra*, such a contract viewed as an obligation merely to pay money would have been held to survive.

White v. Com. 39 Pa. 167.

It cannot be said that because the fulfillment of this agreement in the case at bar required the execution of another contract that therefore the agreement does not survive.

For an agreement to grant an annuity survives.

Nield v. Smith, 14 Ves. Jr. 491.

A covenant to convey a copyhold on request survives.

Thurseden v. Worthen, 2 Bulstr. 158.

A covenant to renew a lease survives.

Macartney v. Blundell, 2 Ridgw. P. O.

actions and collections and satisfaction of judgments, is revoked by the death of his client. *Turnan v. Temke*, 84 Ill. 286; *Risley v. Fellows*, 10 Ill. 581; *Clegg v. Baumberger*, 110 Ind. 596; *Gleason v. Dodd*, 4 Met. 333; *Megary v. Funtia*, 5 Sandf. 376; *Palmer v. Reiffenstein*, 1 Mann. & G. 94; *Perles v. Aycinena*, 3 Watts & S. 64; *Clayton v. Merrett*, 53 Miss. 353; *Moyle v. Landers*, 73 Cal. 99; *Campbell v. Kincaid*, 3 T. B. Mon. 46; *Judson v. Love*, 35 Cal. 463; *Balbi v. Duvet*, 3 Edw. Ch. 413, 6 L. ed. 710; *Putnam v. Van Buren*, 7 How. Pr. 31.

And the retainer of an attorney is determined by the death of his client. *Whitehead v. Lord*, 7 Exch. 691, 21 L. J. Exch. 239.

In *Wylie v. Ooze*, 56 U. S. 15 How. 415, 14 L. ed. 733, where the attorney was to receive a contingent fee for prosecuting a claim against the Mexican republic, the death of the owner of the claim did not dissolve the contract and the attorney was entitled to compensation which would be a lien upon the money when recovered.

In *Zenon's Succession*, 34 La. Ann. 1187, where there was no stipulation as to the amount of the fees of the attorneys, it was proper for them to enforce a contract for their services against her succession and continue their services, unless discharged by the administrator.

And in *Andrews v. Showell*, T. Raym. 18, where a judgment was confessed by an attorney, and the defendant died before it was signed, the court refused to set aside the judgment as it was for a good debt.

And a motion in discharge from a debtor's prison was allowed where the notice was served on the plaintiff's attorney who was his son and who refused to disclose who was the plaintiff's personal representative, the plaintiff being dead. *Booth v. Steer*, 7 Jur. 673, 1 Dowl. & L. 374; *Poole v. Stead*, 11 Mees. & W. 759.

Notes, bills, and checks.

Ordinarily, indorsements and transfers affecting liability cannot be made after the death of a party, to a note or bill.

The death of a principal generally invalidates the power of another to draw bills of exchange in his name, or to indorse or deliver an indorsed note for him. *Bromage v. Lloyd*, 1 Exch. 32, 5 Dowl. & L. 123, 16 L. J. Exch. 257; *Bank of Washington v. Piereson*, 3 Cranch, C. C. 686; *Michigan State Bank v. Leavenworth's Estate*, 23 Vt. 209.

And where a note is found indorsed among the papers of a decedent, but undelivered, his personal representatives are not authorized to deliver the 33 L. R. A.

118; *Phillips v. Everard*, 5 Sim. 102; *Colgrave v. Manby*, 2 Russ. Ch. 238; *Hawkins v. Ball*, 18 B. Mon. 816, 68 Am. Dec. 755, note.

Contracts to convey real estate survive.

Hawkins v. Ball, supra.

It is also held that agreements to make certain dispositions of property by will may be enforced against the estate of the promisor.

Ibid.; *Hatt v. Williams*, 72 Mo. 314, 37 Am. Rep. 438.

The plaintiff is entitled to judgment for an amount which shall be the present value of each yearly payment due at the end of the year in which by the agreement it was to be earned, with interest from December 1, 1888, the time the waterworks were completed, & the date of the verdict.

Alder v. Keighley, 15 Mees. & W. 117; *Robinson v. Harman*, 1 Exch. 855; *Driggs v. Dwight*, 17 Wend. 71, 31 Am. Dec. 283, and note; *Pearson v. Mason*, 120 Mass. 53. See also *Parker v. Russell*, 183 Mass. 74; *Amos v.*

same. *Clark v. Sigourney*, 17 Conn. 511; *Clark v. Boyd*, 2 Ohio. 53.

And a power of attorney to demand payment on a note is determined by the death of the principal. *Gale v. Tappan*, 12 N. H. 145, 37 Am. Dec. 194.

An indorsement of a note to a deceased person, in order to transfer the title to such person's representative, is invalid. *Valentine v. Holloman*, 68 N. C. 475.

And the power to negotiate generally ceases on the death of the accommodation indorser. *Michigan Ins. Co. v. Leavenworth*, 30 Vt. 11; *Smith v. Wyckoff*, 3 Sandf. Ch. 77, 7 L. ed. 777.

Under an arrangement, whereby a bill was drawn in the name of a deceased person and accepted by a defendant, he is estopped from claiming that the indorsement was not that of the decedent. *Ashpittel v. Bryan*, 33 L. J. Q. B. 91, affirming 33 L. J. Q. B. 323.

Under 1 N. Y. Rev. Laws, 516, the liability on a promissory note in favor of an indorser where the indorsement is made after the maker's death, continues against the makers' heirs. *Parsons v. Parsons*, 5 Cow. 476.

A principal may claim, on the death of an agent, a note taken by an agent in his own name, belonging to his principal. *Charleston v. Duncan*, 3 Brev. 386.

And a bill of exchange may be completed by the addition of the drawer's name, after the death of the acceptor. *Carter v. White*, L. R. 25 Ch. Div. 686, 54 L. J. Ch. 138, 50 L. L. T. S. 670, 32 Week. Rep. 692.

And where the drawer's name was blank and it came in the possession of the plaintiff as administratrix, who inserted her own name as drawer, it was sustained. *Seard v. Jackson*, 34 L. T. N. S. 65.

Where presentment, demand, and notice are prevented by death, a reasonable diligence thereafter is required. *White v. Stoddard*, 11 Gray, 236, 71 Am. Dec. 71; *Duggan v. King*, 1 Rice, L. 240, 33 Am. Dec. 107; *Smith v. Bank of New South Wales*, L. R. 4 P. C. 194; *Massachusetts Bank v. Oliver*, 10 Cush. 557; *Cayuga County Bank v. Bennett*, 5 Hill, 236; *Harp v. Kenner*, 19 La. Ann. 63; *Bank of Washington v. Reynolds*, 3 Cranch, C. C. 239; *Groth v. Gyrer*, 51 Pa. 271, 72 Am. Dec. 745; *Juniata Bank v. Hale*, 16 Serg. & R. 157, 16 Am. Dec. 558.

And notice of non-payment must be given to the administrator of an indorser, if he is qualified before the maturity of the note. *Oriental Bank v. Blake*, 23 Pick. 206.

And must be given to an indorser, even if he is the administrator of the drawer. *Magruder v. Union Bank of Georgetown*, 28 U. S. 3 Pet. 87, 7 L. ed. 612.

Oakley, 181 Mass. 418; *Jewett v. Brooks*, 184 Mass. 505.

And it makes no difference in the measure of damages that the contract is for a contract.

Pratt v. Hudson River R. Co. and *Drigge v. Dwight*, *supra*.

The defendants are not entitled to have the water already taken and to be taken in the future by the Monument Mills and the two tenement houses allowed in reduction of damages.

Sutherland, Damages, § 158; *Dillon v. Hunt*, 105 Mo. 154; *Harding v. Townshend*, 43 Vt. 586, 5 Am. Rep. 304; *Cunningham v. Evansville & T. H. R. Co.* 102 Ind. 478, 52 Am. Rep. 638; *State v. Bishop*, 24 Md. 310, 87 Am. Dec. 608; *Chitty*, Cont. 10th Am. ed. by J. C. Perkins, 984, 985; *Ellis v. Wire*, 38 Ind. 127, 5 Am. Rep. 189.

The rule is not confined to actions of tort, but extends to actions of contract.

Sondes v. Fletcher, 5 Barn. & Ald. 835;

Or where the indorser knew that the note would not be paid and that the maker was dead. *Gower v. Moore*, 25 Ma. 16, 43 Am. Dec. 247.

The negligence of the executrix of a holder for several months to present a note or give notice of non-payment, discharges the indorser. *Wilson v. Senier*, 14 Wis. 380.

And in *Toby v. Maurian*, 7 La. 493, it was held that no recovery could be had of an indorser until a demand was made on the heirs of the maker, if he is dead and there was no administrator, unless the impossibility of making a demand was apparent.

But a demand does not have to be made on the day of the funeral, at the dwelling of the deceased maker. *Huff v. Ashcraft*, 1 Disney (Ohio) 60.

If the maker of a note is dead at the time of its indorsement, no demand is necessary to bind such indorser. *Davis v. Francisco*, 11 Mo. 572, 49 Am. Dec. 98; *Picklar v. Harlan*, 75 Mo. 678.

And in *Landry v. Stansbury*, 10 La. 484, it was held that a demand of an administrator of a maker is unnecessary to bind the indorser, where such administrator was not authorized to pay any claim until after a certain time.

Unless the note matured more than a year after the appointment of the administrator. *Hale v. Burr*, 12 Mass. 86.

Where a protest was made after the death of the indorser and the notice was taken from the post-office, by the direction of a subsequent indorser, and delivered to the administrators of the deceased, this was sufficient. *Beals v. Peck*, 12 Barb. 245.

And a notice of dishonor, to the drawer, who is the party who is to pay the bill as executor of the acceptor, is sufficient. *Caunt v. Thompson*, 7 C. B. 400, 6 Dowl. & L. 621, 18 L. J. C. P. 125, 13 Jur. 495.

Upon the death of the drawer of a bill, the rights and liabilities of the parties thereto are not altered. *Billing v. Devaux*, 3 Mann. & G. 565, 4 Scott. N. R. 175, 5 Jur. 1182.

And a payment on presentation was sustained where a master of a ship gave a bill of exchange on the consignee for the freight money, and died before the bill reached the hands of the indorser. *Cutts v. Perkins*, 12 Mass. 206.

Ordinarily, a note should be delivered in the lifetime of the parties, but a delivery to the administrator of the payee has been sustained. *Welch v. Dumeron*, 47 Mo. App. 221.

And an administrator might elect to take a bill belonging to the decedent, which had been indorsed by his agent to him, in ignorance of his 28 L. R. A.

Hawkins v. Coulthurst, 5 Best & S. 843; *Sedgw. Damages*, 496, ed. of 1878; *Chitty*, Cont. 10th Am. ed. by J. C. Perkins, 984, 985.

So far as the Monument Mills have taken and used the water that is a collateral matter wholly independent of the defendants and is as to them *res inter alios acta*. The payments made by the Monument Mills not having been procured by the defendants and the payments not having been either paid or received to satisfy in whole or in part the defendants' liability, they can derive no advantage therefrom in mitigation of damages.

Sutherland, Damages, § 158; *Dillon v. Hunt*, *Harding v. Townshend*, and *Cunningham v. Evansville & T. H. R. Co.* *supra*.

Messrs. Marshall Wilcox and A. Chalkley Collins, for defendant:

The language, "I hereby agree to enter into a contract binding myself to take water," in terms calls for no action other than his personal

death. *Murray v. East India Co.* 5 Barn. & Ald. 204.

And the administrator may indorse away bills owned by the decedent. *Rawlinson v. Stone*, 3 Wils. 1; *Makepeace v. Moore*, 10 Ill. 474.

Money received by a private banker to pay the drawer of a draft belongs to the drawer if the banker dies before it is transferred. *First Nat. Bank of Central City v. Hummel*, 8 L. R. A. 788, 14 Colo. 250.

And where a note was indorsed by an agent in consideration of an extension of time, in ignorance of his principal's death, such indorsement was sustained. *Burrill v. Smith*, 7 Pick. 291.

And where a note was delivered by an agent after the death of the drawer, to a person who had made advances upon their faith to the drawer, such delivery was sustained. *Perry v. Crammond*, 1 Wash. C. C. 100; *Dick v. Page*, 17 Mo. 284, 57 Am. Dec. 287.

A payment by a bank of a check of the decedent, in ignorance of his death, is valid. *McMurray v. Ennis*, 81 N. Y. S. R. 976.

And where a payee of a check indorsed it to another party, and then died, the property of such indorser in the check ceases. *Burke v. Bishop*, 27 La. Ann. 465.

An agent who received for his principal a check just before the death of the principal, and drew the money after his death, as executor, cannot be compelled to account, except by first applying upon it what the testator owed him on account. *Re Kellogg*, 104 N. Y. 648.

In *Lewis v. International Bank*, 18 Mo. App. 202, it was held that as in that state the delivery of a check is an appropriation of that much of the fund on deposit, the death of the drawer before presentation does not operate as a revocation of the check.

See also subhead, *Guaranty*.

Personal services.

Ordinarily a contract for personal services is extinguished by the death of the party to perform the same. *Hyde v. Dean of Windsor*, Cro. Eliz. 558; *Lee v. Griffin*, 2 Best & S. 272, 30 L. J. Q. B. 252, 7 Jur. N. S. 1302, 4 L. T. N. S. 543, 9 Week. Rep. 702; *Farrow v. Wilson*, L. R. 4 C. P. 744, 38 L. J. C. P. 523, 20 L. T. N. S. 810, 18 Week. Rep. 43; *Siler v. Gray*, 38 N. C. 569; *Parker v. Macomber*, 16 L. R. A. 384, 17 R. I. 674.

And a contract by a pastor personally to pay an organist for a certain time ceases at the death of

action. If his estate or his administrators are bound to carry out such personal contract, it must be so because the law by construction finds it was the intention of Mr. Crane to bind not only himself personally but his estate in the hands of his administrators in case of his death.

But this must be determined in the light of the circumstances, objects, and motives surrounding the parties.

Vide Metcalf, Cont. 1st ed. p. 273; *Nichols v. Luce*, 24 Pick. 102, 85 Am. Dec. 302; *Whittier Mach. Co. v. Graffan*, 156 Mass. 415.

Mr. Crane wanted the water for business conducted under his arrangements with the Monument Mills corporation. In case of his death, his business was liable to be absolutely terminated and the intended use of the water extinguished.

Under these circumstances it is but a reasonable deduction that the parties understood

that the "formal contract" was to be made with reference to the expected continuance of Mr. Crane's business relations with Monument Mills corporation and that the water was wanted only for use in that business.

The instrument of June 11, 1888, in view of its language and personal surroundings and circumstances, called for the individual act of Mr. Crane himself in the execution of the "formal contract," and upon his decease the execution of it was not obligatory upon his estate in the hands of his administrators.

And had the formal contract been executed in his lifetime, its relations to Mr. Crane and his business and the inability of his administrators to continue the business and the use of the water therein, warrant the court in holding that the obligations of the contract should expire with him.

Tasker v. Shepherd, 6 Hurlst. & N. 575; *Dickinson v. Calahan*, 19 Pa. 227; *Bland v.*

the pastor, where the church is subsequently closed. *Harrison v. Conlan*, 10 Allen, 85.

In *Siboni v. Kirkman*, 1 Mees. & W. 418, 2 Gale, 51, it was stated that the only exception to the liability of an estate on a contract of a testator is where personal skill or taste is required.

A contract which does not involve skill, and which binds the heirs, executors, and administrators of the party and can be completed within a reasonable time, is not extinguished by the death of either party. *Billings's App.* 106 Pa. 558.

A contractor agreeing to build a house, may be required to finish the same after the death of the owner of the land. *Cooper v. Jarman*, L. R. 3 Eq. 35, 36 L. J. Ch. 85.

A contract to build that is completed after death of owner, is not invalidated by such death. *Riblet v. Wallis*, 1 Daly, 380.

Where a contract by two to do work is completed by one after the other's death, the estate of the deceased is entitled to its share in the profits. *Jepson v. Killian*, 151 Mass. 598; *McClean v. Kennard*, L. R. 9 Ch. 386, 43 L. J. Ch. 323, 30 L. T. N. S. 126, 22 Week. Rep. 582.

Under La. Code, § 2007, providing that all contracts for labor are personal on the part of the obligor but heritable on the part of the obligee, a contract of employment as a clerk of a decedent is exigible against his estate. *Tete v. Lanoux* (La.) Nov. 20, 1893.

Where a coat was ordered and fitted before the death of the tailor, and finished and delivered by his widow and administratrix, the purchaser was liable. *Werner v. Humphreys*, 3 Scott, N. R. 226, 2 Mann. & G. 852.

So if work contracted for by the testator is completed by the executors, by using the materials of the testator, a recovery may be had for the value of such material. *Marshall v. Broadhurst*, 1 Crompt. & J. 403, 1 Tyrw. 349.

The death of a farmer does not avoid liability on a contract for labor by a party on the farm for one year, where he completed the year's service after the death of the farmer. *Lacy v. Getman*, 35 Hun. 46.

In *Gilman v. Wilher*, 1 Dem. 547, whether or not a contract to give tuition is extinguished by the death of the promisor, was not decided, although questioned.

Under a contract to saw lumber for another, by a debtor in payment of his debt, if the party furnishing the same dies, the debtor cannot be compelled to pay, before he has refused to saw the same. *Hawkins v. Ball*, 18 B. Mon. 516, 68 Am. Dec. 755.

On the subject of recovery for services on contracts interrupted by sickness or death, see exhaustive note, *Parker v. Macomber*, 16 L. R. A. 858, 17 R. I. 674.

For other cases of personal services, see *Re Williams' Estate*, 1 Misc. 38; *Shultz v. Johnson*, 5 B. Mon. 500; *Dickinson v. Calahan*, 19 Pa. 227; *Ross v. Hardin*, 79 N. Y. 84.

Apprentice.

On the question as to the effect of the death of a master of an apprentice, upon the premium which has been paid by such apprentice, there is some conflict of decision. The early cases of *Newton v. Rowse*, 1 Vern. 460; *Soam v. Bowden*, Finch, 396; *Hirst v. Tolson*, 2 Maon. & G. 134, 2 Hall & T. 359, 19 L. J. Ch. 441, 14 Jur. 559, held, that on the death of the master a partial recovery of the premium money was allowed, but subsequently in *Re Thompson*, 1 Exch. 864, a court of equity refused to require a return of a portion of the premium paid by the articulated clerk, who had died, and in the later case of *Whincup v. Hughes*, L. R. 6 C. P. 78, 40 L. J. C. P. 104, 24 L. T. N. S. 74, 19 Week. Rep. 439, it was held that a partial failure of consideration by the death of the master, will not authorize a recovery of part of the premium money. The court in this case discusses the previous cases, claiming that in *Soam v. Bowden* the executor had come into court and said that he was willing to do whatever the court would direct, referring to *Newton v. Rowse*, *supra*, the court claimed that there must have been a mistake or misrepresentation, as a basis of recovery which does not appear, and finally overrules *Hirst v. Tolson*, *supra*.

Wood on Master & Servant, § 42, gives *Whincup v. Hughes*, *supra*, as an authority for the converse of the proposition decided in the reported case.

The liability of service by an apprentice is extinguished by the master's death. *Baxter v. Burfield*, 2 Strange, 226; *Boast v. Firth*, L. R. 4 C. P. 1, 38 L. J. C. P. 1, 19 L. T. N. S. 264, 17 Week. Rep. 29.

But not where the contract bound the apprentice to serve the executors of the master. *Cooper v. Simmons*, 7 Hurlst. & N. 707, 31 L. J. M. C. 138, 3 Jur. N. S. 81, 5 L. T. N. S. 712, 10 Week. Rep. 270.

But the liability of the master on an apprentice's contract, binding the master, his heirs and assigns, continues after his death as to meat, drink, clothes, etc. *Com. v. King*, 4 Serg. & R. 109.

In this note cases on the subjects of Donatio causa mortis; Checks; Joint contracts; Mortgages; Surety; Partnership; Bonds official; Contracts to be performed at death; questions as to Pleading; Abatement; Survivorship, and Descents,—are not included as more properly matters for other notes.

L. T.

Junstead, 23 Pa. 816; *Quain's App.* 22 Pa. 510; *Chamverlain v. Dunlop*, 126 N. Y. 45; *Shear v. Wright*, 60 Mich. 159; *Hove Sewing Mach. Co. v. Hosensteel*, 24 Fed. Rep. 583; *Butterfield v. Byron*, 12 L. R. A. 576, 153 Mass. 517; *Mare*, Cont. pp. 647, 653.

Holmes, J., delivered the opinion of the court:

This is an action of contract on the following writing:

New York, June 11th, 1888, M. J. Drummond—Dear Sir: I hereby agree to enter into a formal contract with the Housatonic Water Company, when organized, binding myself to take at least seven hundred and fifty (\$750) dollars worth of water per annum for the period of ten years, on the following basis: Water for manufacturing purposes, 12½ cents per 1,000 gallons; hydrants, \$40.00 per annum each; private dwellings, one tap for one family, \$8.00 per annum. In the construction of these waterworks, they are to commence at Long Pond, with a 14-inch pipe, and continue with a 12-inch pipe, then reducing to 10-inch, then to 8-inch to the village, and using 6-inch and 4-inch distribution pipes. C. R. Crane."

This writing was signed in order to induce the plaintiff to build an aqueduct for the stock and bonds of the Housatonic Water Company, and the offer contained in it was made in consideration of the plaintiff's doing so. The plaintiff accepted the offer, furnished the consideration, and the promise became a binding contract. Just afterwards, Mr. Crane died, and his administrators refused to perform the contract. The first question is whether the administrators were bound to pay for the ten years, as agreed by Mr. Crane.

The question is not whether the administrators are bound by their intestate's contract. They are bound by it, of course, whether named or not, because they represent his person. *Shelley's Case*, 1 Coke. 93, 96a; *Iremonger v. Newsum*, Latch, 260, 261; *Day v. Worcester, N. & B. R. Co.* 151 Mass. 302, 308.

A sufficient proof is that they unquestionably would be liable for a breach by their intestate in his lifetime. The true question is whether the contract, properly construed, requires a continuance of the promised action beyond the lifetime of the promisor. It is the same question, and is to be answered in the same way, as if the promisor himself were alive for purposes of being sued, but dead for the purposes of performance.

The facts relied on by the defendants are that, as the plaintiff knew, the reason why Mr. Crane wanted the water was that he might use it in his business; that his business was the manufacture of woollens under a lease and business arrangement with the Monument Mills; that by the terms of his lease the mills had a right to terminate it, and did terminate it in fact, within three months of Crane's death. The plaintiff knew the kind of business in which Crane was engaged, and that it was carried on under some arrangement with the Monument Mills, but did not know what the arrangement was.

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But the motives which induced Crane to make the promise are not so important an aid in determining its scope as the object which the plaintiff manifestly had in exacting it. It was perfectly plain that the reason why the plaintiff required the promise as a condition of making his investment and filling the reservoir was that he might have some security for returns. The plaintiff committed himself absolutely to the investment, whether Crane lived or died. Obviously, the security which he wanted was one equally independent of Crane's life. From the point of view of the plaintiff, the contract was like a guaranty, upon executed consideration, that he should have so much business for a certain time, which, of course, would run on whether the guarantor lived or died. See *Lloyd's v. Harper*, L. R. 16 Ch. Div. 290. It may be that it was prudent administration for the defendants to break the contract and to pay the damages, but we are of opinion that Crane's undertaking was to take the water for ten years, dead or alive. Very possibly, he did not think of the chance of his dying, and might have hesitated if the present aspect of his contract had been called to his attention. But the circumstances and the words used gave notice of the extent of the obligation which he was entering into, and, if we are to conjecture, it is as probable as anything else that the plaintiff would not have accepted less than, by our construction, he got. No cases very like the present have been called to our attention. We may mention *Kernochan v. Murray*, 111 N. Y. 806, 2 L. R. A. 185; *Chamberlain v. Dunlop*, 126 N. Y. 45; *Billings's App.* 106 Pa. 558; *Martin v. Hunt*, 1 Allen, 418, 419.

The considerations which we have put forward are not affected by the fact that the contract sued upon contemplated another more formal contract. That is merely an additional wheel in the machinery. Nor does it matter that the second contract would be made with another party. It was expected that the plaintiff would become the owner of substantially all the stock of the water company, when it was issued, and he did so; so that his interest was substantially the same with reference to the present question as if the second contract were to run to him.

The other question reserved by the report concerns the measure of damages. The judge who tried the case, without a jury, found that the cost of delivering the water was nothing, and ruled that the plaintiff was entitled to recover the present value of each yearly payment, deducting such sums as the water company received, or ought to have received, for water used upon the premises occupied by Crane at the time of his decease. Only the plaintiff complains of this ruling. We have no doubt that the defendants are right in conceding that the plaintiff is entitled to recover substantial damages, subject to any just deductions. It does not matter how the contractee is interested to have a contract performed,—whether directly, or because he is a stockholder in a corporation,—if he is interested. It has been held in England that trustees can recover to the extent of the interest of their *cestuaries que*

trustent. Lloyd's v. Harper, L. R. 16 Ch. Div. 290. Also, the intended intervention of a second contract is not important. *Pratt v. Hudson River R. Co.* 21 N. Y. 805; *Driggs v. Dwight*, 17 Wend. 71, 81 Am. Dec. 288.

The matter of the deductions is more difficult to deal with. Even if the contract were as broad as upon this question the plaintiff's interest would have it regarded, some circumstances can be imagined which would make the damages only nominal, at most. The object being, as we have said, to secure the plaintiff a return for his investment by guaranteeing a certain amount of custom, if the plaintiff's company had customers for all the water which it could furnish, only nominal damages ought to be allowed. The same consideration of the object of the contract points also to some latitude of construction as to what constitutes performance. If the contract had specified the buildings in which the water was to be taken, there could be no doubt that the ruling was right. The contract would mean, not that Crane personally would take so much water at all events, but that so much water should be taken in those buildings. The contract does not specify any buildings, but still we are of opinion that it does not require a personal taking of the water throughout the ten years. It is satisfied if the taking was started by Crane, and its continuance fairly may be attributed to him. When the contract was made, both parties understood that Crane made it for the sake of his factory in the building of the Monument Mills. If Crane, in his lifetime, had taken water there, and after his death his administrators had done the same, and then within the ten years the factory had

changed hands, and the same amount of water was taken afterwards, it would be a hard construction to deny that the contract adopted in advance Crane's choice of place, to the extent that a continuous taking of water in the same place was a performance. The obligation to take the water would not follow Crane's person and estate so far as to bind the administrators to take water in another place in addition. So if Crane, after taking water, himself had sold the factory. Things had not gone quite so far as we have supposed, because Crane died just before the water was ready for delivery. Yet it seems very plain, and, as we take it, was inferred by the judge who tried the case, that the places in respect of which the judge made the allowances were understood by both parties to be places at which the water was to be delivered. No doubt, Crane was free to change his place of performance, but a taking at the factory satisfied the contract *pro tanto*. As to the sums paid for water by the two tenements of the Crane estate also allowed by the judge, the facts do not appear in any detail. We cannot say that the allowance was not right, upon the principles which we have explained.

No objection has been raised to the recovery in this action of all the damages which ever can be recovered, although the ten years have not elapsed. It seems to be assumed that the case is governed by *Puige v. Barrett*, 151 Mass. 87, and the cases there cited. We do not disturb the assumption. If it be made, the deductions to be allowed on account of earnings in the future must be matter of estimate.

Judgment on the finding.

OREGON SUPREME COURT.

Roland WARD, *Resp.*,
v.
SOUTHERN PACIFIC CO., *App.*

(.....Or.....)

1. The mere fact that persons have frequently trespassed upon a railroad track, and that the company has resorted to no means to stop such trespassers, does not amount to a permission or license to use the track as a footpath.
2. A railroad company owes to a trespasser upon its track no legal duty to keep a lookout or guard him against danger.
3. The finding of the body of a child on a railroad track, where it had been struck by a train, raises no presumption of negligence on the part of the company, although the track

was straight and clear, where there is nothing to show the circumstances of the accident, or how long the child had been on the track when struck.

(March 12, 1894.)

APPEAL by defendant from a judgment of the Circuit Court for Douglas County in favor of plaintiff in an action brought to recover damages for the killing of plaintiff's son, which was alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. E. C. Bronaugh and W. D. Fenton for appellant.

Mr. J. W. Hamilton for respondent.

Lord, *Ch. J.*, delivered the opinion of the court:

The complaint alleges that, by the negli-

NOTE.—Most cases as to implied license to go upon a railroad track have related to a crossing, as to which, see *Central R. & Bkg. Co. v. Rylee* (Ga.) 13 L. R. A. 634, and note, and *Chenery v. Fitchburg R. Co.* (Mass.) 22 L. R. A. 575.

But as to claim of license to use track as a footpath, see also *Anderson v. Chicago, St. P. M. & O. R. Co.* (Wis.) ante, 203.

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As to presumption of negligence of person found killed by alleged negligence of another, see *Hendrickson v. Great Northern R. Co.* (Minn.) 16 L. R. A. 261, and note.

The question of presumption in the present case, it will be noticed, is that of the negligence of the railroad company and not that of the trespasser.

gence of the defendant in the management of its locomotive engine, a son of the plaintiff, about six years of age, was run over and killed. The answer denies such alleged negligence, and sets up as a defense that the plaintiff and his son were contributorily negligent. The reply denies the new matter in the answer. The cause being thus at issue, a trial was had, resulting in a verdict for the plaintiff, and from the judgment which followed this appeal was taken.

In the progress of the trial, it appears that, at the close of plaintiff's testimony, defendant interposed a motion for judgment of nonsuit, which the court overruled, and the defendant excepted. As the propriety of this ruling is questioned, our present inquiry is as to whether the testimony for the plaintiff is legally sufficient to warrant the verdict in his favor.

The record discloses that the testimony for the plaintiff, in substance, is that he is a farmer, and that Freddie Ward, the deceased, was his son, who was about six years of age; that the railroad track passes through a field of plaintiff's farm, within about fifty yards of his residence, which stands inside of an inclosed yard, and adjoining this yard is the barn lot, from which a gate opens into said field; that, on the afternoon of the day of the accident, plaintiff was engaged in hauling wood through his barn lot to the side of the railroad track, where he piled it; that shortly before four o'clock in the afternoon of said day, which was the usual hour for the Southern Pacific train to pass his place in going to Roseburg, the plaintiff, having loaded his wagon, said to his son, "Run and open the gate, so that I can get the load off before the train comes," which being done, he drove his team through the gate to the wood pile beside the track (the distance between the gate and wood pile being about fifty yards), and that the gate was left open by his direction; that before reaching the wood pile the plaintiff looked back, and, not seeing his son, supposed that he had returned to the barn; that, the last time plaintiff saw his son, he was at the gate, and that about twenty minutes thereafter, but after the train had passed, some five or ten minutes, Mrs. Clark found the dead body of the child, and gave the alarm, when the plaintiff ran to the spot, and saw the body of his son lying in the middle of the railroad track, with the shoulders about five or six inches from the rail, and the head dis severed from the body, lying outside of the rail near the wood pile, and some thirty feet from where the body lay; that from the time he last saw his boy, at the gate, until the body was found by Mrs. Clark, the plaintiff did not know where his son was, but supposed that he was at the house, though he did not tell him to go there, or "notice him after that;" and that the wood pile at which plaintiff was unloading his wagon when the train passed was about seventy feet long, six or seven feet from the track, and eight feet high. There was some evidence tending to show that school children and other persons sometimes used the railroad track as a footpath, but none showing that the company knew or had notice that the

track was so used; and the plaintiff admitted that he had not seen any school children so using the track for about a year previous to the death of his son. It was also shown that the track was open and straight, from the direction from which the train came, for nearly half a mile before the place was reached where the child was found. This being, substantially, all the evidence for the plaintiff, the contention for the defendant is that such evidence wholly fails to prove the negligence alleged as a cause of action, and that, therefore, the trial court erred in not granting the motion for a nonsuit. As argued, this contention involves two points: First, that the evidence totally fails to show that the injury and death of plaintiff's son were caused by the negligence of the defendant or its employés in the management of the train at the time of the accident; and, second, that, conceding the negligence of the defendant, the plaintiff's evidence shows that, in view of the circumstances, he was guilty of negligence contributing to produce the fatal occurrence, in leaving his son in such dangerous proximity to the railroad track.

As to the first point, it is put upon the ground that, as shown by the evidence, the company had the exclusive right of way where the accident occurred to the deceased, and hence that he was a trespasser upon its track, to whom the company owed no legal duty to keep a lookout, or guard him against danger. The evidence shows that the body was found, not at a public crossing, or where people habitually pass over the track, and are known to be in the habit of doing so by those operating the trains, but in a field through which the railroad passes, and over which the company had the sole right of way. Some persons or school children living in the vicinity of the railroad track occasionally used it as a footpath, but without the knowledge or permission of the company. It was a license of their own taking which they took *cum periculo*, or subject to its perils. "Persons," says *Mr. Justice Nelson*, "living in the vicinity of railroads, who use the tracks or the embankments, or the space between the tracks, as a footpath, are wrongdoers, unless permission is granted by the company so to use its tracks. Although pedestrians, or the public generally, travel over them without objection, people go there at their own risk, and, as said by the supreme court of Massachusetts, 'enjoy the license subject to the perils.' *Gaynor v. Old Colony & N. R. Co.* 100 Mass. 208, 97 Am. Dec. 96." *Grethen v. Chicago, M. & St. P. R. Co.* 22 Fed. Rep. 609. User of this sort will not establish a public way over the track, or relieve those so using it from the imputation of being trespassers.

A railroad company has the right to the exclusive use of its track, unless a right of way or footpath over it has been acquired by its consent, express or implied, or a joint use has been reserved to the public, as at a public crossing. There is no doubt that if the company permitted the public, for a long time, to travel or habitually pass over its track at some given point, or use it as a footpath between different points, without objec-

tion or hindrance, its consent or acquiescence in such use might be presumed, and it would be bound to manage and run its trains with reference thereto. In such cases the company and the people have a common right or joint use in the track, as a public way, and the right of each must be regarded. But the mere fact that persons have frequently trespassed upon the track, and that the company has resorted to no means to stop such trespasses, does not amount to a permission or license to use the track as a footpath. There is nothing in the case at bar to indicate that the public have acquired any right to use the track as a footpath or highway, with the consent or by the acquiescence or sufferance of the company, at the place where the accident happened. Such being the case, the deceased was on the track at a place where the company had the sole right of way, without its consent or acquiescence; and, in legal contemplation, he was wrongfully there, and therefore must be regarded as a trespasser.

But, conceding the fact that the deceased child was unlawfully upon the track, and a trespasser, it is insisted by counsel for the plaintiff that as the day was clear, and the track open and straight for nearly half a mile before the place was reached where the accident occurred, if the engineer of the company operating the train had kept such a vigilant outlook as the proper discharge of his duties required, he must have discovered the child in time to have stopped the train before reaching him, and his not doing so is negligence, and the proximate cause of the injury. In this view the railroad company is bound to run its trains with reference to the probability of accident to trespassers on its tracks. This duty is founded upon the assumption that, although the defendant is not bound to exercise that degree of diligence and care for the safety of a person on its track at a place where there is no public crossing required as to passengers, yet, as the defendant employs a dangerous force in running its trains, it is bound at least to exercise ordinary care, when so employing it, so as to avoid injury to persons or property which may happen to be on its track; and if, by using such care, the accident would not have happened, the failure to use it, even though the injured party be a trespasser, is negligence which would render the defendant liable. This principle finds its illustration in *Houston & T. C. R. Co. v. Symphkins*, 54 Tex. 615, 38 Am. Rep. 632, where the plaintiff lying in a state of insensibility on the railroad track, not at a public crossing, was run over by the cars, and seriously injured. The court, in that case, says: "If the engineer on the approaching train keep that lookout which is required of him at all times, not only to secure the safety of the train, but to avoid injury to any animal or person on the track, this person lying there in open view must be discovered. Not to discover him is, under the circumstances, negligence; and that negligence is the proximate cause of the injury, whilst the negligence of the party in going on the track is only a remote cause." Within this principle, "keeping a lookout" is regarded as a duty always devolving upon

those running trains; and a failure in its performance, whereby an injury happens to a trespasser on the track, is negligence which must be regarded as the proximate cause of the injury. As, in this view, the duty of keeping a lookout is a requirement of ordinary care, although a person may be improperly or unlawfully on the track of a railroad, still that fact will not discharge the company or its employes from the observance of such care; and hence a "lookout," who does not see what, with due care, should have been seen, would not be in the proper discharge of his duty.

In *Harlan v. St. Louis, K. C. & N. R. Co.* 65 Mo. 22, Henry, J., states the principle in this wise: "When it is said, in cases where the plaintiff has been guilty of contributory negligence, that the company is liable if, by the exercise of ordinary care, it could have prevented the accident, it is to be understood that it will be so liable if, by the exercise of reasonable care after a discovery by defendant of the danger in which the injured party stood, the accident could have been prevented, or if the company failed to discover the danger through the recklessness or carelessness of its employes, when the exercise of ordinary care would have discovered the danger and averted the calamity." Under this rule, ordinary care with regard to trespassers is exacted, and in the absence of such care a railroad company will be held liable. Hence, the plaintiff contends that the failure of the engineer of the defendant to see the plaintiff's son on the track, although a trespasser, when he could have seen him if he had kept that lookout which his duty required, is a want of ordinary care, or negligence, which was the proximate cause of the injury, and renders the defendant liable. On the other hand, the defendant claims that it is not bound to keep a lookout for trespassers upon its track, but only to avoid injury to them, if possible, when their presence and liability to danger become known, and that this rule applies in the case of a child, just as it does in that of a grown person. In short, the contention for the defendant is that the company is not liable to trespassers on its track, except where the injury was willful, or where the company, after discovering his presence, fails to exercise reasonable care to prevent injury. In this view, the duty of the company begins when the trespasser is first discovered, and its extent is to refrain from doing him willful or wanton injury. It is put upon the principle that it is not negligence to omit to do an act, unless there was a legal duty to perform it. As the railroad company is entitled to the exclusive use of its track, and is bound by no contractual relations to provide for the safety of trespassers, it is under no legal duty or obligation to take precautions or keep a lookout against possible injuriers to them, and hence the conclusion that the failure of those operating trains to see trespassers upon the track, whereby injury results to such trespassers, although they could have been seen if they had kept a watch, would not be negligence. The policy of the law is to make the track

of a railroad clear of all obstructions which might impede its free and exclusive use, as being necessary, not only for the protection of the company and its employes, but for the safety of the traveling public. "Public policy," says Brannon, J., "looking to the safety of not only those who walk on railroad tracks, but of employes and passengers on trains, requires that the law forbid the use of railroad tracks for that purpose." *Spicer v. Chesapeake & O. R. Co.* 34 W. Va. 516, 11 L. R. A. 885.

The track is the private property of the company, and was not built to be used as a highway for pedestrians. Being intended for the sole use of the company, except at public crossings, the law will not sanction its use as a footpath. Nor will the fact that people may have frequently used the track to walk on change the law, or render their act less unlawful. In some countries it is made a penal offense to go upon the track. Although it is not so with us, yet, as Strong, J., says, "it is a civil wrong, of an aggravated nature, for it endangers, not only the trespasser, but all who are passing or transporting along the line." *Philadelphia & R. R. Co. v. Hummell*, 44 Pa. 378, 84 Am. Dec. 457. As the law holds the company to a high degree of responsibility for the safety of its passengers, and public convenience exacts rapid transit, common justice requires that the company should have a clear track. *Toomey v. Southern Pac. R. Co.* 86 Cal. 374, 10 L. R. A. 189. "We hold these corporations," said Paxson, J., "to a strict line of responsibility whenever passengers are injured by accidents to their trains. It follows that we should be equally emphatic as to their control of their tracks. Except at crossings, where the public have a right of way, a man who steps his foot upon a railroad track does so at his peril. The company have not only a right of way, but such right is exclusive at all times, and for all purposes. This is necessary, not only for the proper protection of the company's rights, but also for the safety of the traveling public. It is not right that the lives of hundreds of persons should be placed in peril for the convenience of a single foolhardy man who desires to walk upon the track. In England it is a penal offense for a man to be found unlawfully upon the track of a railroad. It would add materially to the public safety, were there a similar law here." *Mulherrin v. Delaware, L. & W. R. Co.* 81 Pa. 366. While it is true that the company owes no duty to a trespasser, and is entitled to assume that its track is clear, except at public crossings, or other places which the public frequents, of which it has knowledge, it is not meant that he may be run down, or that a willful or wanton injury inflicted upon him would be justifiable. The fact that a person may be a trespasser when using a railroad track as a sidewalk will not justify the infliction of injury as a punishment, or out of recklessness. After the company discovers the trespasser, it becomes its duty to use care and diligence commensurate with the danger of his position. But the company is no more bound to keep a lookout for

a trespasser than it would be to furnish appliances for his benefit as such. "The company," said Zollars, J., "at all times, owes a duty to passengers upon its trains to keep a lookout for obstructions upon the track; and if it fail to do so, and by reason of such failure a passenger suffers injury, the company is liable, on the ground of negligence. But it cannot be said, with reason, that it owes such duty to one trespassing upon the track. As to him, it is not bound to anticipate such intrusion, and is not liable if a collision occurs without its knowledge." *Terre Haute & I. R. Co. v. Graham*, 95 Ind. 286, 48 Am. Rep. 719. It is therefore not a part of the duty of a railroad company, in exercising ordinary care in the operation of its trains, to provide against the possibility of trespassers being on its track. This being so, the company is not bound to anticipate their presence, or to take precautions for their safety, nor is it liable for injury to such trespassers if a collision occurs without its knowledge. In *Woodruff v. Northern Pac. R. Co.*, 47 Fed. Rep. 689, it was held that it was not willful negligence in the engineer not to see a trespasser on the track, though, by ordinary care and diligence, he might have discovered him in time to have avoided the injury. In that case the complaint charged that the child, being twenty-two months old, went upon the track, and was run over by a passing train, and so injured as to be crippled for life, and that the engineer could have seen the child on the track in time to have stopped the train and averted the disaster, and that the failure to see the child and stop the train was negligence. Upon demurrer these facts were held insufficient to constitute a cause of action. Hanford, J., said: "The defendant was not bound by any contract with the plaintiff to take care of, or provide for the safety of, his infant, and owed no duty to look out for intruders upon its track, on ground dedicated and reserved for its exclusive use as a right of way. The complaint does not charge that the child was enticed or licensed by the defendant to come upon its track, nor that the place where the injury happened was at a public crossing or within a public highway, nor that the defendant's servants, after seeing the child, intentionally or wantonly committed the injury; and without one or the other of these elements, or something equivalent thereto, I cannot regard the defendant's conduct as being morally culpable or legally wrong, so as to give rise to a legal claim for damages." A like principle is announced in *Givens v. Kentucky Cent. R. Co.* 13 Ky. L. Rep. 950, where a boy nine years old was killed by a locomotive backing upon him when he was on the track at a place where the company had the exclusive right of way. Holt, Ch. J., said: "The deceased was in fact a trespasser, and those in charge of a train are, under such circumstances, ordinarily, not required to keep a lookout, and guard against danger to such a person. They are not required to presume that any one will trespass upon the exclusive right of way of the company; and they are therefore not bound to look out for them, but only to

avoid injury to them, if possible, when their presence and liability to danger become known. This rule applies in the case of a child, just as it does in that of a grown person. If those operating a train were required to look out and guard against danger to children trespassing upon the track, then this would necessarily afford an opportunity to see all other persons who might be upon it, and in danger. Undoubtedly, a greater degree of care is required of them as to children not old enough to be aware of the danger than as to grown persons, when they have been once discovered upon or near the track, but until their presence is known the rule applies equally to both. An exception to this rule exists, however, where a train is passing through a town or city, and where people are likely to cross the track at any point, and are known to be in the habit of doing so by those operating the train. In such a case there is constant danger to life; and, out of regard for it, those in charge of a train must look out for persons who may be upon the track, and give such notice of its approach and movements, and so regulate its speed, as is likely to warn them of danger, and enable them to get out of the way." For further reference, see notes to Am. & Eng. Encyclop. Law, title "Railroads" pp. 935-937, and notes to *Philadelphia & R. R. Co. v. Troutman* (Pa.) 6 Am. & Eng. R. R. Cas. 117-120.

The principle to be deduced from these authorities is that a railroad owes no duty of keeping a lookout for persons on its track, where it is entitled to have it clear, and that as to such it is not liable if a collision occurs without its knowledge. If, therefore, the plaintiff's son was a trespasser upon the company's track, the failure of the engineer on the approaching train to discover him, by reason whereof the accident happened, was not negligence, as the defendant owed the deceased no legal duty to keep a lookout. Now, the facts show that the plaintiff's son was found dead, and that his death was the result of a collision with the train upon the track of the defendant at a place where the railroad company was not bound to anticipate his presence, and where he was a trespasser, and that those operating the train had no knowledge of the fatal occurrence until they were informed by telegraph, after they had reached the city of Roseburg. Assuming,

then, that plaintiff's son was on the track, and that the engineer could have discovered him in time to have stopped the train, if he had kept a lookout, his failure so to do would not render the company liable for neglect to perform any duty it owed him, within the principle of the authorities cited, except *Houston & T. O. R. Co. v. Symkins*, *supra*, where the fact appeared that the plaintiff was lying on the track, and that the engineer could have discovered him in time to have stopped his train without running over him. But in the case at bar there is no evidence showing that the deceased was on the track when killed, other than the inference from the finding of the body, or, if so, how he came to be there, or how long he had been there when struck by the train, or whether he was on the track a sufficient length of time before the collision, or entered upon it a sufficient distance ahead of the train, so that he could have been seen or discovered by those operating it in time to have avoided injuring him. For aught that appears from the evidence, the boy may have come in sudden contact with the train, in such a way that his presence might not be discovered by the most vigilant "lookout." However this may be, the circumstances attending his death are not known, except that it resulted from collision with the locomotive, which is evidenced by his body having been found on the track. Whether he was on the track, though it was straight and clear, a sufficient length of time before the collision, so that the engineer on the lookout could have seen him in time to have averted the disaster, is not shown by the evidence. While we recognize the rule that, if there is any evidence tending to show negligence upon the part of the company or its employees, or from which an inference of it might be fairly drawn, or about which different men might draw different conclusions, such evidence should be left to the jury, unless it should appear that the accident would not have happened but for the contributory negligence of the party, we do not think the evidence for the plaintiff shows a case of negligence sufficient to be submitted to a jury. In view of these considerations, it is not necessary to consider whether the plaintiff was guilty of contributory negligence.

It results that the motion for nonsuit should have been allowed, and that the judgment must be reversed.

MISSOURI SUPREME COURT (Div. 2).

Christian TRABUE *et al.*, *Receipts*,
v.

DWELLING HOUSE INSURANCE CO.,
Appl.

(.....Mo.....)

1. Partition of the property among the

NOTE.—The above case follows the doctrine as to divisibility or severability of insurance of the earlier Missouri cases notwithstanding the use of the word "entire" in a clause as to forfeiture of 33 L. R. A.

devises of the insured effects a change in the "interest, title, or possession" within the meaning of a clause in an insurance policy avoiding the contract if such change occurs.

2. A clause making the "entire policy void in case of breach of condition in any respect" will not make the policy indivisible so as to

the policy. See note reviewing and analyzing the numerous cases on the subject with the case of *Wright v. Fire Ins. Assn. of London*, (Mont.) 19 L. R. A. 211.

preclude any recovery on it in case it is, for convenience made to cover different kinds of property which are separately valued, although but one premium is paid.

(March 13, 1864.)

CERTIFICATION of an appeal by the St. Louis Court of Appeals for the opinion of the Supreme Court after reversal of a judgment of the Circuit Court of Ralls County in favor of plaintiffs in an action brought to recover the amount alleged to be due on a policy of fire insurance. *Reversed in part.*

The facts are stated in the opinion.

Messrs. Joshua F. Hicklin and Ed. E. Yates, for appellant:

Under the condition: "This entire policy shall be void, if any change [other than by the death of the insured] take place in the interest, title, or possession of the subject of insurance, whether by legal process or judgment or by voluntary act of the insured, or otherwise," the will of Anthony E. Trabue and his subsequent death avoided the policy.

Sherwood v. Agricultural Ins. Co. of Watertown, 73 N. Y. 447, 29 Am. Rep. 180; Burbank v. Rockingham Mut. F. Ins. Co. 24 N. H. 550, 57 Am. Dec. 800; Hine v. Woolworth, 93 N. Y. 75, 45 Am. Rep. 176.

The partitioning of the realty after the death of the assured by the voluntary act of the parties in interest, worked a change in title, interest, or possession of the subject of insurance.

Dreher v. Aetna Ins. Co. 18 Mo. 128; Card v. Phoenix Ins. Co. 4 Mo. App. 424; Barnes v. Union Mut. F. Ins. Co. 51 Me. 110, 81 Am. Dec. 563; Keeler v. Niagara F. Ins. Co. 16 Wis. 523, 84 Am. Dec. 716.

The contract is an entirety. "This entire policy shall be void," is its language. Can this mean part of it?

Rapalje's Law Dict. 446; American Ins. Co. v. Barnett, 73 Mo. 864, 39 Am. Rep. 517; Crook v. Phania Ins. Co. of Brooklyn, 38 Mo. App. 532.

The only cases in America determining the effect of the language, "this entire policy," are in favor of the entirety of the contract.

Kiernan v. Agricultural Ins. Co. of Watertown, 73 Hun, 519; McWilliams v. Cascade F. & M. Ins. Co. 7 Wash. 48.

Mr. Reuben F. Roy for respondent.

Gantt, P. J., delivered the opinion of the court:

The facts alleged in the petition and supported by the evidence, and which are not controverted by the parties in this suit, are as follows: The defendant company, by the policy of insurance on which this suit is based, insured Anthony E. Trabue against loss by fire or lightning for a term of five years, beginning at noon on the 20th day of April, 1888, in the sum of \$800, on the dwelling house occupied at the time by said Trabue, and the sum of \$250 on the contents of said dwelling house, and also \$200 on other property which escaped the fire. The insured was the owner of the insured property. On the 1st day of February, 1889, said insured died at his place of residence, which was said dwelling house, in Ralls county, Mo. At the time of his death there were liv-

ing with him at the said dwelling house his wife, the plaintiff Christiana Trabue, and three of his children, plaintiffs herein, to wit, Taylor J. Trabue, Kitty R. Trabue, and Mary G. Trabue. The insured left a will, by which he devised to his wife, Christiana Trabue one third of his estate during her widowhood, and the residue and remainder he devised to his four children, his only descendants, plaintiffs herein, in equal parts, with the provision that the portion willed to one child, Taylor J. Trabue, should go to him and his bodily heirs. The plaintiff Christiana Trabue was appointed executrix, and was qualified as such. The plaintiff Mary G. Trabue is a minor, and was a member of her father's family at the time of his death. The property was destroyed by fire October 16, 1890. At the time of the loss the plaintiff Christiana Trabue was occupying the house as a dwelling house. Three of her children—the plaintiffs Taylor J. Trabue, Kitty R. Trabue and Mary G. Trabue—were living with her as a part of her family.

Prior to said loss the plaintiffs, in an *ex parte* proceeding in the Ralls circuit court, had the real estate devised to them by said Trabue partitioned among them, and that portion on which said dwelling house stood, including said house, was set off to said Christiana Trabue during her natural life or widowhood. Notice and proof of loss were given, and the property was worth the amount claimed. The personal property insured was in said house in the possession of Christiana Trabue at the time of the loss. In March, 1864, just before their marriage, said Anthony E. Trabue and Christiana Trabue entered into a marriage contract, by which it was agreed that neither should have or inherit any interest in the property of the other, and it was provided that the said Christiana Trabue should not receive any dower or inherit any property of said Anthony E. Trabue, except as he should give or devise to her. The policy contained this clause: "This entire policy shall be void if any change (other than by death of the insured) take place in the interest, title, or possession of the subject of insurance, whether by legal possession or judgment or by voluntary act of the insured or otherwise." The circuit court gave judgment for plaintiffs for the whole amount of the policy, and defendant appealed to the St. Louis court of appeals, where the judgment was reversed without remanding, but, the decision being in conflict with the decision of the Kansas City court of appeals in *Crook v. Phania Ins. Co. of Brooklyn*, 38 Mo. App. 532, the cause was certified to this court under the mandate of section 6 of the Constitutional Amendment of 1864.

1. The St. Louis court of appeals held the policy was avoided as to the dwelling house by the transfer of the title thereto by the partition proceedings and judgment therein between the devisees of Anthony E. Trabue, the loss having occurred after that decree. The court waived all discussion of the effect of the marriage contract, and whether the will alone, which became operative upon his death, worked a change of property,

"other than by death of the insured," and placed their judgment upon the view that the partition proceedings had that effect. In that conclusion we concur. A partition of property, whether by deeds *inter sese* or by the judgment or decree of court, effects "the change of interest, title, or possession" against which the policy provided. *Sherwood v. Agricultural Ins. Co. of Watertown*, 73 N. Y. 447, 29 Am. Rep. 180; *Burbank v. Rockingham Mut. F. Ins. Co.* 24 N. H. 550, 57 Am. Dec. 800; *Hine v. Woolworth*, 98 N. Y. 75, 45 Am. Rep. 178; *Barnes v. Union Mut. F. Ins. Co.* 51 Me. 110, 81 Am. Dec. 562; *Finley v. Lycoming County Mut. Ins. Co.* 30 Pa. 311, 72 Am. Dec. 705; *Dreher v. Aetna Ins. Co.* 18 Mo. 128.

2. As this judgment, on its face, only affected the real estate covered by said policy, the plaintiffs insist they are entitled to recover the insurance on the personal property, as to which there was no breach of any condition in the policy; but the defendant insists that by the use of the terms "entire policy" in said clause the whole policy is avoided for a breach in any respect. If defendant's contention be correct, it is a most appropriate subject for legislative correction at the earliest opportunity. But is this clause properly construed by the court of appeals? As early as the case of *Loehner v. Home Mut. Ins. Co.* 17 Mo. 247, it was held by this court that where a firm obtained insurance upon a storehouse and a stock of goods therein in separate amounts, and the insurance on the house was avoided because the interest in the house was incorrectly described in the application, the policy was not vitiated as to the goods; in other words, this court then held that such a contract was divisible. Afterwards, in *Koontz v. Hannibal Sav. Ins. Co.* 42 Mo. 126, 97 Am. Dec. 325, the action was on a policy by defendant on a livery stable, the livestock, and personal property, each separately stated and appraised. In that case Judge Wagner reviewed the cases, and admitted there was a conflict between the decisions, but held that *Loehner v. Home Mut. Ins. Co.* 17 Mo. 247, was a binding authority, and "cheerfully followed it, because this court regarded it as in consonance with justice." These two cases have never been overruled, or their authority questioned, until the decision of *American Ins. Co. v. Barnett*, 73 Mo. 364, 39 Am. Rep. 517. The very able and learned judge of the St. Louis court of appeals who prepared the opinion in *Halloway v. Dwelling House Ins. Co.* 48 Mo. App. 1, considered *American Ins. Co. v. Barnett* as the controlling decision, and followed it, as required by the constitution of his court; and in this case Thompson, J., treated the point as decided by the *Halloway Case*, and as clear of all difficulty. Since then the Kansas City court of appeals, in *Shoup v. Dwelling House F. Ins. Co.* 51 Mo. App. 286, has followed Judge Rombauer's decision in the *Halloway Case*; so that it becomes very important to determine the effect of the *Barnett Case*. An examination of that case will show that the remarks of the learned judge who delivered that opinion were entirely "*obiter dicta*" as to this question of the divisibility of the

contract. He says, "if such a stipulation was in fact in the policy," the plaintiff would be entitled to the full relief prayed; so that it is clear no such clause was before the court; and, while his opinion is entitled to respect on the supposed case, it is equally clear that the court did not overrule the decision in *Loehner's Case* or *Koontz's Case*, but, on the contrary, on the only point that was in fact before the court, those cases were treated as binding authority. Our conclusion is that so much of Judge Norton's opinion as referred to the entirety of the policy in the *Barnett Case* was *obiter*, and did not overrule the *Koontz* and *Loehner Cases*; but, independent of the binding authority of those cases, we think they were correctly decided. In both of those cases "the policy" was to be void upon certain conditions. Here it is said "the entire policy" shall be avoided. "The policy" includes all and every part of it, and the insertion of the word "entire" cannot add anything more to it, so that this mere verbal addition has not, in our opinion, changed the law of the case. The cases cited by Judge Norton from Pennsylvania, Maine, Maryland, and other states are based upon the case of *Friesmuth v. Agawam Mut. F. Ins. Co.* 10 Cush. 587. By the laws of Massachusetts, the policy in that case was a lien on the interest of the assured in both the building and personal property insured. In holding that such a policy was an indivisible contract Judge Bigelow put it upon the ground "that the consideration was regarded as an entirety, for which the deposit note was given, and the liability of the assured to assessments on that amount in case of losses." He said: "They [the company] had a right to look to their lien on each and all of different kinds of property insured by them for the security of the whole amount of the note;" and so that policy said on its face. Upon the facts of that case no question can be made of its correctness. The lien was given on all the property. A false representation affected all of the lien. On the same principle stand the subsequent cases of *Brown v. People's Mut. Ins. Co.* 11 Cush. 281; *Gould v. York County Mut. F. Ins. Co.* 47 Me. 408, 74 Am. Dec. 494. In *Gottman v. Pennsylvania Ins. Co.* 56 Pa. 210, 94 Am. Dec. 55, Judge Thompson cites the *Friesmuth Case*, and those based on that case, without, however, advertent to the statutory lien. That other courts have adopted this construction of the entirety of the contract is not questioned, but, entertaining for them, as we do, all due respect, we see no reason for departing from our own decisions when they are based upon what appears to us the soundest reason. When one applies for distinct and separate insurance, a part on real estate, a part on personal property, he can require two separate policies. The accidental circumstance that for convenience merely they are included in one policy does not merge them into one. If the goods alone were destroyed, the terms of the policy applying to them alone could be made the basis of recovery. The supposed danger of making a contract for the parties is not in the case. The question is whether, according to legal principles, the contract made is sev-

erable or entire. There is nothing to indicate the company would not have assumed the risk on the house without taking one also on the goods, nor *vice versa*.

The contract as to each admitted of being separately executed as to the separate subjects of insurance. The application is for separate insurance, and it is kept distinct in the policy. Nor are the cases of Koontz and Loehner, *supra*, unsupported by authorities in other states. In *Phenix Ins. Co. v. Lawrence*, 4 Met. (Ky.) 9, 81 Am. Dec. 521, the supreme court of Kentucky held that when insurance was obtained upon a storehouse and stock of goods, in an action for loss on the goods the fact that the insurance on the house was void because the interest on the insured was incorrectly stated did not vitiate the policy on the goods, but it would be treated as a separate policy; citing *Loehner v. Home Mut. Ins. Co.*, 17 Mo. 247, with approval. In *Clark v. New England Mut. F. Ins. Co.*, 6 Cush. 343, 58 Am. Dec. 44, a policy made separate insurance on two buildings, with a clause declaring it void if the insured should alienate the property. It was held that alienation of one building did not avoid it as to the other. In *Merrill v. Agricultural Ins. Co.*, 78 N. Y. 452, 39 Am. Rep. 184, the policy was upon several separate and distinct classes and species of property, each, as in the case at bar, separately valued; the sum total of the valuation was insured for a premium in gross; the contract was held severable. Judge Folger reviewed all the cases, including the two cases of *Loehner* and *Koontz*, *supra*, decided by this court, and in a most satisfactory manner sustained the reasoning of those cases upon the analogies of the law and the proper construction of the contract. *Johnson v. Johnson*, 8 Bos. & P. 162; *Mayfield v. Wadley*, 8 Barn. & C. 357; *Goring v. Insurance Co.* 10 Ont. Rep. 236; *Hartford F. Ins. Co. v. Walsh*, 54 Ill. 164, 5 Am. Rep. 115; *Dale v. Gore Dist. Mut. F. Ins. Co.* 14 U. C. C. P. 548; *Deidericks v. Commercial Ins. Co. of New York*, 10 Johns. 284; *Trench v. Chenango County Mut. Ins. Co.* 7 Hill, 122; *Phillips v. Insurance Co.* 46 U. C. Q. B. 834; *Heacock v. Saratoga M. & F. Ins. Co.* (unreported), referred to in *Merrill v. Agricultural Ins. Co.* 78 N. Y. 462, 39 Am. Rep. 184; *Moore v. Virginia, F. & M. Ins. Co.* 28 Gratt. 508, 26 Am. Rep. 373. The *Merrill* Case came under review in 1896 in *Schuster v. Dutchess County Ins. Co.* 103 N. Y. 260, and was unanimously sustained. In 1891, in *Pratt v. Duelling House Mut. F. Ins. Co.* 130 N. Y. 206, the question again recurring, the court of appeals says: "Whatever may be the rule elsewhere, it is settled in this state that where insurance is made on different kinds of property, each separately valued, the contract is severable, even if but one premium is paid, and the amount insured is the sum total of the valuations." See also *Smith v. Home Ins. Co.* 47 Hun, 30; *Woodward v. Republic F. Ins. Co.* 32 Hun, 865; *German Ins. Co. v. Fairbank*, 32 Neb. 750.

23 L. R. A.

In the very recent case of *Coleman v. New Orleans Ins. Co.*, 49 Ohio St. 310, 16 L. R. A. 174, the supreme court of Ohio aligns itself in this conflict of authority on the side taken by this court in *Loehner v. Home Mut. Ins. Co.* 17 Mo. 247, and *Koontz v. Hannibal Sav. & Ins. Co.* 43 Mo. 126, 97 Am. Dec. 325, holding such contracts as this severable. *Vide*, also, *Rogers v. Phenix Ins. Co. of Brooklyn*, 121 Ind. 570; *Commercial Ins. Co. v. Spankneble*, 52 Ill. 53, 4 Am. Rep. 582; *Quarrier v. Peabody Ins. Co.* 10 W. Va. 530, 27 Am. Rep. 582; *State Ins. Co. of Des Moines v. Shreck*, 27 Neb. 527, 6 L. R. A. 524.

When this contract was made, then, it was the settled rule of decision in this state that such a contract as this was divisible or severable, although the policy had a clause which would avoid the whole contract. The addition of the word "entire" given its utmost latitude could not avoid any more than the whole policy; hence it added nothing to the policy. Forfeitures are not favored in the law, and will not be enforced if any reasonable interpretation can be made which will prevent one. No reason is given here why a forfeiture should be enforced, except the insertion of the word "entire" into the policy. The risk was not increased. The premiums were taken, kept, and enjoyed for insurance on the personal property. The policy as to the house was avoided, doubtless, through the ignorance of the insured; but they have violated no condition as to this personal property. Holding, then, as we do, that this was a divisible contract, it results that the legal effect is the same as if two distinct and separate policies were issued, and, so reading the contract, we do not reject the word "entire" at all, but apply it to that policy, or portion of this policy, which the insured has forfeited by the change of title to which alone this clause refers; and it avoids that "entire" policy, and not the policy in which no condition or warranty has been broken. This construction logically follows from the divisibility of the contract, and best accords with fair dealing and the presumed intention of the parties. Our conclusion is that neither the law nor common honesty will permit the defendant to avoid paying the loss as to this personal property.

The judgment of the St. Louis Court of Appeals is affirmed in so far as it adjudged the policy on the dwelling house avoided, and reversed in so far as it avoids the insurance on the personal property, and the cause is remanded to that court with directions to affirm the judgment of the circuit court to the amount of \$250, the amount of insurance on personal property and piano, and reverse it as to the remainder of said judgment. The costs of the appeal to this court are adjudged to plaintiffs, and the costs of the appeal to the St. Louis court of appeals are adjudged to defendant, as also the costs in the circuit court, after the offer of judgment was made; the other costs to plaintiffs.

All concur.

FLORIDA SUPREME COURT.

Robert GRANT, *Pff. in Err.*,
v.

STATE of Florida.

(.....Fla.....)

*1. Before a verdict returned by a jury in cases of felony is complete it must be accepted by the court for record. At any time after the verdict is returned into the

*Headnotes by MABEY, J.

NOTE.—Correction of verdict in criminal cases.

- I. General rules.
- II. By the court.
 - a. General doctrine.
 - b. To assess punishment.
 - c. To find the degree of offense.
- III. By the jury under the court's directions.
- IV. Sealed verdicts.
- V. Effect of discharge.
- VI. Effect of recommitting.
- VII. Special verdicts.
- VIII. English decisions.

I. General rules.

The court cannot withhold from the jury the power to return a verdict according to their will, for any grade of the offense charged against a defendant. *Fagg v. State*, 50 Ark. 508.

It is the jury's duty to take the court's exposition of the law as that applicable to the case, but the court cannot direct a verdict for a higher offense nor restrain the jury from returning it for a lower grade. *Ibid.*

The verdict which binds the parties is that at which the jury finally arrive and deliver to the court. *State v. Clementson*, 69 Wis. 623.

Verdicts are to have a reasonable intendment and to have a reasonable construction, and are not to be avoided unless from necessity originating in doubt of their import or immateriality of the issue found, or they show a manifest tendency to work injustice. *McMillan v. State*, 7 Tex. App. 100; *Curry v. State*, Id. 91; *Lindsey v. State*, 1 Tex. App. 327.

Verdicts are to have a reasonable intendment and to receive a reasonable construction, and are not to be avoided unless from necessity. *Welch v. State*, 50 Ga. 123, 15 Am. Rep. 690; *Ga. Code*, §§ 3503, 3541; *Arnold v. State*, 51 Ga. 144.

The judge should look after its form and substance, so as to prevent a doubtful or insufficient finding from passing into the records of the court. *Cattall v. Dispatch Pub. Co.* 33 Mo. 355.

It is competent for the court to make such inquiry of the jury as will enable it to comprehend the intention and will of the jury in reference to their finding, where, in the opinion of the court, there is no doubt or uncertainty in the language employed by the jury. *Gipson v. State*, 38 Miss. 295.

A defective or informal verdict is no verdict. *State v. Clifton*, 30 La. Ann. 951.

To correct a mistake where no prejudice can result from it, is not only proper but the duty of the court. *Levells v. State*, 32 Ark. 585; *Brister v. State*, 26 Ala. 132; *Rex v. Parkin*, 1 Moody, C. C. 45.

In *Fagg v. State*, 50 Ark. 508, it is stated as being the better practice, in every case where the verdict is not complete on its face, for the judge to point out its defects before receiving it, and to inquire of the jury what their intention is and show them how to perfect it.

Under section 1280 of the California Penal Code,

court, and before it is accepted by the court for record, the accused has the right to have the jury polled in order to ascertain if the verdict offered is unanimous, and in the absence of a polling of the jury any member thereof has the right *sua sponte* to recede from the verdict agreed upon at any time before it is accepted for record.

2. At common law the verdict of the jury in cases of felony was pronounced in open court, then entered on the record by the clerk, and after this affirmed by the en-

the appellate court may reverse, affirm, or modify a judgment appealed from, "and may, if proper, order a new trial."

A verdict of a jury under an indictment for murder must show the degree, and in the absence thereof the court has the power to order the jury to retire and amend the same by adding the degree. *People v. Marquis*, 15 Cal. 38.

If the facts necessary to sustain the verdict of guilty on one count are inconsistent with a verdict of guilty on the other, further deliberation is necessary in order that the jury may decide between the alternatives, and the judge cannot have cut the knot by drawing a verdict of not guilty upon either. *Com. v. Lowrey*, 158 Mass. 12.

Where, in an indictment for murder the jury found the defendants guilty as charged in the indictment, a new trial was granted upon the ground that the verdict did not fix the degree of murder, the court stating that when such verdict was announced, it being insufficient, the court, before discharging the jury, should have ordered them to retire and return a verdict in proper form. *Ford v. State*, 34 Ark. 649.

II. By the court.

a. General doctrine.

In *People v. Jenkins*, 56 Cal. 7, it is said to be the duty of a court to look after the form and substance of a verdict, so as to prevent a doubtful or insufficient finding from passing into the records of the court. For that purpose, the court can at any time while the jury are before it or under its control, see that it is amended in form so as to meet the requirements of the law.

The courts have power to correct a verdict with the consent of the jury, and an irregularity is never to be presumed, and therefore a formal verdict rendered upon the record may be shaped by the direction of the court with the jury's consent, which need not necessarily be entered on the record. *State v. Steptoe*, 1 Mo. App. 19, where the defendant was indicted for robbery in the first degree, the jury finding the defendant guilty of robbery, the verdict being corrected by the court.

A verdict may be put in proper form in the presence of a jury with their consent. *Pehlman v. State*, 115 Ind. 131.

If the jury find a verdict which is informal, their attention should be called to it, and with their consent the verdict may, under the direction of the court, be reduced to proper form. *Ellis v. State*, 27 Tex. App. 190.

Such a correction may be made in open court, as well as by sending the jury back to their room. *State v. Anderson*, 24 S. C. 109.

There is no necessity for sending the jury out again to cure a mere technical defect in the verdict. *Clough v. State*, 7 Neb. 323.

It is within the power of the court to have a second verdict corrected, the jury assenting thereto. *Taylor v. State*, 14 Tex. App. 340.

tire jury, when it became complete. The manner of receiving and affirming verdicts in cases of felony discussed.

3. When a jury returns into court an informal, insensible, or repugnant verdict, or one that is not responsive to the issues submitted, they may be directed by the court to reconsider it, and present a verdict in proper form. The court should, however, use great caution, and not intimate to the jury the kind of verdict in substance that should be returned.

It has been the practice for the trial judge in the presence of the jury to make formal corrections of the verdict, and he should undoubtedly have this power. *Blair v. Com.* 14 Ky. L. Rep. 495.

"Howsoever the verdict seem to stray and conclude not formally or punctually unto the issue, so as you cannot find the words of the issue in the verdict, yet if a verdict may be concluded out of it to the point in issue the court shall work it into form, and make it serve." *Foster v. Jackson*, Hob. 54.

Mere clerical errors are amendable in criminal as well as in civil cases. *Sharff v. Com.* 2 Binn. 518.

And so as to make them conform to the real intentions of the jury. *State v. Underwood*, 2 Ala. 744. In such a case this course may be taken instead of directing the jury to retire for that purpose. *People v. Jenkins*, *supra*.

But a direction to the jury to retire and correct such informality is not error. *Ibid*.

Such amendments are the mere exercise of discretion when kept within proper limits, therefore the refusal to amend is not reversible on error. *State v. Underwood*, *supra*.

So the judge has the right to direct that proper corrections shall be made in the minutes, so as to conform the same to the facts within his personal knowledge, even after the trial, the verdict having been rendered. *State v. Harris*, 39 La. Ann. 1105.

In *Guffy v. Com.* 2 Grant, Cas. 69, it was held that the court had a supervision over so much of the verdict in a criminal prosecution as related to the costs, notwithstanding an acquittal.

If the jury persist in finding an informal verdict from which, however, it can be clearly understood that their intention is to find in favor of the defendant upon the issue, it should be entered in the terms in which it is found, and the court shall give judgment of acquittal, but no judgment of conviction can be given unless the jury find expressly against the defendant upon the issue, or judgment be given against him upon a special verdict. *Laws* 1851, § 427, p. 258; *People v. Ah Ye*, 31 Cal. 451.

When a jury returned a verdict of not guilty in a criminal case, the trial court has no power to set it aside or modify it in any respect. *Lowe's App.* 46 Kan. 255.

Where, in a conviction of murder the verdict of the jurors was accompanied with a recommendation to mercy, the court ordered the verdict entered without the recommendation, held it was no error, the recommendation being solely addressed to the court and constituting no part of the verdict. *People v. Lee*, 17 Cal. 75.

So where the jury found "the defendant, J. M. Boggs, guilty" it was held that the words "J. M. Boggs" might have been rejected as surplusage, and their presence worked no injury, it being sufficient that the jury found the defendant guilty. *People v. Boggs*, 20 Cal. 433.

Where, in an indictment for burglary, the court charged the jury that if they found the defendants guilty they must do so on the first of the two counts of the indictment, as the second was defective, the jury found the verdict "guilty on the first account" the court ordered the syllable "no" to be erased

4. After the case had been submitted to the jury under the charge of the court they returned into court the following verdict viz.: "We, the jury, find the defendant guilty of manslaughter in the first degree." The court refused to accept this verdict, and stated to the jury that it was not in proper form, as there were no degrees in manslaughter, and that they must retire and present a verdict in proper form. The jury retired and returned the following verdict, viz.: "We, the jury, find the defendant guilty of murder in the first degree, and re-

from the last word, having the power to order the correction. *Roberts v. State*, 14 Ga. 3, 53 Am. Dec. 533.

Upon an indictment for an assault with intent to murder, by shooting with a pistol, the jury returned a verdict, "We, the jury, find the defendant guilty of shooting, not in his own defense, and recommend him to the mercy of the court." It was held that such verdict was not uncertain, and might properly be aided by the indictment showing that the prisoner shot at the party injured, not in his own defense and without justification. *Arnold v. State*, 51 Ga. 144.

And where, in an indictment for assault with a deadly weapon upon the person of Mary Danner, it appeared upon the trial that her name was spelled Dannaher, it was held that the difference in the sound in the two names being apparent the incorrect spelling would be disregarded, it being so slight. *Gahan v. People*, 58 Ill. 160.

Where upon an indictment containing two sets of counts, the first set for robbery, the second for an assault and battery with intent to rob, the jury found the defendant guilty of the charge contained in the second count, and also of grand larceny, and assessed the punishment adapted to the charges in the indictment, it was held, there being no charge of larceny, that there was no error in the prosecuting attorney's ascertaining from the jury in the presence of the court, and with its permission, whether it was a general verdict of guilty which they intended to find, and in his presenting them with the form of such a verdict to be disposed of as they might think proper. *McGregg v. State*, 4 Blackf. 101.

Upon a prosecution before a justice of the peace for assault, the jury returned a verdict, "We, the undersigned, do find the defendant guilty of a breach of the peace, and agree that he shall pay the sum of five (\$5.00) dollars and costs,"—the court held that, the surplusage being left out, the verdict was still good. *State v. Douglass*, 1 G. Greene, 551.

So where the defendant was indicted for murder, and the jury were instructed that if they found him guilty of murder they should fix his penalty at death or confinement in the state penitentiary for life, and if they found him guilty of manslaughter that the maximum punishment was confinement in the state penitentiary for the term of twenty-one years, and they returned a verdict finding defendant guilty and fixing his penalty in the penitentiary for ninety-nine years, it was held that the court's reformation of the verdict so as to read, "We, the jury, find the defendant guilty and fix his punishment at confinement in the penitentiary for life," was correct and the verdict as reformed by the court expressing in unambiguous terms, what was manifestly the verdict of the jury, they agreeing in open court, in the presence of defendant and his attorney, that the said verdict as written out by the court was their verdict. *Bledsoe v. Com.* 10 Ky. L. Rep. 809.

Upon an indictment for uttering a forged writing, the verdict of a jury as follows, "We, the jury, find S. E. Blair guilty of forgery as per indictment, and fix penalty at three years penitentiary,"—was

commend him to the mercy of the court," and this verdict was accepted by the court. *Held*, that the court did not err in refusing to receive the first verdict and in accepting the second one.

6. In the opinion of a majority of this court, the testimony in the record is not sufficient to sustain the verdict of murder in the first degree, and a new trial is awarded.

(March 1, 1894.)

ERROR to the Circuit Court for Duval County to review a judgment convicting

defendant of murder in the first degree. *Reversed*.

The facts are stated in the opinion.

Messrs. T. A. MacDonell and B. B. MacDonell for plaintiff in error.

Mr. William B. Lamar, Atty.-Gen., for the State.

Mabry, J., delivered the opinion of the court:

The indictment against the plaintiff in error was for murder, and the sentence of the court

altered by the judge so as to read, "We, the jury, find S. E. Blair guilty and fix punishment at three years in the penitentiary,"—it was held, such verdict being afterwards read to the jury, and assented to by them, and so received, that such alteration was not error, such verdict only conforming to the intention of the jury and the real meaning of the finding. *Blair v. Com.* 14 Ky. L. Rep. 495.

Where the defendant was charged with the embezzlement of a gun, and the jury found him guilty of a breach of trust, the verdict as recorded being: "We, the jury, find the accused guilty in manner and form as he stands charged in the indictment," the indorsement on the indictment showing the verdict: "We, the jury, find the accused guilty of breach of trust and recommend him to the mercy of the court,"—it was held that such verdict showed the intention of the jury and ought not to be sustained. *State v. Reonnals*, 14 La. Ann. 276.

In an indictment for murder, the jury returned a verdict: "We are the jury find Watkins guilty of manslaughter" signed "Ja. Washington" and upon being polled separately assented thereto, and ordered to be recorded, the court held there was no man on the jury whose name was "Ja. Washington," but one whose name was "Jiles Washington" whose identity was not disputed; that the irregularity was trivial and not worthy of notice. *State v. Smith*, 33 La. Ann. 1414.

Upon a trial for grand larceny, and for receiving and having stolen goods, knowing the same to have been feloniously stolen, the jury returned a verdict: "Guilty of knowingly receiving stolen property." The court ordered the same annulled, as nothing could be taken by the court by implication or intendment, that which is not found not being supposed to exist. *State v. Burdon*, 33 La. Ann. 367.

In *State v. Pierre*, 39 La. Ann. 915, upon a conviction of horse stealing and sentenced to two years' imprisonment at hard labor, the minutes not showing that the indictment was returned into court indorsed by the foreman of the grand jury, who had permitted the district attorney to have them amended by the clerk instant, by inserting the name and capacity of the foreman, it was held that the court might at any time make necessary corrections of its minutes, especially for the purpose of supplying material omission and correcting one within the personal knowledge of the judge, the same being done for no other purpose than to make the minutes conform to the facts. Such a correction might be made after a motion in arrest of judgment was filed.

On an indictment for larceny of bank bills and gold coin, a verdict, "Guilty, but not of taking the gold piece,"—which was recorded as one of not guilty with respect to stealing the gold coin, but guilty as to the remainder, after the jury had separated, was held sufficient although objected to by the defendant. *Com. v. Stebbins*, 8 Gray, 422.

Where upon an indictment charging an assault with intent to murder, a verdict, "Guilty of assault and battery as charged, but without the 23 L. R. A.

felonious intent,"—was amended during the sitting of the court, by striking out the words "and battery" so as to conform to the truth. *Com. v. Lang*, 10 Gray, 11.

Where the verdict did not find that the defendant was the same person whose name purported to be signed to the acceptance set forth in the indictment, or that he had any connection with or interest in the bank on which the draft purported to be drawn, nor that he was a banker or in any manner connected with, responsible for, or interested in the paper in question except it was to be inferred from the single fact of taking it out upon a check drawn upon him, the court held that if any of these facts were omitted the verdict could not be supplied by the court. *People v. Wells*, 8 Mich. 104.

Where, upon an indictment for unlawful banking a special verdict found that the defendant "did pay out" the paper in question, it was held that the court could not add anything to this finding but could only draw the legal conclusions from the facts found; that no facts could be inferred by the court which the jury had not inferred and set forth, especially against a defendant in a criminal case. *People v. Wells*, *supra*.

To such a verdict the maxim applies, "*de non apparentibus, non existentibus, eadem est ratio et iudicium.*"

Upon an indictment for an assault with intent to kill and murder, with a verdict of guilty of an attempt to commit manslaughter and recommendation to mercy, the jury believing that the higher penalties inflicted for the actual commission of such offense were severer than the circumstances attending the case required, such verdict being in writing, the court asked the jury, "if they found the accused not guilty of an assault and battery with intent to kill and murder, and found him guilty of an assault in the attempt to commit manslaughter,"—to which the jury replied in the affirmative, and the verdict was recorded: "We, the jury, find the defendant not guilty of an assault with intent to kill and murder as charged, but guilty of an assault in the attempt to commit manslaughter."—this was held no error. *Gipeon v. State*, 38 Miss. 295.

A verdict which originally read, "We, the undersigned jurors in the above case, find a verdict of guilty as charged in the indictment," was corrected so as to read, "We, the undersigned jurors in the above case find a verdict of guilty as charged in the indictment against A. P. Waterman." The court held there was no error in the correction, both verdicts meaning the same thing and it was always competent for the court to suggest a correction in a mere matter of form. *State v. Waterman*, 1 Nev. 543.

Where, upon an indictment for embezzlement a verdict, "guilty of embezzlement," was entered and the jury discharged, and subsequently during the term, the court, on motion, directed the finding to be entered: "The jury find the prisoner not guilty of the larceny charged,"—the court held such addition to the verdict after the discharge of

pronounced against him was confinement in the state penitentiary for life, based upon a verdict of guilty of murder in the first degree with a recommendation of mercy to the court.

A motion in arrest of judgment was made and overruled. The first ground of the motion is, "that the allegations in the indictment are not sufficient to charge the defendant with murder in the first degree, but that necessary and material allegations to constitute such charge are not therein made, and that judgment thereon, in view of the verdict received and recorded by the court, cannot be entered."

The only supposed defect pointed out in the brief under this ground of the motion is, that the indictment does not allege that the wound was the cause of the death of the deceased. We have examined the indictment and find that the objection urged cannot be sustained. It is sufficiently alleged that the deceased died of the wound inflicted upon him by the accused. The other grounds of the motion in arrest of judgment are not discussed by counsel, and may be considered as abandoned. They call for no discussion by us.

The other points presented by counsel for

the jury clearly irregular and must be disregarded, being without authority and precedent. *Guenther v. People*, 24 N. Y. 100.

An indorsement made upon an indictment of a plea of not guilty as on a given date, upon which date the bill was not found nor the crime committed, was held to be a clerical error which was amendable by the insertion of the true facts. *Com. v. Chauncy*, 2 Ashm. 81.

In *Com. v. Yeager*, 3 Pa. Dist. Rep. 237, where the defendant, charged with forgery, was found not guilty, and the costs were placed upon the prosecution, it was held that the court had a right to supervise such verdict so far as it related to the costs and set it aside, the prosecution being founded upon a probable cause, there being no evidence of malice.

In an indictment for murder the jury returned a verdict, "We find the prisoner Samuel Yancey guilty of murder," the words "Samuel Yancey" being interlined by order of the court some days after the verdict was returned into court, the other defendant being found not guilty, and it was held that the amendment of the verdict was irregular but did not vitiate the conviction, which was regular, the verdict although badly written and incorrectly expressed being clear enough and sufficient, there being no reasonable doubt as to which of the indictes the word "guilty" was applied. *State v. Yancey*, 3 Brev. 142.

Where, in an indictment for feloniously and willfully breaking open and entering a dwelling house, for the purpose of committing a larceny therein, the jury found "defendant is guilty in manner and form as charged in the writ of indictment," and fixed his imprisonment in the jail and penitentiary house of the state at a period of five years, the court held, there being error in the verdict, that it could render no judgment except in accordance with the verdict, having no power to change the verdict or to pronounce any other judgment. *Murphy v. State*, 7 Coldw. 516.

Where a verdict of the jury found the defendant guilty of murder in the first degree, and omitted the word "confinement" before the words "in the penitentiary for life," the court with the consent of the jury inserted the word "confinement" before such words, which was held no error. *Taylor v. State*, 14 Tex. App. 340.

Upon a conviction for robbery in which there were two trials, the prisoner pleading guilty at the first was convicted of theft, the punishment being assessed at confinement in the penitentiary for thirty years, the foreman requesting the presiding judge to have the verdict put in proper form, and the district attorney wrote a verdict finding the defendant guilty of robbery as charged in the indictment and assessing the punishment as above, such verdict as amended being signed by the foreman, and read to the jury who answered it was their verdict—held the court had the power to amend such verdict, and as amended it was legal, the case standing as though there had been no in-
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formal or illegal verdict. *Robinson v. State*, 23 Tex. App. 315.

In *United States v. Keen*, 1 McLean, 429, the indictment contained five counts; the jury found the defendant guilty upon the last four but did not pass upon the first, and it was held that the verdict could not be amended so far as to enter "Not guilty" upon the first count nor amend it at all.

Section 334 of the compiled statutes of Montana, ed. 1887, p. 465, gives power to the court to correct the verdict in the jury's presence and with their consent in matters of form.

And under section 348, the court may reduce the sentence.

b. To assess punishment.

Under section 4230 of the Revised Statutes of Missouri, ed. of 1889, p. 381, where the jury find a verdict of guilty and fail to agree on the punishment to be inflicted, or do not declare such punishment by their verdict, or assess a punishment not authorized by law, and in all cases of judgment by confession, the court shall assess and declare the punishment and render judgment accordingly. *Rev. Stat. 1879, § 1930.*

By section 4232 of the same, if a jury assess a punishment, whether of imprisonment or fine, greater than the highest limit declared by law for the offense of which they convict defendant, the court shall disregard the excess and pronounce sentence and render judgment according to the highest limit prescribed by law in the particular case.

Where the punishment given by the judgment is greater than the law authorizes, it is void. *Ex parte Page*, 49 Mo. 291.

Where the defendant was convicted of felonious assault, and the jury found him guilty as charged in the indictment, ten being in favor of two years' penitentiary sentence, and two in favor of \$100 fine, and, after such judgment was received and the jury discharged, the court fixed the punishment at imprisonment in the penitentiary for a period of two years, it was held that the court had such power to fix the punishment under section 4230 of the above statutes. *State v. Dennison*, 108 Mo. 541.

Where the verdict of the jury found the defendant guilty of murder in the second degree, but failed to assess the punishment, it was held that the court had power to assess and declare the punishment and render judgment accordingly. *State v. Foster*, 115 Mo. 448.

Where a jury upon a verdict ascertained a term of imprisonment shorter than that prescribed by law, upon which the court rendered a judgment for a different term, it was held error. *Nemo v. Com.* 2 Gratt. 558.

c. To find the degree of offense.

Where, in an indictment for murder, no degree of the offense was found by the jury, the court held that there was no power subsequently to ascertain

plaintiff in error for our consideration relate to the action of the trial court in refusing to accept the first finding returned by the jury, and in entering judgment upon the second verdict, and to the sufficiency of the evidence to sustain the verdict accepted by the court. After the case had been submitted to the jury under the charge of the court the bill of exceptions recites the following, viz.: "We, the jury, find the said defendant guilty of manslaughter in the first degree. C. R. Bisbee, Foreman," which said verdict the said judge then and there refused to receive, stating to the jury

that the said verdict was not in such form that the court could receive, and that they must return and present a verdict in proper form; that there were no degrees in manslaughter. Whereupon the said jury retired to their room; and afterwards, to wit, on said day, then and there gave their verdict in words and figures following, to wit: "We, the jury, find the defendant guilty of murder in the first degree and recommend him to the mercy of the court. Nov. 28th, '93. C. R. Bisbee, Foreman." Several grounds in a motion for a new trial are based upon the action of the court in rendering

the degree by reason of the indictment. *Thompson v. State*, 26 Ark. 323.

A verdict which does not show the degree of the crime charged is void, where the offense charged is divided into degrees. *People v. O'Neil*, 73 Cal. 338; *People v. Travers*, 73 Cal. 590; *People v. Campbell*, 40 Cal. 129; *People v. Travers*, 77 Cal. 176.

Where, in an indictment for murder, the jury returned a verdict of manslaughter without stating the degree, it was held the legal presumption was that they intended to find him guilty of the highest grade of that offense, and that a judgment pronounced by the court in the highest grade was no error. *Welch v. State*, 50 Ga. 123, 15 Am. Rep. 690.

III. By the jury under the court's directions.

After announcing a verdict, if they see fit before they are discharged, a jury may change the same and render a different verdict. *State v. Clementson*, 69 Wis. 623.

The jury may be examined by the poll and then either of the jurors may disagree to the verdict. *State v. John*, 30 N. C. 330, 49 Am. Dec. 366.

A juror is not estopped by his signature from refusing his assent to the verdict when it is returned in open court. *Stewart v. People*, 23 Mich. 63, 9 Am. Rep. 78.

Where express power by statutory enactment was given a jury to determine both the law and facts, it was held the trial court had no power to interfere with the verdict in any prejudicial respect. *Lowe's App.* 46 Kan. 255.

Where the verdict of a jury is not signed by the foreman before being brought into court, there can be no error in allowing him to subscribe his official character to his signature in open court in the presence of the jury and before they are discharged. *Clough v. State*, 7 Neb. 323.

The jury may announce its verdict to the court *ore tenus* or upon paper at their pleasure, and, however rendered, upon the suggestion of the judge it may be varied by the jury in its terms so as to make it speak their intentions, and a change thus made in the finding need not be noted in writing, even if it be such as to entirely supersede the verdict. *State v. Underwood*, 2 Ala. 744.

The action of the court in permitting a jury thus to correct their finding is clearly competent and proper. *Cole v. Laws*, 104 N. C. 651; *Waller v. State*, 40 Ala. 325.

Such a power is essential to securing a fair trial and a correct verdict. *Cole v. Laws*, *supra*.

In *Fry v. Com.* 32 Va. 334, it was held that the court had power, in an indictment for a felony, to permit the jury to retire and amend the verdict.

The jury in such a case should be requested to return to their room with proper instructions as to the correction which ought to be made. *Pehlman v. State*, 115 Ind. 131.

Where the whole matter is still in the breast of the jury, it is entirely competent to correct an inadvertence so as to make the verdict responsive to the indictment. *State v. Bishop*, 73 N. C. 44.

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If the meaning of the finding is not plain, then the jury must make it so. *Blair v. Com.* 14 Ky. L. Rep. 405.

Where the jury have manifestly made an omission or mistake in their verdict, it is the duty of the presiding judge to call their attention to that fact and return it to the jury for correction. *State v. Clementson*, 69 Wis. 623.

The power of the court in this respect is undoubted. *State v. Anderson*, 24 S. C. 109; *State v. Corley*, 13 S. C. 5.

The court should refuse it, call the attention of the jury thereto, and give directions as to its amendment. *Walker v. State*, 13 Tex. App. 618; *Code Crim. Proc. arts.* 715, 716; *Alston v. State*, 41 Tex. 39; *Woodbridge v. State*, 13 Tex. App. 443, 44 Am. Rep. 708; *People v. Dick*, 34 Cal. 663.

So it is not error for the court to direct the jury to retire and say under which count of the indictment they find the defendant guilty. *People v. Graves*, 5 Park. Crim. Rep. 134.

A jury may vary the form or correct a verdict before they are discharged and before it is recorded. *Burk v. Com.* 5 J. J. Marsh. 675.

A jury may besent back to correct a defective verdict. *Pehlman v. State*, 115 Ind. 131; *Com. v. Nicely*, 130 Pa. 261.

If the verdict is not full when returned, it is the duty of the court not to receive it, but to require it to be made full. *Cook v. State*, 26 Ga. 593.

The proper course to be pursued in an important criminal trial is for the judge to inform the jury that their verdict as originally returned was defective or informal, and to instruct them as to the proper form of a verdict just as though nothing had been returned into court by them as a verdict, and that after so instructing them they should be directed and allowed to make up and return their own verdict, whatever it may be. *State v. Clifton*, 30 La. Ann. 951.

Even if there be a substantial difference between the verdict first originally handed in by the jury and the verdict as corrected by them, there can be objection to the latter after the jury have assented to it. *State v. Waterman*, 1 Nev. 543.

When a jury after due and thorough deliberation on any case, shall return into court without having agreed on a verdict, the court may explain to them anew the law applicable to the case, and may send them out again for further deliberation, but if they shall return a second time without having agreed on a verdict, they shall not be sent out again without their own consent, unless they shall ask from the court some further explanation of the law. *Tuberson v. State*, 26 Fla. 472; *McClell. Dig.* § 23, p. 448.

It is error for the court to allow the jury to return their verdict to the clerk, and the counsel has no authority to assent thereto, or to waive the right of a prisoner charged with felony to be present when the jury delivered their verdict to the court. *Waller v. State*, 40 Ala. 325; *Eliza v. State*, 39 Ala. 693; *State v. Hughes*, 2 Ala. 102, 36 Am. Dec. 411; *Prine v. Com.* 13 Pa. 108; *Nomaque v. People*,

judgment on the second verdict, and in refusing to accept the first one. One ground is, that the court erred in receiving the second verdict finding the defendant guilty of murder in the first degree for the reason that the verdict for manslaughter in the first degree operated as an acquittal of the said offense of murder, the latter being a higher offense and embracing the former. The effect of the first return of the jury is a matter presented for our consideration. There are now no degrees of manslaughter under our statutes, the only

offense under this head being manslaughter. Conceding for the present that the first return of the jury was a good finding of manslaughter, and that the added words, "in the first degree," might have been considered by the court as surplusage, what effect must be given to this finding? In cases of felony according to the common law the verdict of the jury is not complete, or conclusive on them, until accepted by the court and recorded. The procedure in returning verdicts in cases of felony, leaving off some of the formalities in reference

1 Ill. 109, 12 Am. Dec. 157; *State v. Buckner*, 25 Mo. 188.

Under section 1161 of Deering's Annotated Penal Code of California, vol. 4, page 259, where there is a verdict of conviction in which it appears to the court that the jury have mistaken the law, the court may explain the reason for that opinion and direct the jury to reconsider their verdict, and if after the reconsideration they return the same verdict it must be entered; but when there is a verdict of acquittal the court cannot require the jury to reconsider it. If the jury render a verdict which is neither general nor special, the court may direct them to reconsider it and it cannot be recorded until it is rendered in some form from which it can be clearly understood that the intent of the jury is either to render a general verdict, or to find the facts specially and to leave the judgment to the court.

The criminal act of California provides that if the jury render a verdict which is neither a general nor a special verdict, as defined in sections 418 and 419, the court may direct them to reconsider it, and it shall not be recorded until it is rendered in some form from which it can be clearly understood what is the intent of the jury, whether to render a general verdict, or to find the facts specially and to leave the judgment to the court. Laws 1861, § 437, p. 253; *People v. Ah Ye*, 81 Cal. 451.

Under article 715 of the Code of Criminal Procedure the court is authorized to call the attention of the jury to any informality in the verdict and have it reduced to proper form. *Gage v. State*, 9 Tex. App. 259, where the defendant was charged with a misdemeanor.

Under section 2412, article 715, of Wilson's Texas Criminal Statutes, title 8, chap. 6, if the jury find a verdict which is informal, their attention shall be called to it, and with their consent the verdict may, under the direction of the court, be reduced to proper form.

By section 372 of Hill's Annotated Statutes and Codes of Washington, vol. 2, page 193, it is provided when the verdict is given and is such that the court may receive, and if no juror disagrees, or the jury be not sent out, the clerk shall file the verdict. The verdict is then complete and the jury shall be discharged from the case. The verdict shall be in writing and under the direction of the court shall be subsequently entered in the journal of the day's proceedings on which it was given.

By section 1322 of Hill's Annotated Statutes and Codes of Washington, vol. 2, page 510, it is provided when there is a verdict of conviction, in which it appears to the court that the jury have mistaken the law, the court may explain the reason for that opinion, and direct the jury to reconsider the verdict, and if after such reconsideration they return the same verdict it must be entered, but it shall be good cause for new trial.

When there is a verdict of acquittal, the court cannot require the jury to reconsider it. Act of February 24, 1891, § 73.

Where, in an indictment for assault with intent

to commit murder with a second count, charging an ordinary assault and battery, the jury returned a verdict of guilty without specifying upon which count, whereupon the court instructed them as to the form of the verdict and directed them to retire again and say upon which count they found the defendants guilty, and the jury retired and returned rendering a verdict of guilty of assault with intent to kill against one defendant, and guilty of assault and battery against the other defendant, the court held there was no error the first being merely informal. *Hughes v. State*, 12 Ala. 453.

Where, in an indictment for forgery of a receipt, the first verdict was imperfect, the court instructed the jury to retire and consider further, which they did without having dispersed and without having been discharged, and it was held that the court in this only did its duty. *Allen v. State*, 79 Ala. 34, 53 Ala. 391.

In the above case the verdict of the jury as first rendered was, "We, the jury, find the defendant guilty in the second degree," and when returned as corrected it was, "We, the jury, find the defendant guilty of forgery in the second degree." *Ibid*.

Where, in an indictment under the statute, for maiming, the offense being a felony, the verdict was, "We, the jury, do find the within named [defendant] not guilty as charged in the within indictment, but find that he and the within named, fought by mutual agreement," upon which the court passed sentence of fine and imprisonment, it was held that although the verdict was not explicit as to fighting by mutual consent, whereby one of the contestants was maimed, yet it bore a construction to that effect and was therefore sufficient. *Strawn v. State*, 14 Ark. 549.

Where several persons were charged with the same offense, and the jury brought in a verdict fixing a joint fine against them, it was held that the court should send them back with directions to assess a separate fine against each, and a verdict received and recorded imposing such joint fine, should be arrested and a *verdict de novo* awarded. *Straughan v. State*, 16 Ark. 37.

Where it was contended, in a prosecution for murder, that the court's telling the jury orally to return when they had brought in a general verdict of guilty, in order to find in what degree they found him guilty, was error, it was held that such direction need not be in writing, their answer being a failure to find and the duty of jury remaining undischarged, they were still under the control of the court, the court not directing them as to the law, but only telling them that they must act and find a verdict on the issue, and not to be error and no charge. *People v. Bonney*, 19 Cal. 423.

In an indictment charging the defendant with stealing, harboring, hiding, and employing in his own service the slave of another, a verdict that the defendant was guilty of stealing and employing a negro to the injury of the owner, was held amendable by the jury. *Cook v. State*, 23 Ga. 503.

Where a verdict, guilty of involuntary manslaughter without due caution and circumspection,

to forfeiture of estates, is in substance as follows: When the jury have come to a unanimous agreement with respect to their verdict, they return to the box to deliver it. The clerk then calls them over, by their names, and asks them whether they agree on their verdict, to which they reply in the affirmative. He then demands who shall say for them; to which they answer their foreman. This being done, he directs the prisoner to hold up his right hand, and addressing the jury says: "Look upon the prisoner, you who are sworn. How

say you? Is he guilty of the felony whereof he stands indicted, or not guilty?" The foreman then answers "guilty" or "not guilty," as the verdict may be. The officer then writes the word "guilty" or "not guilty," as the verdict is, on the record, and again addresses the jury: "Hearken to your verdict, as the court hath recorded it. You say that (A) is guilty (or not guilty) of the felony whereof he stands indicted, and so say you all." 1 Chitty, Crim. L. 686; *Com. v. Tobin*, 125 Mass. 203, 28 Am. Rep. 320; *Givens v. State*, 76 Md. 485.

was refused and the jury were sent back charged as to the law as to the two kinds of involuntary manslaughter, whereupon they returned a verdict of guilty of voluntary manslaughter, it was held that the latter judgment was rightly received by the court, there being no error in sending the jury back to make a legal verdict, the judge not intimating that they should not find involuntary manslaughter the court stating that "the second sober thought of the jury was right." *Turbaville v. State*, 58 Ga. 545.

Upon a charge of burglary the verdict found defendant "guilty of receiving stolen goods" which was not covered by the indictment. The court held such improper finding was rightly rejected as unwarranted by law, and that a direction to find a verdict of guilty or not guilty was not error. *Mangham v. State*, 87 Ga. 549.

Where, in an indictment for assault with intent to murder by shooting, the jury intended to find the defendant guilty of the offense of shooting at another, not in his own defense, and made efforts to express their finding in writing, using language which in the court's opinion failed to express the finding with sufficient accuracy, it was held not error for the court to require them to put their verdict in such form as to make its meaning entirely clear and free from objection, or to allow the solicitor general at the jury's request to frame their verdict for them, the jury subsequently ratifying and confirming such verdict. *Brantley v. State*, 87 Ga. 142.

In an indictment charging the defendant with the unlawful sale of intoxicating liquors, the jury, while in the box and before their discharge, were permitted to insert in their verdict the word "days" after the word "thirty," and the court held there was no error, the defect being apparent on the face of a character amendable before the discharge of the jury, the body expressing the intention to punish by imprisonment, and the insertion of the word "days," only supplying an apparent omission, the amended verdict including shortest period of imprisonment allowed and therefore not prejudicing the defendant. *Quinn v. State*, 123 Ind. 59.

In an information for murder in the second degree a verdict, "We, the jury, find the defendant guilty as charged," signed by the foreman, being informal was amended so as to read, "We, the jury find the defendant guilty of murder in the second degree, as charged in the information" and signed by the foreman, the jury intimating to the court before the amendment of such verdict, that it was their intention to find the defendant guilty of murder in the second degree, and after the verdict was amended it was read to the jury, who collectively answered that it was their verdict, and the court offered to have the jury polled, neither party accepting the offer all being present at the time, and the court held there was no error. *State v. Potter*, 16 Kan. 80.

Where, in an indictment for permitting unlawful gaming in his house, by the defendant, before the verdict was received or the jury had been

asked whether they had agreed to it, the judge had a witness called to prove the identity of the house, whereupon the jury without retiring changed their verdict to one of guilty the court rendering judgment thereon, it was held such verdict was not erroneous, the jury having full control over the case and their verdict until delivered. *Burk v. Com.* 5 J. J. Marsh. 875.

Where, in an indictment for murder, the jury brought in a verdict of manslaughter under an instruction that if the accused were guilty of manslaughter, his punishment was confinement in the state prison for a period of not less than ten or more than twenty-one years, and the jury fixed the punishment at ten years' confinement in prison, the verdict being announced and the jury polled, when it was found such instruction was erroneous two years being a minimum punishment, and the jury were again instructed and returned to their room, and finally returned a verdict fixing the punishment at four years, the court held such last verdict could not be upheld and did not cure the defect in the former one. *Roberts v. Com.* 90 Ky. 654.

Where in a prosecution for attempt at murder, the indictment containing two counts, upon the second of which the defendant was convicted, the jury returning a verdict finding "the prisoner guilty of stabbing with intent to kill," which verdict the court refused, explaining the law to the jury and directing them to return to their room for further deliberation and report, when they returned a verdict, "Guilty of stabbing with a knife and inflicting a wound less than mayhem," which verdict was received by the court and the jury discharged,—the court held such verdict regular, and that the court exercised proper power in so directing the jury. *State v. Harris*, 99 Ia. Ann. 1105.

Where, in an indictment for assault, the jury found the defendant guilty of both of the charges, and attention was called to the fact that the judge had instructed them that if they found the defendant guilty of the whole charge, they should return a general verdict of guilty, and that if they meant to find a verdict against the defendant of the whole charge, they should return a general verdict of guilty, and thereupon the foreman, being asked by the clerk, rendered a verdict of guilty, which was affirmed, the court held such verdict regular. *Com. v. Thompson*, 116 Mass. 846.

Where, upon an indictment charging the defendants in one count with larceny, and in the other count with receiving the same property knowing it to have been stolen, the jury returned a verdict of guilty against both defendants upon both counts, which verdict was general and affirmed by the court, the defendants filing a motion to arrest, claiming the verdict as inconsistent and void in law, the court stated it would have been quite proper, before the recording and affirmation of the verdict, for the presiding judge to have called the attention of the jury to their misunderstanding of his previous instructions, and to have explained to them the mode by which it became their duty, if they convicted upon either of the counts, to acquit upon the oth-

At common law a verdict was either public or privy. The public verdict was pronounced in open court in the presence of all the jury, and the privy verdict, in order to release a jury from confinement, was delivered to the judge out of court. In all cases of felony and treason the verdict was required to be delivered in open court and in the presence of the prisoner. In the case now before us, the indictment being for murder, the verdict was returned into open court, and it does not become necessary to consider in what cases a verdict may now be rendered out of court. It may be

stated, however, that in cases of misdemeanor and in the lower grades of felonies a practice has obtained of consenting for the jury to reduce their finding to writing, and after sealing it up to separate till the next meeting of the court, when the paper being handed to the judge, the verdict is received from the foreman of the jury and recorded in the usual way. The verdict in such a case is not the one written out by the jury, but the one openly delivered in the court, accepted, and recorded. *Com. v. Carrington*, 116 Mass. 37; *Com. v. Durfee*, 100 Mass. 146.

er, and to have required of them to retire for further deliberation, and that if after such instruction the jury persisted in returning a general verdict of guilty upon both counts, it would have been proper in the presiding judge, even if not his duty, to set the verdict aside, as the only means of securing to the defendants their rights. *Com. v. Haskins*, 128 Mass. 60-62.

Where a defendant was indicted for the larceny of a leather trunk containing one new fifty-dollar bill, and the jury returned a verdict of guilty of the larceny of a fifty-dollar bill, counsel not being present at the time, and the court informed them that the prisoner was not indicted for stealing the bill but the trunk, and they retired to their room and after consideration rendered a verdict of guilty of the larceny of the trunk as charged in the indictment, it was held there was no error in the latter verdict, the former one not being received or recorded, nor the jury discharged. *State v. Bishop*, 78 N. C. 44.

Where, upon an indictment for burglary, the jury were instructed if they found the defendants guilty of breaking and entering on the first count, to find a verdict of not guilty on the third count, which charged one of the defendants with larceny in the building and the other with inciting the commission of that offense, and further to find a verdict for the defendants on the second count, no exceptions being taken to these instructions, the jury rendered a verdict of guilty on the first count, not guilty on the second count, and the foreman being then inquired of concerning the third count answered guilty, the judge reminded the jury of his formal instructions and directed them to find a verdict for the defendants on the third count, which they did, the court held there was nothing upon which the defendants could take exceptions. *Com. v. Lowrey*, 158 Mass. 18.

Where on an indictment for assault and battery upon a police officer, and for knowingly and willfully obstructing and hindering him in the discharge of his duty the verdict was "Guilty of an assault on a police officer," which was not correct in form, not stating their finding upon the issue tried, it was held to be the right and duty of the judge to instruct the jury as to the correct form of their verdict, and when in answer to his question the foreman replied that they meant a verdict of guilty of assault upon an officer in the discharge of his duty, the judge correctly instructed them that the proper form was a general verdict of guilty, and that their second verdict of guilty was rightly received and recorded and corrected the irregularities in the first verdict. *Com. v. Delehan*, 148 Mass. 254.

Where, in an indictment for grand larceny, a verdict of guilty was returned and recorded, the court, with the consent of the district attorney and the defense, allowed evidence as to the value of the stolen articles to be given before the jury left the box, and instructed them to retire and reconsider their verdict, which they did, and returned one of petit larceny. *People v. Smith*, 1 Wheel. Crim. Rep. 119.

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Where, in an indictment for feloniously removing the dead body of a human being from the grave for the purpose of dissection and sale, with a count charging the defendant with unlawfully receiving the dead body for the purposes of dissection, knowing the same to have been unlawfully disinterred, a verdict, "We find the prisoner guilty of receiving and dissecting," was entered by the clerk, and subsequently, upon the suggestion of the prosecution and before the jury had separated, the court directed the clerk to change the verdict to that of guilty under the fourth count, to which the jury upon being polled disagreed, and retired again under the court's directions and finally returned with a verdict of "Guilty under a fourth count," the court affirmed the conviction. *People v. Graves*, 5 Park. Crim. Rep. 184.

Where in an indictment for burglary in the second degree, a jury return a verdict of burglary in the third degree, and the court directed them to retire and instructed them that under the testimony the prisoner could only be convicted of burglary in the second degree, it was held that the court had a right to direct the jury to reconsider their verdict before it had been recorded, and it was his duty to do so if satisfied that there had been a probable mistake. *People v. Bush*, 3 Park. Crim. Rep. 552.

Where, upon an indictment for assault and battery, it was discovered before the court received and entered the verdict of the jury, and at once suggested, that there was a mistake and misapprehension on the part of the jury, of which fact they became presently conscious upon given explanation and thereon returned for further consideration of their verdict, corrected the error and rendered a verdict of guilty, it was held such verdict was correctly received. *State v. Shelly*, 98 N. C. 673.

Where the prisoner was indicted for robbery, and with murder while in the commission of the robbery, a verdict, guilty as charged in the first count of the indictment, was refused by the court who instructed the jury to further deliberate, whereupon they returned a verdict, "We, the jury, on the issue joined, find the defendant guilty as he stands charged in the indictment" which verdict was received and excepted to by the defendant, the court held such last judgment was not error as, although the first verdict was sufficient to entitle the court to sentence the prisoner, yet the proper course was for the court to endeavor to obtain a verdict responding to both counts and that course was pursued. *Jackson v. State*, 39 Ohio St. 37.

Where the verdict in an indictment for murder in the first degree, was, "Guilty in manner and form as they stand indicted," there being no finding as to the degree of the crime, and before such verdict was actually recorded or the jury left the box, the court sent them back to their room with instructions to find the degree, and they returned a verdict of "guilty of murder in the first degree," and upon being polled each returned the same verdict, which was duly recorded and the jury dis-

The common-law procedure in reference to delivering verdicts by juries has been relaxed somewhat in modern practice, but still there must be a substantial compliance with such formalities as have been long in use, as form in such cases becomes substance. *Anonymous*, 63 Me. 596; *State v. Fentason*, 78 Me. 495; *State v. McCormick*, 84 Me. 566; *Com. v. Roby*, 12 Pick. 496; *Givens v. State*, and *Com. v. Tobin*, *supra*. By the common-law procedure, then, the verdict of the jury was orally pronounced in open court, then recorded by the clerk, and affirmed by the jury, which was done by that

officer saying to them to hearken to their verdict as recorded by the court, and repeating to them what had been taken down for record. At any time before the verdict was recorded, the prisoner had the right to have the jury polled in order to ascertain whether or not the verdict as given was unanimous, and in the absence of a polling, any member of the jury had the right, *sua sponte*, to recede from the verdict as agreed on at any time before it was recorded. As the jury had the right to depart from any finding before it was recorded and affirmed by them, the only complete verdict in

charged, the court held such verdict valid. *Com. v. Nicely*, 180 Pa. 251.

Where a jury was instructed that their verdict should fix the term of imprisonment at a certain number of years, which charge the judge discovered was erroneous and sent the jury out again, when they fixed a longer period, whereupon the judge entered the verdict for the term first returned by the jury and pronounced a judgment thereon, it was held no error. *Henslie v. State*, 8 Heisk. 202.

Where a verdict, "We, the jury, find the defendant guilty as charged in the indictment, and assess the penalty of five years' confinement in the state penitentiary," was read as such by the clerk of the court on the coming in of the jury, but in the verdict as written by the jury on the back of an indictment and copied into the minutes of the court, and as there found, instead of the word "guilty" the word "guily" was used, the "t" being omitted, the prosecuting counsel filing an affidavit of the juror who wrote the verdict, explaining the mistake as accidental, being written in the dark, or so near the dark that he could scarcely see to write, it was held that the validity of the verdict was not impaired, nor was there sufficient ground for disturbing the conviction, and that the verdict was sufficiently intelligible to preclude any reasonable doubt as to its meaning. *Curry v. State*, 7 Tex. App. 91.

Where the defendant was convicted of theft, and punishment assessed at confinement in the state penitentiary for a term of ten years, the verdict was, "We, the jury, find the defendant guilty and assess his punishment at ten years in the penitentiary," and the judge, without reading aloud, stated to the counsel on both sides, the defendant being present, that there was no mistaking the intention of the jury, but that the verdict was not altogether as formal as it ought to be and directed the jury's attention to the informality; counsel on both sides offering no exception, the word "confinement" being omitted and subsequently the jury returned their verdict,—accordingly the court held the judgment ought not to be reversed, the action of the defendant's counsel being a virtual assent to the course pursued, and for the further reason that the verdict was sufficient as first brought in by the jury, the course pursued by the court being permissible under article 686 of the Revised Code of Criminal Procedure. *Jones v. State*, 7 Tex. App. 103.

Where the indictment charged the prisoner and two others jointly with murder in the second degree, and assessed the punishment at confinement in the penitentiary for ninety-nine years, such verdict being informal as to the punishment and contrary to the charge of the court, and not such a verdict as the court could receive, it was held not only proper but the duty of the court to refuse to receive the verdict, and to call the attention of the jury to the charge of the court and send them out again to consider of their verdict. *Taylor v. State*, 14 Tex. App. 340.

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Where in an indictment for murder the jury returned a verdict of murder in the first degree, assessing the punishment at ninety-nine years confinement in the penitentiary, which the court refused, calling their attention to the charge upon the punishment, it was held there was no error, but the proper practice was pursued. *Roberts v. State* (Tex.) March 4, 1891.

Where the verdict of a jury convicted the defendant of "theft of twenty dollars, and assessed his punishment at confinement in the penitentiary for thirty years," the foreman requesting the judge to have the same put in proper form, whereupon the district attorney wrote, "We, the jury find the defendant guilty of robbery as charged in the indictment and assess his punishment at ten years' confinement in the state penitentiary," which verdict as amended was signed by the foreman, read to the jury who answered that it was their verdict, the jury being polled each returning a like answer, it was held that under the statute as well as at common law, the verdict could be amended and such verdict as amended was legal. *Robinson v. State*, 23 Tex. App. 315.

In an indictment for theft, the jury found the defendants guilty and assessed their fine at twenty-five years, and the court refused the verdict and instructed them to further consider, and after returning they handed in the following, "We, the jury, find the defendants guilty and assess the punishment at two years imprisonment in the state penitentiary," the court held such first verdict informal as not responsive to the issue, and that it was correctly rejected and did not operate as an acquittal. *Alston v. State*, 41 Tex. 39.

Where, upon an indictment for burglary and theft against two defendants, the jury found both guilty of burglary and sentenced them to the reformatory, but after being informed that one of the defendants could not be sent to the reformatory, retired and returned a verdict sending both to the penitentiary, the court held such verdict good. *Trent v. State*, 31 Tex. Crim. Rep. 251.

Where the prisoner was indicted for felony and the jury agreed upon their verdict, writing the same out in the jury room, the same being read in open court as the verdict, and amended by the clerk in open court before the jury was discharged, in a point immaterial, and before such amended verdict was read, a juror being taken sick retired to the jury room, the amended verdict being read and assented to by only eleven jurors, such verdict was held annulable and ought to be disregarded, not being the verdict of a full jury; until the assent of the jury is expressed the verdict is not perfect. *Com. v. Gibson*, 2 Va. Cas. 70.

Where, upon an indictment for maliciously stabbing with intent to maim, disfigure, disable and kill, the verdict as first rendered was, "We, the jury, find the defendant not guilty as charged in the indictment, but we find said defendant guilty of unlawful cutting," the court directed the state attorney to put the verdict in proper form and it was written as follows: "We, the jury, find the de-

a case was that recorded by the court. 10 Bacon, Abr. title *Verdict* (G) p. 315; *Coffee v. Groover*, 20 Fla. 64; *Jones v. State*, 97 Ala. 77; *Wright v. Phillips*, 2 G. Greene, 191; *Bishop v. Mugler*, 83 Kan. 145; *Burk v. Com.* 5 J. J. Marsh. 675; *State v. Walters*, 15 La. Ann. 648; *Edelen v. Thompson*, 2 Harr. & G. 81; *Ford v. State*, 13 Md. 514; *Lawrence v. Stearns*, 11 Pick. 601; *Com. v. Dowling*, 114 Mass. 259; *Com. v. Carrington*, 116 Mass. 87; *Lord v. State*,

16 N. H. 825, 41 Am. Dec. 729; *People v. Bush*, 3 Park. Crim. Rep. 552; *Dornick v. Reichenback*, 10 Serg. & R. 84.

It may be well for us to say here, in order to guard against a misapprehension, that we do not determine what is a sufficient recording of the verdict returned by a jury. The practice prevalent in this state is for the jury in all cases to write out their finding, and after announcing in open court that they have agreed

feudent, William Davis, not guilty of maliciously cutting, stabbing, and wounding . . . as charged in the within indictment, but we do find him guilty of unlawfully cutting, stabbing, and wounding . . . with intent and by means whereof to maim, disfigure, disable, and kill . . .," and afterwards the jury being polled and one dissenting, it was held that the court rightly directed such jury to retire to their room and further consider the verdict, and that the rendition of the same verdict by the jury after such retirement and reconsideration was no error. *State v. Davis*, 31 W. Va. 300.

Where, upon an indictment for murder the verdict of the jury convicted the prisoner of manslaughter in the first degree, whereupon the court sent the jury out to find another verdict and refused to take the first the prosecution protesting, it was held that the defendant who had requested such step could not subsequently take advantage of it. *Loew v. State*, 60 Wis. 559.

Where, in an indictment for forgery, the jury were unable to agree and returned into court, and being polled it was found they agreed upon a verdict of guilty under the first two counts, but could not agree as to the third and fourth counts, when they were again sent out and the court permitted a *nolle prosequi* to be entered upon the third and fourth counts, and the jury being informed thereof returned guilty upon the remaining counts, it was held a mere error in practice, not affecting substantial rights or amounting to a deprivation of the liberty without due process of law. *Cross v. North Carolina*, 123 U. S. 132, 38 L. ed. 283.

IV. Sealed verdicts.

Where a jury have been allowed to separate and return a sealed verdict, and upon reassembling the verdict is found to be defective, the jury may be required to retire to their room and make the proper amendments or corrections. *Pehlman v. State*, 115 Ind. 181.

By permitting a jury to separate after they have agreed upon a verdict, and before it is returned into court, nothing is waived either as to the power or duty of the court to have the verdict amended if it prove defective, or as to the right of either party to object to its reception as an incomplete or imperfect verdict. *Ibid.*

The above rule is said to be applicable to criminal as well as to civil cases. *Ibid.*

A sealed verdict having been returned by the jury who retired the evening previous, the foreman was allowed to amend the same as read by the clerk, by inserting therein the word "not" before the word "guilty," after which amendment by the foreman the verdict was affirmed and recorded. It was held, the correction being merely one of a verbal error, thereby reducing the verdict to form and making it indicate truly the result to which the jury had arrived, there was no error. *Beal v. Cunningham*, 42 Me. 362.

Where the jury upon retiring at the adjournment of the court for the day, were instructed that when they had agreed upon a verdict they might seal it up and separate, and they agreed upon a verdict and separated, during the night, but

had not reduced it to writing, the indictment alone being returned in a sealed envelope, the judge directed them to retire and reduce their verdict to writing, instructing them to return it as agreed upon and without further deliberation on their part, which they did, the court held the verdict invalid. *Com. v. Doran*, 108 Mass. 488.

Where, in an action of slander, the judge directed the jury to bring in a sealed verdict, and gave permission to separate after agreeing on the same, no objection being taken by the parties to such direction they will be deemed to have assented thereto, and therefore such a verdict will not be set aside for irregularity where the jury separated after agreeing upon such verdict, and on coming into court one of the jurors dissented, but subsequently the jury being sent out again, agreed to the verdict as originally rendered. *Douglass v. Tousey*, 3 Wend. 332, 20 Am. Dec. 615.

V. Effect of discharge.

With the assent of the jury to the verdict as recorded their functions with respect to the case cease, and the trial is closed, and after the verdict is received and the jury discharged, the control of the jury and of the court over such judgment is at an end. *People v. Lee Yune Chong*, 94 Cal. 379.

The office of a juror is thereby discharged. *Ibid.* The case is then beyond their control. *Williams v. People*, 44 Ill. 473.

And they cannot be recalled to alter or amend it. *Levelis v. State*, 32 Ark. 555; *Sargent v. State*, 11 Ohio, 472; *Mills v. Com.* 7 Leigh, 751; *Settle v. Alison*, 8 Ga. 201, 32 Am. Dec. 393; *Waller v. State*, 40 Ala. 325; *Brister v. State*, 26 Ala. 132, followed.

The jury having become accessible to the parties and subject to their influence. *State v. McBride*, 19 Mo. 239.

And having had opportunity to intermingle with outsiders about the case. *Ellis v. State*, 27 Tex. App. 190.

Consequently they cannot afterwards add anything to or subtract anything from the verdict. *Allen v. State*, 85 Wis. 22.

So the court cannot alter it. *People v. Lee Yune Chong*, and *Sargent v. State*, *supra*.

No matter whether it has been received by a single judge or in open court. *Sargent v. State*, *supra*.

Such a course would jeopardize the jealous guards with which the law has surrounded jurors to insure the pure administration of justice and to protect the citizen. *Ibid.*

Yet if the jury have not separated, and as a body are still in the presence of the court, the order discharging is a venire, and yet in the breast of the court and may be recalled. *Levelis v. State*, *supra*.

Where error has been committed by the jury, either by returning a verdict against the wrong party, or if not so, for a larger or smaller sum than they intended, and those where, if the amendment or alteration should be increased or diminished, or the verdict reversed, the rights of the parties would be immediately affected and changed, but after the jury had by their separation become accessible to the parties and subject to their influence, there can be no amendment. *State v. Mc-*

upon their verdict, to hand the paper to the clerk, and after it is read aloud by that officer, the jury affirm it, and from this paper the permanent record is made. The point for decision in the present case does not make it necessary for us to pass upon the propriety of the practice referred to, as it is clear from the record that the first finding of the jury was not accepted by the court for record. The judge refused to receive the verdict when given by the

jury, and they were instructed to retire and present a verdict in proper form. Thereupon they retired and brought in another and different verdict. The first verdict was never recorded, nor does it appear from the record before us that it had ever been affirmed as the unanimous finding of the jury. The jury having retired and brought in a different verdict which was recorded, it cannot be held that the first is the verdict of the jury, or that

Bride, supra; *Little v. Larrabee*, 3 Me. 33, 11 Am. Dec. 43.

When the jury found their verdict, separated, dispersed, and mingled with the community at large for three days, without being under a charge from the court not to converse themselves, nor permit others to converse with them or in their presence about the case, it would be affording every facility for operating on the minds of the jury, and be highly prejudicial to the fair administration of justice, to allow them to reassemble and render a fresh verdict. *Williams v. People*, 44 Ill. 478.

Where upon an indictment for burglary and grand larceny, upon returning into court the jury handed the clerk the verdict, which was read in open court in the defendant's absence, and the jury discharged, two of the jurors having left the court-room, when the court discovered the defendant was not present, and the court then had the jury recalled within five minutes after the discharge, and the jury then again rendered the verdict of guilty, the court held such verdict void, the court stating that it would be a dangerous practice, after the jury had dispersed among the audience, to hold that the persons composing such jury should be reassembled as such to render a verdict after they had been discharged. *Cook v. State*, 60 Ala. 39, 31 Am. Rep. 31.

Where, in an indictment for murder, the jury returned a verdict as follows: "We, the jury, find the defendant guilty of murder in the first degree, S. Wiggins, foreman," such verdict being read by the clerk, the jury polled, each answering that it was his verdict, the judge discharged the jury, but before they had all left the box, all being in view of the judge and under his control, they were called back to take their seats again without having mingled with the bystanders, and the judge pointed out its defect, there being two counts in the indictment, and gave directions to amend by showing upon which of the counts they found, the court held there was no discharge of the jury and therefore a second verdict finding the defendant guilty of murder in the first degree, as charged in the first count of the indictment upon which the jury were polled, each answering that it was his verdict, was not error. *Levells v. State*, 32 Ark. 365.

Where, in an indictment of murder the jury returned a verdict "We, the jury, find the defendant guilty and fix the penalty at imprisonment for life," such verdict being declared and duly recorded, the jurors discharged and left the court-room and mingled with spectators; subsequently the judge ordered the jury called back into the jury box and told the clerk to make an order as follows, that the order discharging the jury in the case of *People v. Lee Yune Chong*, be set aside and vacated, and also directed the verdict as recorded, to be set aside and vacated,—the jurors being again brought together and instructed that their verdict was informal and they must find the degree of the crime, when they returned a verdict, "We the jury, find the defendant guilty of murder in the first degree and fix the penalty imprisonment for life,"—the court held such verdict in-

valid, the court having, by the discharge and disbursement of the jury after the record of the verdict, lost control of them. *People v. Lee Yune Chong*, 94 Cal. 379.

Where a verdict was imperfect by reason of its not finding all the issues submitted, and the court four days after it had been received and recorded and the jury dispersed permitted the jury to reassemble and state what they intended to find by their verdict and to amend it accordingly, the court held such amendment invalid, the jury having been discharged from the further consideration, having mingled with the parties, the witnesses and their fellow citizens generally, ascertaining perhaps the wishes of one of the parties, the intention of the witnesses, or the state of public opinion in relation to their verdict. *Settle v. Allison*, 8 Ga. 201, 52 Am. Dec. 393.

Where the jury had rendered an imperfect verdict by not finding all the issues submitted to them, which was received and recorded, and the jury discharged from further consideration of the cause, it is error in the court after the expiration of four days to reassemble the jury and amend the verdict according to what the jury then stated that it was their intention to find, such intention not being shown upon the face of the verdict. *Mitchell v. State*, 22 Ga. 211, 236, 58 Am. Dec. 493; *Settle v. Allison, supra*.

In *Jackson v. State*, 45 Ga. 126, it was held that a consent on the part of counsel for the prisoner that the jury might return their verdict to the clerk, implied a consent that they might disperse after doing so, and that if their verdict was for manslaughter not specifying the grade, it was not error in the court to reassemble them and submit the verdict to them again, in order that they might specify the grade of manslaughter, unless the prisoner could show that his case had been prejudiced by reason of the dispersion.

Where the jury returned a verdict finding defendant guilty, and when in the box and before the verdict was received, the defendant's counsel was asked if he desired to poll the jury and replied in the negative, and upon being asked if he knew of any reason why the verdict should not be received, also replied in the negative, and the verdict was then received and read, and the jurors in the box were then discharged, and it subsequently appeared to the court that their names had not been called over when the verdict was delivered, and they were reassembled some five or ten minutes afterwards, the oath administered, and each juror sworn to the fact that he was in the box when the verdict was read; that he heard it read and found the defendant guilty of murder, and that he had agreed to such verdict.—It was held that the statement not only acquitted the judge of error, but made manifest the *tota causa* difference between that case and that of *Settle v. Allison*, and *Mitchell v. State, supra*.

Where, in a prosecution for larceny the jury retired to construct their verdict, under an agreement of the counsel that they might seal the same, place it in the hands of the officer having charge of them, and separate, the clerk received the same and read it the next day in court, when it was

it has any validity whatever. The case was still in the hands of the jury upon their second retirement, and, not being bound by their former action, they were at liberty to review the case and bring in an entirely new verdict. Whether the action of the court in refusing to have the first verdict recorded in the proper way, was unauthorized interference with the province of the jury, is another question which will presently be considered, but confining our-

selves to the effect of the first finding as given by the jury, it cannot be affirmed on this record that it is of any validity whatever. This being the case we must turn our attention to the objections urged against the verdict that was accepted and recorded by the court.

The refusal of the court to receive the first verdict, and the acceptance and record of the second one, are alleged as errors in the motion for a new trial. It is stated in Wharton's

found defective in not finding the value of the property stolen, and was therefore refused, the court directing the sheriff to recall the jury, require them to come into court and amend the verdict, which three days after their finding and delivery of the verdict they did, and under the court's direction returned a verdict which was defective, and again retired, and subsequently brought in a verdict upon which a judgment was rendered, it was held error. *Williams v. People*, 44 Ill. 478.

Where, in an indictment for murder, the jury returned a verdict, "Both guilty of capital punishment," which was signed by the foreman, and the court again ordered the jury polled and each juror then answered, "Both guilty of capital punishment," which verdict the court ordered recorded, remanded the prisoner to jail and discharged the jury without the slightest effort to call the jury's attention to the absurdity of their verdict, or affording them opportunity for correction or explanation, the court held such verdict could not sustain the death sentence, the verdict convicting the accused of no offense known to the law or charged in the indictment. *State v. Foster*, 38 La. Ann. 387.

Where the defendant was indicted upon two counts, the first charging him with uttering and publishing a counterfeit bank bill, and the second with an attempt to utter and publish the bill, the jury returned a sealed verdict, after the adjournment of the court for the day, which was delivered to one of the associate judges and the jury discharged, and upon opening the verdict next morning it appeared to be signed by the jurors and was, "We, the jurors, find the defendant guilty on the first count," upon which the prisoner's counsel objected to an entry on the second count against the court's suggestion that not guilty should be entered upon that count, the court recalled the jury and asked if they found the prisoner not guilty on the second count but guilty on the first; the jury's answer being that they considered finding him guilty on the first count was finding him guilty also on the second, and that they intended a general verdict of guilty, whereupon the court ordered a general verdict of guilty on the indictment to be entered, it was held error. *Sargent v. State*, 11 Ohio, 472.

There can be no correction or alteration of a verdict, after it has been received and recorded and the jury dismissed. *Walters v. Jenkins*, 13 Serg. & R. 414, 16 Am. Dec. 585.

Where, after the verdict had been rendered and the jury discharged from the case, they were re-impaneled the next day for the purpose of giving them instructions, inadvertently omitted before as to their power to recommend to mercy, the court held there was no authority for such proceeding. *State v. Dawkins*, 32 S. C. 17.

In such a case the second verdict would be an absolute nullity, and the judgment thereupon rendered without legal foundation. *Ibid*.

Where, upon a conviction for the theft of a hog, the jury found the defendant guilty and assessed his fine at five (\$5) dollars, were discharged, left the court and dispersed, but in five minutes afterwards upon discovering that the verdict was fatally de-

fective, as not assessing some imprisonment in the county jail as required by the statute in case of theft of hogs under twenty (\$20) dollars in value, they were recalled and reconvened in the courtroom against defendant's objections, and verbally instructed to find a verdict of imprisonment as part of the punishment, and to retire and consider the verdict, the court held that their subsequent verdict finding the defendant guilty and assessing his punishment at a fine of a less amount than the first verdict, and one day in the county jail, could not be received and was invalid. *Ellis v. State*, 37 Tex. App. 190.

Where the information charged that the defendant "did willfully, feloniously, and of his malice aforethought, kill and murder the deceased," and the jury returned a general verdict of guilty, the court held that such defective verdict could not afterwards be corrected, either by the court itself or by reassembling the jury and ascertaining from them what degree of murder they intended to find, the conviction and sentence being founded upon the verdict of the jury and not that of the court. *Allen v. State*, 85 Wis. 22.

If the jury in a misdemeanor are allowed without consent of the defendant to separate after the case is finally committed to them by the court and before the verdict is returned, the verdict cannot be recorded unless it clearly appears that the verdict was not influenced by anything that took place during the separation. *Com. v. Carrington*, 116 Mass. 37.

See also "Sealed verdicts," *supra*.

VI. Effect of recording.

When the jury are asked if they have agreed on their verdict, and they respond that they have and that their foreman shall say for them, and the foreman speaking for the whole panel, find a proper verdict and the same is recorded, the whole panel being called upon to hearken to it as the court has it recorded, no objection being made either by the jury or counsel for the state or prisoner, such verdict is proper as given through the foreman, being the verdict of the whole panel, and it is too late, after the record of it under such circumstances, for any of them to alter or amend it, and it is also too late to poll the panel. *Ford v. State*, 12 Md. 514, 546.

Where the defendant was charged with keeping and maintaining a tenement for the illegal sale of liquors, the foreman adding to the word "guilty" the words "under the instruction of the court" and the clerk entered only the word "guilty," and read to the jury the verdict "guilty" adding the words "So gentlemen you all say," a motion to the court to instruct the clerk to record the verdict as returned by the jury with the words added by the foreman was properly refused.

When all possibility of improper influences is excluded by conclusive evidence, that the jury arrive at and reduce to writing before their separation the same result which was afterwards in open court, the verdict may be received and recorded. *Com. v. Carrington*, 116 Mass. 37.

Criminal Pleading & Practice, section 751, that "if there is any informality, uncertainty, or impropriety about a verdict, the court may require the jury to amend it before they separate." And it may be stated generally that when a jury returns an informal, insensible, or a repugnant verdict, or one that is not responsive to the issues submitted, they may be directed by the court to reconsider it and bring in a proper verdict. Thus, when the verdict

is guilty as charged, where the indictment is for murder, and the statute requires the degree of the offense to be ascertained in the finding of the jury, the court may tell the jury that their verdict is not in proper form, and that they must retire and designate in which degree they find the prisoner guilty. *People v. Bonney*, 19 Cal. 426. And so the court may intercede and have the jury correct any informal or insensible verdict. *State v. Waterman*, 1 Nev.

VII. Special verdict.

There would seem to be no reason why a special verdict should not be rendered in a criminal prosecution. Indeed such verdicts have been upheld. *State v. Wallace*, 25 N. C. 196; *State v. Moore*, 29 N. C. 223; *State v. Watts*, 32 N. C. 339; *State v. Curtis*, 71 N. C. 53; *State v. Bray*, 89 N. C. 480; *Com. v. Call*, 21 Pick. 509, 32 Am. Dec. 234.

By section 1156 of the California Penal Code (Hittell's Cal. Codes and Statutes, vol. 2, p. 1342, § 14156), if the jury do not, in a special verdict, pronounce affirmatively or negatively on the facts necessary to enable the court to give judgment, or if they find the evidence of facts merely, and not the conclusions of fact, from the evidence as established to their satisfaction, the court must order a new trial.

Under section 1156 of the California Code of Criminal Procedure, a new trial must be ordered in the case of a defective special verdict.

Section 1236 of Hill's Annotated Code of Oregon, vol. 1, page 807, contains like provision.

By section 405 of Levisse's Dakota Codes, ed. of 1885, page 1334, if the jury render a verdict which is neither a general nor a special verdict, the court may, with proper instructions as to the law, direct them to reconsider it, and it cannot be recorded until it be rendered in some form from which it can be clearly understood what is the intent of the jury, whether to render a general verdict, or to find the facts specially, and to leave the judgment to the court.

By section 4468 of the Iowa Code of Criminal Procedure (McClain's Anno. Code, vol. 2, ed. 1888, p. 1674, § 5868) if the jury render a verdict which is neither a general nor a special verdict, the court may direct them to reconsider it, and it shall not be recorded until it be rendered in some form from which it can be clearly understood what is the intent of the jury, whether to render a general verdict or to find the facts specially and leave the judgment to the court.

By section 4478 of the Iowa Code of Criminal Procedure (McClain's Anno. Code, vol. 2, ed. 1888, p. 1676, § 5868) if the jury do not, in a special verdict, pronounce affirmatively or negatively on the facts necessary to enable the court to give judgment, or if they find the evidence of facts merely, and not the conclusions of fact from the evidence as established to their satisfaction, the court may order them to retire for further deliberation.

Where the verdict of a jury partook of the nature of a special verdict, and did not pronounce affirmatively or negatively on the facts necessary to enable the court to give judgment, it was held that the order should have been for the jury to "retire for further deliberation." *State v. Arthur*, 21 Iowa, 322.

It was also competent for the court in such a case to set aside the verdict and order a new trial. *Ibid.*

Where the prisoner was indicted for the crime of burglary, and the jury found him guilty of entering the house in the night-time, as stated in the indictment, and recommended him to the mercy of the court, the court held such verdict special and
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failed to respond to all the facts necessary to the rendition of a judgment, and that a direction to the jury to reconsider it was correct. *State v. Maxwell*, 42 Iowa, 208.

In such cases there must be a *verdict de novo*. *Com. v. Call*, 21 Pick. 509, 32 Am. Dec. 234.

And the same is the practice under the New York Code of Criminal Procedure, § 443. Silvernail's Annotated Penal Code and Code of Criminal Procedure, ed. 1893, p. 174; Donnan's Annotated Code of Criminal Procedure, ed. 1886, p. 178; Cook's Annotated Code of Criminal Procedure, ed. 1892, p. 178.

See also §§ 447, 448, of the New York Code of Criminal Procedure, the former of which gives the court the power to direct a reconsideration of the verdict in cases where the jury have mistaken the law, and the latter points out in what cases the court has power to direct their reconsideration of the verdict.

In *Miller v. People*, 25 Hun, 473, where the prisoner was indicted for feloniously receiving stolen property, knowing it to have been stolen, and the jury found the prisoner guilty of receiving stolen goods, knowing them to have been stolen, it was held not to be a general verdict of guilty, but a special verdict which could not be enlarged by indictment.

Such a verdict cannot be held to mean more than is expressed by it. *Miller v. People*, *supra*.

In the above case it was held that such a verdict did not amount to a finding that the prisoner feloniously received the property. *Ibid.*

In *State v. Duncan*, 2 McCord, L. 129, a special verdict was rendered upon which the defendant sought his discharge upon the ground that by the finding of the jury he was not guilty, and the court held the verdict defective and awarded a *verdict de novo*.

So where, upon an indictment for unlawful banking a special verdict was found, that the defendant "did pay out the paper" in question, it was held that the court could add nothing to his finding, but could only draw the legal conclusion from the facts found, it not being competent for the court to infer facts, not inferred by the jury, and set forth, especially in a criminal case. *People v. Wells*, 8 Mich. 104.

To such verdicts the maxim, *de non apparentibus et non existentibus eadem est ratio et iudicium*, applies. *People v. Wells*, *supra*.

In *Jones v. State*, 2 Swan, 399, when the defendant appealed from a special verdict, it was held that the court could supply no defects in the statement made by the jury on the record, by any indictment or application whatsoever, even though circumstances might be sufficient to warrant an inference or presumption of the existence of the matter omitted.

The court can deduce no conclusion by way of intendment or presumption, from the facts stated in the verdict, in order to supply the omission of a material fact not stated. *Jones v. State*, *supra*.

VII. English decisions.

Where upon a trial for larceny, one of the jurors by mistake delivered a verdict of not guilty, which

548; *Cook v. State*, 26 Ga. 598; *Gipson v. State*, 38 Miss. 295; *Nemo v. Com.* 2 Gratt. 558; *Levells v. State*, 82 Ark. 585; *Reg. v. Vodden*, 6 Cox, C. C. 226; *Reg. v. Meany*, 9 Cox, C. C. 281.

While it is entirely clear that the trial judge may send a jury back to the consultation room for the purpose of correcting their finding as to the matters of informality, uncertainty, and where the issue has not been passed upon by them, yet the judge must not even suggest the alteration of a verdict in substance. The ac-

tion of the judge in the correction of verdicts should be exercised with great caution. The old practice allowed a greater exercise of authority by him over verdicts than is now permissible. 1 Chitty, Crim. L. 648; *McConnell v. Linton*, 4 Watts, 857. The judge must not throw the weight of his influence into the deliberations of the jury as to matters exclusively within their province. *Garner v. State*, 28 Fla. 118; *Pinson v. State*, Id. 735.

Can it be said that the action of the judge in

was entered by the clerk on the minutes, and also by the chairman on his note book, and the prisoner was thereupon discharged, when the other juror interfering said the verdict was, "guilty," the prisoner being brought back and the chairman asked the jury what their verdict was, when all pronounced "guilty," and that they were unanimous, it was held that such verdict was correct, as too long a time had not elapsed since the first verdict was entered. *Reg. v. Vodden*, 6 Cox, C. C. 223, Dears. C. C. 229, 23 L. J. M. C. 7, 17 Jur. 1014.

Where, upon an indictment containing two counts for assault, and unlawfully and maliciously inflicting grievous bodily harm, and also a common assault, the jury found the verdict of guilty of an aggravated assault without premeditation, and that it was done under the influence of passion, whereupon the verdict of guilty was directed to be entered upon the first set of counts, the court held that such verdict was rightly entered. *Reg. v. Sparrow*, 8 Cox, C. C. 393, Bell, C. C. 393, 39 L. J. M. C. 98, 5 Jur. N. S. 1122, 3 L. T. N. S. 1145, 9 Week. Rep. 58.

A judge both in a civil and criminal court has a perfect right, and sometimes it is his bounden duty, to tell the jury to reconsider their verdict. *Reg. v. Meany*, 9 Cox, C. C. 231, Leigh & C. C. 213, 32 L. J. M. C. 24, 8 Jur. N. S. 1161, 7 L. T. N. S. 393, 11 Week. Rep. 41.

He may send them back any number of times to reconsider their findings. *Ibid.*

The judge is not bound to record the first verdict, unless the jury insists upon its being recorded. *Ibid.*

If they find another verdict, that is the true verdict. *Ibid.*

Where, upon an indictment for obtaining goods by false pretenses, the jury found the defendant guilty, but added that they thought he meant to pay for the goods, and the court refused the verdict telling the jury that they must find the prisoner guilty or not guilty, whereupon the jury after further consideration found the prisoner guilty, held the verdict was correct. *Ibid.*

In *Rex v. Keat*, 1 Salik. 47, it is held that a verdict, general or special, might be amended by the notes of the clerk of assize, but this was in civil not in criminal cases. *Bold's Case*, 1 Salik. 73, to the same effect.

Where, in a prosecution for perjury, the judge instructed the jury that he did not see how, on the evidence, the defendant could be convicted upon the first count, but left it to the jury whether there was not a strong case on the second, and the jury after retiring, found not guilty on the first for want of sufficient evidence, and guilty on the second, such verdict being duly entered, subsequently the judge having no note of his summing up, made one having a distinct remembrance of it, and no doubt of the jury's intention, and allowed the postea to be amended by entering guilty on the first and third assignments and not guilty on the second, it was held that the amendment was bad, there being no note or other document to amend by. *Reg. v. Virrier*, 12 Ad. & El. 317, 4 Perry & D. 161.

In the above case it was further stated that if

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there had been a note or other document in existence, the verdict might on proper grounds have been amended, even in a criminal trial. *Ibid.*

Where the defendant was indicted for forgery of a bond upon which a special verdict was found, and after being drawn up the prosecution moved for leave to amend the *nisi prius* roll by the record of the indictment which was right, alleging that the record of *nisi prius* had been made up by the clerk in court of the defendant who might be suspected to have made it wrong on purpose, the court inclined to the opinion that such verdict was amendable at common law as by a fault committed by the defendant who ought not to take advantage of it. *Rex v. Hayes*, 2 Strange, 844.

Where a jury returned a verdict, "Guilty of the printing and publishing only," upon which the officer entered a verdict of guilty literally, without adding the usual words of reference to connect the verdict with the matters to which it related, by a motion made to fill up the formal words of reference and to omit the word "only," the court was of the opinion that the first was a technical omission of the clerk and ought to be set right, but that the word "only" must stand in the verdict. *Rex v. Woodfall*, 5 Burr. 2661.

Where the prisoner was prosecuted for the stealing of a bank note, the jury retired and returned saying that they had found the prisoner guilty of having the note in his possession, but how he got it they could not say, whereupon the judge asked if they thought he could have found it three weeks after he was in company with the person whose note it was, when one of them said "Yes," and the judge then ordered an acquittal and a verdict of not guilty was recorded, upon which some of the jury intimated that the jurymen who answered had no authority from his companions to give such answer, and that they differed therefrom, and were thereupon directed to retire and subsequently returned a verdict of guilty, the court held that such mistake in the former verdict might be corrected, and the conviction was therefore proper. *Rex v. Parkin*, 1 Moody, C. C. 45.

The judge has no power, under the rules of the Supreme Court of 1875, after leaving a question to the jury, to give a judgment contrary to their finding on a question left to them, and in such a case a new trial will be ordered. *Perkins v. Dangerfield*, 51 L. T. N. S. 353.

Where the prisoner was convicted on an indictment for obtaining goods upon false pretenses, and pleaded guilty to previous conviction and was sentenced to seven years' penal servitude, it was held that the sentence was wrong and was amended by reducing the sentence to five years' penal servitude. *Reg. v. Horn*, 48 L. T. N. S. 273, 15 Cox, C. C. 205.

Under Statute 11 George IV. and 1 William IV., chap. 70, § 9, in trials for felony or misdemeanor on a queen's bench record, the judgment may be pronounced at the assizes and has the effect of a judgment in the court above, except a rule be granted for a new trial in the first six days of the term, or for an amendment of the judgment. *Rex v. Lloyd*, 4 Barn. & Ad. 126.

the case before us improperly influenced the jury in returning the verdict upon which judgment was entered? The first finding brought into court was for manslaughter in the first degree, and the judge refused to receive it, and told the jury in effect that it was not in such form as that the court could receive it, there being no degrees in manslaughter, and that they must retire and present a verdict in proper form. We cannot say that the judge, in what he said to the jury, suggested to them the substance of what should be their verdict, as he expressly stated that the verdict was defective in form. The defect as to form is pointed out, it being a finding for manslaughter in the first degree when there were no degrees in manslaughter. The direction was to retire and present a verdict in proper form. There is nothing here to indicate the character of verdict to be returned, except that one for manslaughter in the first degree was not in proper form. If there was any error on the part of the judge, it was in refusing to receive the first verdict as presented and in not proceeding to affirm it in the proper way. It is of course true that when a complete formal verdict is returned by the jury the court has no discretion in the matter and must proceed to affirm it. In the case before us the finding of manslaughter

in the first degree was technically informal, as there are no degrees of manslaughter, although we are of the opinion that such a verdict was in legal effect one of manslaughter, and the court might have regarded the words "in the first degree" surplusage and proceeded to affirm the verdict. We cannot say, however, that the court erred in referring the matter to the jury for correction in the particular mentioned, and when this was done they had the right to reconsider the case and bring in a new verdict. What is said disposes of all objections to the verdict.

The remaining point presented by counsel for plaintiff in error relates to the sufficiency of the evidence to sustain the verdict. There is no question about the fact that the accused shot and killed the deceased, but it is insisted that the testimony does not justify the inference that the killing was done with a premeditated design to effect the death of the deceased.

A majority of the court are impressed with the view that the testimony in the record before us is not sufficient to sustain the verdict of murder in the first degree. As the case has to be tried again, it is deemed best to omit any discussion of the testimony in this opinion.

The judgment is reversed, and a new trial awarded; and it will be ordered accordingly.

Where a defendant was sentenced at the assizes, and applied to the court to amend the judgment by diminishing the punishment upon affidavits in mitigation, or without showing a special defect or matter not deducible at the assizes, the court disallowed the amendment. *Id.*

In *Reg. v. Nott*, 4 Q. B. 768, Car. & M. 288, Dav. &

M. 1, 12 L. J. M. C. 143, a judgment on a record of the queen's bench was pronounced at the assizes under the Statute, 2 George IV. and 1 William IV., chap. 70, § 9; it was held that the court might amend the judgment by ordering it to be arrested.

E. W.

WEST VIRGINIA SUPREME COURT OF APPEALS.

Hell J. EVANS, Committee of Evan Morgan, v.

Omer B. JOHNSON *et al.*, Thornton Pickenspaugh, Impleaded, etc., *Appt.*

(.....W. Va.)

*1. A county court or its clerk cannot appoint a committee for a person as in-

*Headnotes by BRANNON, P.

sane without notice to him. Such an appointment is void, and confers no authority.

2. Until chapter 87, Acts 1891 (Code 1891, chap. 118, § 1), a committee could not resign.

3. No time bars the right, either under the statute of limitations or presumption of payment, of a vendor to recover purchase money for land, if he has not parted with the legal title.

4. The statute of limitations has no ap-

NOTE.—Necessity of notice of lunacy proceeding to the alleged lunatic.

It appears, strangely enough, that the statutes in some states providing for inquisition to determine the fact of lunacy are entirely silent as to the necessity for any notice of the proceeding to the person whose status is to be adjudicated. The courts have in some cases required such notice even when the statute did not provide for it, but in other cases have dispensed with any notice to the person in question, and in one or two instances seemed to have regarded it unnecessary to give notice to any one representing him.

Thus in South Carolina an early case declared that no notice was necessary to the party who was found of unsound mind. *Medlock v. Cogburn*, 1 Rich. Eq. 477.

That notice to a lunatic is not required on an application to the probate court to appoint a guardian is said in Bates Ohio Digest, to have been decided by the Pickaway district court in the case of *Davison v. Tipton*, 10 Week. L. Bull. 1031, 28 L. R. A.

In *Southern Tier Masonic Relief Assn. v. Lauenbach*, 5 N. Y. Supp. 901, it was said in respect to the lack of notice of the inquest to an alleged lunatic "whether or not the notice shall be required in proceedings *in rem* depends upon the statute. No question of constitutional power is involved. The Fifth Amendment to the Constitution of the United States has nothing to do with it. That amendment restricts the power of the general government but has no effect upon the statutes." But the court seems to have overlooked the fact that due process of law is demanded by the Fourteenth Amendment, which does apply to the states, as well as by the Fifth Amendment and also by the state constitution. It should be said, however, that the effect of the adjudication on the inquisition seems to have been involved in this case only as evidence of the mental capacity of the alleged lunatic at the time of making an appointment of a beneficiary of a mutual benefit certificate, and that the court decided as a matter of fact that he was not insane at that time, so that no decision was actually

plication to bar a lien for purchase money reserved in a conveyance of land. Though action on a note given for such purchase money be barred, so as to defeat its collection out of other property of the debtor, the lien against the particular land conveyed is not barred. Presumption of payment from lapse of time and laches, unless repelled and explained, will defeat enforcement of such lien.

(Dent J., dissents from proposition 1.)

(April 4, 1894.)

APPPEAL by defendant Pickenpugh from a decree of the Circuit Court for Monongalia County in favor of complainant in a proceeding brought to enforce a vendor's lien on certain real estate. *Reversed.*

The facts are stated in the opinion.

Messrs. Berkshire & Sturgiss, for appellant:

Nothing can call forth courts of equity into activity but conscience, good faith, and reasonable diligence; and when these are wanting the court does nothing.

Harrison v. Gibson, 28 Gratt. 212.

All these are clearly wanting in this case, and, being absent, should be fatal to the plaintiff's pretensions.

Relief has been denied in cases of laches of fourteen years and as low as eight years.

Cranmer v. McShoards, 24 W. Va. 594.

No liens can be predicated on this alleged deed nor otherwise, against the real estate in controversy in the hands of the defendant, Pickenpugh. In a case like this a lien can

only exist where it is retained in a deed. And it is clear enough that there can be no deed without a seal or scroll making it such; both of which, it will be seen, are wanting in the paper referred to purporting to be the deed from Commissioner Hough to the said E. L. Morgan.

Pratt v. Clemens, 4 W. Va. 443; *White v. Denman*, 16 Ohio, 59.

Messrs. L. V. Keck and Okey Johnson for appellee.

Brannon, P., delivered the opinion of the court:

Evan Morgan owned an interest in a tract of land in Monongalia county. Omer B. Johnson, as his guardian, upon petition obtained from the circuit court of that county an order to sell his ward's interest in the land, and did sell it to Elza L. Morgan, who executed to said guardian two notes for deferred installments of purchase money. Under authority of the order of sale, a special commissioner made to the purchaser a deed conveying said infant's interest in the tract of land, retaining a lien for said notes. Afterwards, when said infant had become of age, the clerk of the county court of Taylor county appointed Hiel J. Evans committee of said Evan Morgan, as an insane person, and said committee brought this chancery suit against said Johnson, Elza L. Morgan, and others for the purpose of charging Johnson as guardian of said Evan Morgan with liability to his ward for the amount of said notes made to him by the purchaser of said interest in said land, because he

rendered in favor of an inquisition without notice.

The view expressed by the court in the above case seems to have been taken by other courts in that state, in which the statute (Code Civ. Proc. § 2325) is silent as to notice to the alleged lunatic, but provides for notice merely to the husband or wife of such person or to one or more of the relatives or to an overseer or superintendent of the poor "unless sufficient reasons for dispensing therewith are set forth." Thus under this statute it is held that the neglect to give notice to one or more of the relatives of the alleged lunatic of an inquisition, or to show any sufficient reason for dispensing therewith, is merely an irregularity and not jurisdictional. *Re Demelt*, 27 Hun, 480.

So it was held in *Re Rogers*, 9 Abb. N. C. 141, that lack of written notice to one of the relatives of a lunatic where he had full knowledge of the proceedings, is a mere irregularity, under N. Y. Code Civ. Proc., § 2325, especially where he participated to some extent in the proceedings, seeming to ignore the necessity of notice to the alleged lunatic himself.

Again in *Re Cook*, 6 N. Y. Supp. 720, although the necessity of notice to the party himself is not discussed, it is held that jurisdiction in such a case under the New York statute does not depend on notice to all of the next of kin.

In *Re Russell*, 1 Barb. Ch. 38, 5 L. ed. 290, it was held that where it is evident that an alleged lunatic keeps out of the way to prevent the service of notice of the execution of a commission of lunacy, service at the place where he makes it his home and also at the several places where he would be most likely to receive it, is sufficient, at least where there is evidence that he must have been aware of the existence of this notice.

In *Re Tracy*, 1 Paige, 580, 2 L. ed. 760, the chancellor 23 L. R. A.

held that it was the privilege of a party against whom a commission of lunacy is issued to have notice and to be present at its execution, yet he added that if there were any peculiar circumstances which render it improper or unsafe to give notice to the party, as in some cases of furious madness, the facts should be stated in the application to the court, so that a provision might be inserted in the commission dispensing with the necessity of notice. But it did not appear that any such exceptional case was there presented, and notice would seem to be possible even in case of furious madness although the attendance of the lunatic might not be proper or possible at the hearing.

In *Re Petit*, 2 Paige, 174, 2 L. ed. 861, in respect to a commission of lunacy for a nonresident, it was said: "The commissioners must also give her due notice of the time and place of executing the commission, that she may attend if she thinks proper to do so."

In *Re Lowe*, 45 N. Y. S. R. 914, on a motion to discharge a committee appointed without notice to an alleged lunatic, it is said that no sufficient reason seems to have been given for not having served the notice.

Although the provision for notice in N. Y. Code Civ. Proc., § 2325, does not mention notice to the alleged lunatic in person, it is held by the court of appeals in a recent case that "a very clear case should be made before the court should proceed in lunacy proceedings, in the absence of actual personal and written notice to the party, unless such a case is made by the petition or affidavits, and providing for notice to relatives or otherwise in lieu of personal notice, an adjudication in the absence of such notice should be set aside." *Re Blewitt*, 131 N. Y. 541.

And in a still later case the same court, in *Grid-*

had been chargeable with their collection, and to settle his account as guardian, and also to enforce the lien existing for the notes under said sale and deed to the purchaser, the bill alleging that they had not been paid. The notes were dated December 8, 1868, and this suit to collect them was brought in 1887. By deed of May 30, 1887, from Eliza L. Morgan, for himself and as attorney in fact for a brother and coparcener, to Thornton Pickenpaugh, and a deed of October 20, 1887, from Minerva A. Fleming, another coparcener, to said Pickenpaugh, Pickenpaugh became owner of the entire tract, including the share of said Evan Morgan which had been sold under said court order and purchased by Eliza L. Morgan. Pickenpaugh is a party to the cause. The court entered a decree holding the said interest in said tract of land liable for the payment of said notes given by Eliza L. Morgan for said interest, and subjecting it to sale in enforcement of said lien, and from this decree Pickenpaugh appeals. Pending the suit, Hiel J. Evans resigned his office of committee, and Justus F. Ross was appointed in his place by the county court of Taylor, and the suit was ordered to proceed in the name of said Ross as committee in place of Evans.

The brief of appellant's counsel, in its opening, presents what in its nature is the first question for us to decide, by insisting that the plaintiff has no right to recover in this suit or any suit. The first reason given by counsel for this contention is that the appointment of Hiel J. Evans to be committee of Evan Morgan as an insane person is void for want of no-

tice to said Evan Morgan. In *Lance v. McCoy*, 34 W. Va. 416, the opinion is expressed that such an appointment by a county court without notice, as required by Code, chap. 58, § 34, is void. A re-examination of this question in this case has confirmed me in the view then expressed. The question is of importance, both because of its frequent occurrence and of its effect upon persons alleged to be insane. So far as my observation has gone, the practice has been, in clerks' offices of the county courts and in county courts, to make such appointments without such notice. It lies at the foundation of justice in all legal proceedings that the person to be affected have notice of such proceedings. As such an appointment takes from the person the possession and control of his property, and even his freedom of person, and commits his property, his person, his liberty to another, stamps him with the stigma of insanity, and degrades him in public estimation, no more important order touching a man can be made, short of conviction of infamous crime. Will it be said, in answer to this, that he is insane, and that notice to an insane man will do him no good? The response is that his insanity is the very question to be tried, and he the only party interested in the issue. Often, if given notice, he will be prompt to attend, and in his person be the unanswerable witness of his sanity; often, if not given notice, those interested in using or robbing him of his property will effectuate a corrupt plan. Almost as well might we convict a man of crime without notice. There is abundant authority for this po-

ley v. College of St. Francis Xavier, 137 N. Y. 327, said in respect to a commission *de idiota inquirendo*: "We do not deem it important now to determine whether the proceedings would be absolutely void and a nullity, if no notice whatever had been given to the idiot of any of the proceedings." But it was held that if notice was necessary, jurisdiction was obtained by the notice given of the time and place of the execution of the writ, as this was the vital part of the proceeding, and that lack of notice of a motion to confirm the finding of the jury and for the appointment of the committee would not be jurisdictional. The court also held that in support of a judgment of the court of common pleas, as a court of general jurisdiction, it would be presumed that the proper notices were served on the idiot, and even that she was present in court, if necessary, in the absence of anything in the record to the contrary.

An *ex parte* proceeding for the condemnation of a person to an inebriate asylum was held unconstitutional in *Re Jones*, 30 How. Pr. 446, for lack of due process of law,—especially where no provision is made for an examination on his own motion before any court officer or jury on which he can be heard for himself.

The doctrine of the highest court in New York as declared in the late cases clearly requires notice to the party whose sanity is in question, although no provision therefor is made by statute, unless some extraordinary reason exists for dispensing with it, but that court has not yet decided whether or not there is a constitutional requirement of notice in every instance.

In a New Jersey case notice on an alleged lunatic was held sufficient without being personally served on such person, where it was served on her brother with whom she lived, and who had taken an active part in resisting several inquisitions concerning
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her condition, and who refused to allow the person having the notice, but who did not disclose his errand, to see her, and another notice was also served on a lawyer who had appeared for her in similar proceedings and subsequently appeared on the inquisition in question without objecting to the sufficiency of the notice. *Re Lindaley*, 46 N. J. Eq. 368.

It is declared in *Re Vanauken*, 10 N. J. Eq. 186, that no verdict of lunacy should be allowed to pass against any man without affording him an opportunity of defending himself, except in extreme cases, when such notice would be nugatory, but the question involved in that case was the reasonableness of the time of the notice that had been given.

In *Re Child*, 16 N. J. Eq. 498, where the question as to the proper county for the execution of a commission was involved, it was said that it was not necessary for the party to be before the jury, but the question of notice was not touched upon.

The question appears still somewhat unsettled in Pennsylvania. In *Re Hambright*, 10 Lanc. L. Rev. 161, the court of common pleas of Lancaster county, Pa., upheld a lunacy proceeding in which the notice was given only to a near friend of the lunatic and not to the lunatic herself. The court does not discuss the necessity of notice in such a case to the alleged lunatic in person, but did discuss somewhat at length the power of the court to waive a rule of court requiring notice to be given for ten days. It cited a large number of cases from the records of the court in which less than ten days had been held sufficient, and in many of which it distinctly appeared that no notice was given to the alleged lunatic. No suggestion seems to have been made that there was a constitutional necessity for personal notice to the party most interested.

Service on a friend of the alleged lunatic, who in

sition. Even though the statute be silent as to notice, as ours as to appointment of committees by county courts is, though that as to circuit court appointment requires notice, yet the common law steps in and requires it. See *Chase v. Hathaway*, 14 Mass. 222, 224; *Hathaway v. Clark*, 5 Pick. 490; *Hutchins v. Johnson*, 12 Conn. 376, 80 Am. Dec. 622; *McCurry v. Hooper*, 12 Ala. 823, 46 Am. Dec. 280; *Monroe County Supra. v. Budlong*, 51 Barb. 498; *Eslava v. Lepretre*, 21 Ala. 504, 56 Am. Dec. 266; *Dutcher v. Hill*, 29 Mo. 371, 77 Am. Dec. 572; *Buswell, Insanity*, § 55; *Stafford v. Stafford*, 1 Mart. (N. S.) 551.

In *Motton v. Henderson*, 62 Ala. 426, held that "inquisition of lunacy without personal notice to the alleged *non compos* is void, and so is the appointment by the probate court of a guardian for said lunatic, and the proceedings by such guardian for a sale of lands belonging to said lunatic." A statute authorizing an inebriate to be committed to a hospital on *ex parte* proceeding was held void by the New York supreme court. *Re Jones*, 80 How. Pr. 446. In Georgia the statute required notice to three relatives of the person before appointment of a guardian over him as an insane person. Judge Bleckley, delivering the opinion, thought there ought to be also notice to the person. He said: "It is, to say the least, doubtful whether the property of an adult citizen can be taken out of his custody and committed to guardianship without previous warning served either upon him, or some person duly constituted by law or some legal tribunal to be notified in his stead." If it was unrea-

sonable, in the opinion of a Roman governor, to send a prisoner, and not signify withal the crimes alleged against him, the law judges it to be equally so to pass upon the dearest civil rights of the citizen, without first giving him notice of his adversary's complaint. The truth is that at the door of every temple of the laws in this broad land stands justice, with her preliminary requirement upon all administrations: "You shall condemn no man unheard. The requirement is as old, at least, as Magna Charta. It is the most precious of all gifts of freedom, that no man be disseised of his property, or deprived of his liberty, or in any way injured, nisi per legale iudicium suorum, vel per legem terræ." It is a principle of natural justice which courts are never at liberty to dispense with, unless under the mandate of positive law, that no person shall be condemned unheard." He said that in that case there was "action, trial, and judgment in two days, and no previous notice." In our practice it often occurs in ten minutes. This practice, I say, as was said by the Louisiana court in *Stafford v. Stafford*, *supra*, might put "the wisest man in the community under the control of a curator, and hold him up to the world as an adjudged insane." Both constitution and statute confer this power on the county courts as a jurisdiction. Before appointing, the court must determine whether or not the fact which alone gives it power to act exists; that is, whether the party is in any of the phases or conditions of mind to be considered insane under the statute. It must inquire into the fact, and, in deciding, exercise judgment, and of

this case was himself appointed the committee, was held insufficient to sustain the proceedings, in *Com. v. Groh*, 10 Pa. Co. Ct. Rep. 557.

In *May's Case*, 10 Pa. Co. Ct. Rep. 233, proceedings to declare that a person was insane were held void on the ground that they were *ex parte*, where the record did not show notice, but did show that the commission was executed the same day the petition was presented, and therefore reasonable notice could not have been given.

An inquisition in another state without notice to the alleged lunatic was held invalid in Pennsylvania. *Com. v. Kirkbride*, 3 Brewst. (Pa.) 419.

In Missouri, although the statute is silent on the subject of notice to the lunatic but directs that the court may in its discretion cause him to be brought before it, it is said in *Dutcher v. Hill*, 29 Mo. 371, 77 Am. Dec. 572, that it should appear from the proceedings why notice was not given to him, or his attendance required, if this does not appear to have been done.

In Iowa an inquiry to determine the insanity of a person, had in his absence and without notice to him, is held valid under Iowa Code, § 1400, authorizing the commissioners to dispense with the presence of such person if they think it would be injurious to him, or attended with no advantage, and permitting any citizen of the county, or any relative of the person, to appear and resist the application, and also allowing appearance by counsel, with the further requirement of personal examination by some regular practicing physician who shall report to the commissioners. *Chavannes v. Priestly*, 9 L. R. A. 193, 80 Iowa, 316. The court denies that such a proceeding is a denial of due process of law.

This case cites that of *Black Hawk Co. v. Springer*, 58 Iowa, 417, which said nothing about notice, but held that an inquest by commissioners was not a

criminal proceeding, within the constitutional provisions for speedy and public trial, etc., in criminal proceedings. It also decided that there were sufficient safe-guards given by the statute in a right to appeal from a finding of the commissioners, or to apply for a new commission, or to contest the question of insanity on a habeas corpus proceeding.

In Indiana where the party is in court as required by statute, lack of notice was held immaterial. *Nyoe v. Hamilton*, 90 Ind. 417.

But the appointment of a guardian for an alleged insane person is void for lack of jurisdiction, if the proceedings were had without notice to him and without his presence in court. *Jessup v. Jessup* (Ind.) Oct. 11, 1893.

This case says that while the Indiana statute makes no direct provision for the issuing and service of summons on the person whose sanity is to be inquired into, it does require that such person shall be produced in court.

Under the Indiana statute requiring the person whose sanity is to be determined to be produced in court, but not requiring notice on such person, the proceedings may be valid without notice or without the appearance of the party in person, if authorized agents appear in his behalf. *Martin v. Mottlinger*, 130 Ind. 555.

If the statute authorizing the adjudication that a person is of unsound mind and the appointment of a committee for such person was to be construed as authorizing proceedings of an *ex parte* character, it would be to that extent in conflict with the Constitution of the United States and void, as depriving one of liberty or property without due process of law. *Ibid.*

The doctrine of the case last cited, although not fully established by express decisions in the other states whose decisions have been considered above,

this legal investigation, all important to him, he ought to have notice. He wants to deny the very basis of the proposed order,—his insanity. It is an important transaction to him. Shall he have no notice of it? Am I told that the statute does not in terms require notice? I answer as shown in *Lance v. McCoy*, 84 W. Va. 416, as a circuit court cannot appoint without, so, by proper construction of the code, neither can a county court. I answer, further, that a statute will not be construed to authorize proceedings affecting a man's person or property without notice. It does not dispense with notice. *Bishop*, Written Law, §§ 25, 141; *Chase v. Hathaway*, 14 Mass. 222, 224; *Arthur v. State*, 22 Ala. 61; *Endlich*, Interpretation of Statutes, § 262; *Boontille v. Ormrod*, 26 Mo. 193; *Wickham v. Page*, 49 Mo. 526. Chief Justice Marshall held void a judgment of even a court-marshal imposing fines on militia men, because without notice. *Meade v. Deputy Marshal of Virginia Dist.* 1 Brock. 824, Fed. Cas. No. 9,872. This statute is one of summary proceeding.

If the case were one of mere error or irregularity, it might be said that the order was good against collateral attack, and must be reversed by a direct proceeding; but the question is one of jurisdiction,—a want of authority to make the order, for want of jurisdiction over the person to be affected. How can his property be affected or title given the committee to enable him to sue for it, if the order is void as to the person? If he is not affected by it, how is his property? If the committee would restrain the person of the *non compos*, could he

not release himself by treating the order as void? I cannot see how an order of a clerk fixing the personal status of a person, without notice, can rob him of his property and vest title in another person. A tribunal may have jurisdiction of cases *ejusdem generis* with the matter involved in a proceeding before it, and it may have jurisdiction of the particular matter involved in that particular case; but if it have no jurisdiction of the person, by service of process or appearance, if the proceeding is not *in rem*, it cannot go on. Though the Taylor county court has jurisdiction to appoint committees for insane persons, and though it had lawful jurisdiction to act on the matter of the appointment of a committee in the particular instance of Evan Morgan, yet it could not act without notice to him, unless we say notice was not required by law, which I have above sought to show is not the case. A sentence of the court without hearing the party, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to any respect in any other tribunal. Jurisdiction is indispensable to the validity of all judicial proceedings. Jurisdiction of the person as well as the subject-matter are prerequisites, and must exist before a court can render a valid judgment or decree, and, if either of these is wanting, all the proceedings are void. So said the court literally in *Haymond v. Camden*, 22 W. Va. 180, syl. §§ 5, 9. So it has often held, as shown by Judge Green in the opinion in *McCoy v. McCoy*, 29 W. Va. 807. No court has more sturdily held the rule of

seems to be the doctrine of the decisions, in most states and the only doctrine that is really defensible. It ought to be noticed that in none of the cases which have held notice to the alleged lunatic unnecessary has there been any real discussion of the constitutional question except in the Iowa case of *Chavannes v. Priestley*, *supra*.

In Alabama an *ex parte* inquisition finding a person a lunatic is void. *Belava v. Lepretre*, 21 Ala. 504, 56 Am. Dec. 286; *Molton v. Henderson*, 62 Ala. 423; *McCurray v. Hooper*, 13 Ala. 823, 46 Am. Dec. 280; *Moody v. Bibb*, 60 Ala. 245.

So in Arkansas that an inquest is void if held without notice to the alleged lunatic, is decided in *Arrington v. Arrington*, 63 Ark. 674.

In Connecticut, in *Hutchins v. Johnson*, 12 Conn. 376, 30 Am. Dec. 622, it is said that such notice is required "by the fundamental principles of justice," and also that while notice has not been required by statute until recently, the former practice showed the necessity of the regulation.

In Illinois also reasonable notice to the supposed lunatic is necessary, although the statute is silent on the question. *Eddy v. People*, 15 Ill. 386.

In this case the court says: "If he be in fact a lunatic, the notice would be entirely useless, and that is the very question to be tried, and until a regular trial is had or inquest made, the presumption is in favor of his sanity."

In Kentucky where the statute required ten days' notice in such a proceeding, lack of notice was fatal. *McAfee v. Com.* 3 B. Mon. 305.

In Louisiana notice to the party himself in a proceeding of this kind must be given, and it is not sufficient to appoint a curator *ad hoc*. *Segur v. Palmerin*, 16 La. 63; *Gernon v. Dubois*, 23 La. Ann. 23.

So an earlier Louisiana case held that *ex parte* proof in such a case would not sustain it, and that where the party on being informed of the proceed-

ing took an appeal, no proof on his side was necessary to reverse the decision. *Stafford v. Stafford*, 1 Mart. (N. S.) 651.

In Maine want of notice of an inquisition by selectmen for the appointment of a guardian for a person on the ground that he is of unsound mind is a valid objection to the further prosecution of the proceedings, although the statute makes no provision for notice. *Holman v. Holman*, 80 Me. 139.

In the absence of notice to the alleged lunatic, an appointment of a guardian is void and will not prevent him from maintaining an action of assumpsit to recover his property from the guardian. *Coolidge v. Allen*, 82 Me. 23.

In Massachusetts it is also held that the silence of the statute as to notice to an alleged lunatic does not make valid an adjudication of lunacy without such notice. *Chase v. Hathaway*, 14 Mass. 222.

And any judgment or decree that a person is *non compos*, or appointing a guardian for that cause without notice, is absolutely void. *Hathaway v. Clark*, 5 Pick. 490; *Chase v. Hathaway*, *supra*; *Conkey v. Kingman*, 24 Pick. 115; *Wait v. Maxwell*, 5 Pick. 219, 16 Am. Dec. 391.

On the death of a guardian of an insane person, the ward is entitled to notice of the appointment of a new guardian. *Allis v. Morton*, 4 Gray. 68.

In this case the court says: "To say one is insane and therefore need not be notified is to decide the question before it is tried," and adds: "When would the existence of insanity be a good reason for dispensing with the notice? A man may be insane so as to be a fit subject for guardianship, and yet have a sensible opinion and strong feeling upon the question who that guardian shall be."

In Michigan, in *North v. Joslin*, 50 Mich. 624, it is said in respect to notice of proceedings to declare a person incompetent that "such notice must be personally served and must be a written one, and this

necessity of process or appearance than this court, whether as to proceedings of superior or inferior courts. Must there be process before a superior court can render merely money judgment, and yet no notice before a clerk can stamp a man with insanity, and take from him his property and freedom of person? Cases may exist of appointment of committees or guardians for *non compos mentis*, without notice appearing, in which they were held good against collateral attack; but it will be found that they were in courts of probate held to be courts of general jurisdiction, or where, after inquisition, the party traversed the finding, or had opportunity to do so.

The next question is if, as in this case, it does not appear from the order of appointment that such notice was given, can want of notice affect the order? The county court is a court of limited jurisdiction, not of record, and as to such courts the rule applies that their jurisdiction must appear, and will not be presumed; whereas, as to courts of general jurisdiction, their jurisdiction will be presumed and need not affirmatively appear, unless the want of jurisdiction does appear. *Mayer v. Adams*, 27 W. Va. 244; *Davis v. Point Pleasant*, 32 W. Va. 294; *Wandling v. Straw*, 25 W. Va. 692; 1 Cooley, Const. Lim. 406. It is a summary proceeding, and notice must appear. *Arthur v. State*, 23 Ala. 61. The county court being a court of limited jurisdiction, it must appear, not only that it had jurisdiction as to the subject-matter, but over the person, by service of process or notice. *Mayer v. Adams*, 27 W. Va. 244; 2

Black, Judgm. §§ 282, 633. When we say there must be jurisdiction, we mean both that the matter must be within the jurisdiction of the court and the person to be affected, by service of notice upon him. Cooley, Const. Lim. 403. I maintain that such action as the appointment of a committee for one as insane without notice, being so grave in its effects upon his personal status, his right to vote, liberty, and property, is not due process of law. It violates the definition by Mr. Webster in the *Dartmouth College Case*, generally received as a proper one of due process of law, that "it hears before it condemns." He resigned, and another was appointed in his room. Invested with no authority, he had none to resign. But, if he had been regularly appointed, could he resign, and could the county court accept his resignation? At common law I do not think so. An executor or administrator, once having taken his office, cannot resign it. Schouler says that, if precedents can be trusted, they cannot resign unless under statute, "for the English rule always discountenanced such a practice as to these and similar fiduciaries." 1 Woerner, Law of Administration, p. 582, § 278; Schouler, Exrs. § 157. In *Henslow's Case*, 9 Coke, 36a, the law is stated thus: "For after the executors have once administered, and so have taken upon them the charge of the executorship, they cannot afterwards refuse." And on page 37a it states that the ordinary cannot accept their resignation. So held, also, in *Wankford v. Wankford*, 1 Salk. 306. So in *Parten's Case*, 1 Mod. 213. So in *Sitman v. Pacquette*, 13 Wis. 293; *Ford*

is absolutely essential to give the court jurisdiction. No notice whatever seems to have been given in this case to the alleged incompetent person, unless it was obtained indirectly through a letter written to her daughter.

The court adds further: "The notice must be not only a written one, but must be given under the order of the judge of probate."

But where due notice to the supposed lunatic was given before making inquisition, the want of notice of the time of entering the decree is not fatal. *Dayison v. Johnnot*, 7 Met. 333, 41 Am. Dec. 443.

In North Carolina, in respect to the alleged irregularity of failing to have the lunatic present before the inquest or notified to attend, the court says in *Bethea v. McLennon*, 23 N. C. 523: "The lunatic is entitled to be present before the jury, and if they deny him this right, such denial will be sufficient cause for setting aside the inquisition, but these alleged irregularities do not so entirely avoid it that the persons may treat it *ipso facto* as null. In this case the inquisition was upheld against a subsequent grantee of the lunatic."

In Ohio it is said, in *Wheeler v. State*, 34 Ohio St. 368, 32 Am. Rep. 375, although it does not appear to be necessary to the decision, that in this country notice to the supposed lunatic in some form has been generally regarded as indispensable.

In Tennessee, although the statute did not provide for notice, the court said in *Ex parte Dozier*, 4 Baxt. 51: "It was never intended by the legislature that so important a proceeding as that of declaring a party a lunatic and taking charge of his person and of his estate should be consummated without personal notice," and for lack of it the proceeding was held void.

In Vermont an inquisition without notice was held void in *Shumway v. Shumway*, 2 Vt. 330, but here a statute expressly required notice.

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In West Virginia, as is shown also in the main case, the doctrine that notice of proceedings to adjudge a person incompetent and to appoint a committee is a prerequisite to the exercise of jurisdiction in such case is declared in *Lance v. McCoy*, 34 W. Va. 416, in which the main question was as to the right to an injunction against the exercise of the powers of the alleged committee, which was denied on the ground that there was an adequate remedy at law.

In the circuit court of the United States the declaration the courts of probate have no right to put a person under guardianship as unfit to manage her affairs without notice to the party and an adjudication on the facts is made in *Smith v. Burlingame*, 4 Mason, 121, citing *Chase v. Hathaway*, 14 Mass. 222.

Waiver of notice.

That the presence of the party and his counsel will not cure the lack of the notice prescribed by statute was decided in *Morton v. Sims*, 64 Ga. 236. The court in this case said: "The commission issued one day, was executed the next, and the judgment appointing the guardian in two days and no previous notice. The surprise and shock of such swift inquisition into an old gentleman's wits might so confound him as to prepare him for assenting through his counsel to be adjudged an imbecile."

So in *Re Whitenack*, 3 N. J. Eq. 252, it was said that the ordinary rule which regards an appearance as curing a defective service ought to have little or no effect, where a lunatic or one of doubtful capacity is called upon suddenly to act upon a matter involving the control of his person and property. In that case the inquisition was set aside and a new inquisition ordered on due notice.

The mere fact that an alleged incompetent person was in the court-room at the time part of the

v. *Travis*, 2 Brev. 299, cited with approval by Chief Justice Marshall in *Griffith v. Frazier*, 12 U. S. 8 Cranch, 27, 3 L. ed. 476; *Washington v. Blunt*, 43 N. C. 253; *Haigood v. Wells*, 1 Hill, Eq. 59; *Sears v. Dillingham*, 12 Mass. 358. In *Flinn v. Chase*, 4 Denio, 86, held that the surrogate had no jurisdiction to accept an administrator's resignation and appoint another. At common law a guardian cannot resign. Schouler, Dom. Rel. 426. Under our Code, chap. 82, § 7, a guardian may resign. I have met with only one case (*Morgan's Case*, 3 Bland, Ch. 832) holding that a committee may resign; but there is no opinion or authority cited, and the facts are not given. I conclude that, without statute leave, a committee cannot resign. An act passed in March, 1891, (Code 1891, chap. 118, § 1) allows a committee and fiduciary to resign on filing a petition and proceeding as therein directed; but this resignation was in 1889. The resignation being ineffectual, it left Evans yet in office, and, the office being full, the appointment of Ross in his place would be void and confer no authority on Ross. Per Moncure, J., in *Andrews v. Ivory*, 14 Gratt. 286, 73 Am. Dec. 855; *Griffith v. Frazier*, 12 U. S. 8 Cranch, 9, 3 L. ed. 471; *Haynes v. Meeks*, 20 Cal. 288. It is not meant to say that public officers of government may not resign. As to them the general rule is that they may resign. Mechem, Pub. Off. § 409; *Edwards v. United States*, 103 U. S. 471, 26 L. ed. 814. Evans, having no office, could resign none; and derivatively from him, as filling his place, no power vested in Ross. But it may be thought

that the appointment of Ross ought to be treated not as filling a vacancy caused by Evans' resignation, but as an original appointment. If so, it would be subject to the same objection for want of notice as the appointment of Evans. What is the consequence of neither Evans nor Ross being a committee? A want of title to prosecute this suit. What title has either to enforce the lien, or to the notes secured by it? None. Evans could not bring the suit. It could not be ordered to proceed in the name of his successor, Ross, and the debt could not be decreed to Ross. Would a payment to him be good? If the appointment be void as to the insane person, if he could resist or disregard, would a sale or payment under decree in this case protect against resale at the demand of a lawfully appointed committee, or Evan Morgan himself? Ought the court to impose these dangers on the late guardian, the purchaser, and his alienee, Pickenpaugh?

The defense was made that there is no lien for unpaid purchase money, because the deed reserving it has no seal. The order giving the guardian authority to sell the land of the infant provided that either on payment of purchase money, or earlier by retaining a lien for it, Hough, as special commissioner, should convey the land to the purchaser. As there is no scroll or seal to the deed, we must say it is not a deed, and does not pass legal title; but does the purchaser get the land for nothing? Is there no lien? Viewing the said paper alone, if it is effective to pass any interest in the land, it is effective equally so to reserve a lien

proceedings were had on an inquisition, and that she had, by persuasion of an attorney whom she had employed, consented to make no defense, being deceived by his representations, without knowledge of the fact that he was seeking his own interest in securing his own appointment as guardian, was held not to waive her right to the notice prescribed by statute, nor to give jurisdiction to the court in the absence of such notice. North v. Joslin, 50 Mich. 624.

And lack of notice to the party, or to his relations, who are friendly to him, is not supplied by bringing him to the inquisition merely for exhibition. *Ex parte Hinchman*, 4 Clark (Pa.) 184, Brightly, 181, note.

But in Kentucky, where the alleged lunatic was brought into court, and an inquisition held in open court, no notice or writ was held necessary. *Lackey v. Lackey*, 8 B. Mon. 107.

In *Rogers v. Walker*, 6 Pa. 371, 47 Am. Dec. 470, which held that a collateral attack could not be made, it was added that the inquisition was actually traversed by plaintiff's next friend, and that any defect of notice was cured by the appearance.

Collateral attack.

In the case last named it was held that lack of notice to the alleged lunatic in such a case could not be urged collaterally in ejectment. *Rogers v. Walker*, *supra*.

So the validity of a sale of land under an order of court by a guardian appointed under an inquisition of lunacy cannot be attacked in an ejectment suit on the ground that the inquisition was void for lack of notice. *Dutcher v. Hill*, 20 Mo. 371, 77 Am. Dec. 572.

But in this case the supposed lunatic had recognized the jurisdiction of the court by applying for his discharge.

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Want of the prescribed notice, it was also held in *Kimball v. Fisk*, 39 N. H. 110, 75 Am. Dec. 218, would not make the inquisition absolutely void on collateral attack. But in this case notice was in fact read in the hearing of the party, but was not given for the time prescribed, and the right of the guardian was upheld in an action of trover.

But in Alabama the invalidity not only of the appointment but also of the proceedings by the guardian for the sale of the lunatic's lands results from lack of notice to the lunatic of the inquest. *Molton v. Henderson*, 62 Ala. 423.

Although such sale may give color of title for the purpose of adverse possession. *Ibid*.

The right of guardians appointed in such a void proceeding to represent the lunatic may be contested in a bill of equity relating to the lunatic's estate. *Belava v. Lepretre*, 21 Ala. 504, 56 Am. Dec. 266.

The guardian's judicial settlement is also void where an inquisition was without notice to the alleged lunatic. *Moody v. Bibb*, 50 Ala. 245.

Under the Indiana statute, which does not require notice, the lack of notice to the alleged lunatic will not prevent the inquest from being a valid judicial proceeding, so that false testimony given thereon may be ground of perjury. *Hutta v. Hutta*, 62 Ind. 214.

In the absence of any showing to the contrary, the court is bound to presume in such a case that the lunatic was present or his presence dispensed with by the court as required by statute. *Ibid*.

See also *Gridley v. College of St. Francis Xavier*, 137 N. Y. 327.

And the failure of the record to show notice is not fatal on collateral attack, where it is not alleged that notice was not given to the relations or friends as required by statute. *Wills v. Wills*, 13 Pa. 159.

on that interest. If we treat it as a contract to convey, passing equitable title, of course there is a lien, as a vendor has a lien for purchase money as long as he retains title. *Yancey v. Mauck*, 15 Gratt. 800, and citations. If another deed were made, a lien could be reserved in it, for, without reserving right in a sale of realty to reserve a lien in the final deed of conveyance, that right exists. *Findley v. Armstrong*, 28 W. Va. 118. The vendor can never be compelled to part with the legal title without payment or security. It seems to be thought in this case that it is a deed which creates the lien, and, as the paper is not a deed, it creates no lien; but there is an implied lien springing from the sale, existing until the legal title is passed by deed, and that deed, reserving it, only reserves yet an already existing antecedent lien, and does not originate it. That paper, so far as it might be deemed necessary to look to it, is competent to preserve that lien. But the sale under the decree was attended with a lien. The court only directed the legal title to pass on actual payment, or by reservation of a lien. The title has not passed to the purchaser, Eliza L. Morgan, and the lien exists. The commissioner could not convey free of lien. Pickenpauh took it, of course, subject to the lien, because he took only what his vendor, Eliza L. Morgan, had,—an equitable, inchoate title; and, also, because he is affected with notice of incumbrance on the face of papers under which Morgan derived title, and both decree and the defective deed told of the lien. If, as suggested in the brief, it be viewed as a private sale by the guardian, the same principle would apply; the lien would exist.

Time is relied on to defeat the debt. In no view can this position prevail. Viewed as a case where the legal title has not passed to the

vendee, as it is to be viewed, the statute of limitations has no application. *Hopkins v. Cockerell*, 3 Gratt. 88; *Hanna v. Wilson*, 3 Gratt. 243, 46 Am. Dec. 190. The statute has no application to a lien reserved in a deed passing legal title. *Hull v. Hull*, 35 W. Va. 155, 165; *Barton*, Ch. Pr. 111, note 5. Though the note given for purchase money be barred as a personal debt, yet the lien remains unaffected by the statute operative against the land. *Coles v. Withers*, 33 Gratt. 194. The statute, perhaps, is not intended to be specifically relied upon, but laches and staleness of demand are. This defense cannot be maintained. One note fell due December 8, 1869, the other December 8, 1870, and this suit began May 17, 1887. Only a presumption of payment of twenty years would operate, and that had not elapsed. Besides, that is not a positive bar, but only a presumption which may be repelled by proof of the continued existence of the debt. The paper signed by Eliza L. Morgan July 5, 1880, admits both notes then unpaid.

As to release dated July 5, 1880, by the mother and brothers of Evan Morgan, it is contended for Pickenpauh as precluding a recovery of said debt. It recites the sale; that Omer Johnson had, as guardian, never collected the two purchase-money notes of Eliza L. Morgan; that recovery was barred as to the surety in them; that said guardian was not at fault for not collecting them, as his omission arose out of an agreement between the brothers and mother of Evan Morgan that Eliza L. Morgan should keep Evan when required, and have enough of the notes applied to reimburse him; and then, to indemnify and save harmless the late guardian, Johnson, said mother and brothers released him from all liability as guardian and on account of such sale

The guardianship being void for lack of notice is not a defense to a suit against the ward personally. *Hathaway v. Clark*, 5 Pick. 480.

The question of collateral attack on an inquisition for lack of notice is manifestly dependent upon the question whether or not the notice is a jurisdictional necessity, or whether the lack of it is a mere irregularity.

Sufficiency of notice.

Service of the writ of arrest, according to the statute, on an alleged lunatic is a sufficient notice of the proceedings. *Fore v. Fore*, 44 Ala. 478.

Notice to others.

In Rhode Island where the intended ward is a person of full age, he is the only person entitled to notice of the proceedings. *Gannon v. Doyle*, 16 R. I. 728; *Hamilton v. Court of Probate of North Providence*, 9 R. I. 304.

But notice to the alleged lunatic and one daughter is held insufficient in *Re Myers*, 73 Mich. 401, where three sons living in the same town were not notified, although the statute in terms did not provide for notice to any one except the alleged incompetent.

A brother of the alleged incompetent person, who holds a mortgage belonging to the incompetent under an unrevoked power of attorney, should be notified of proceedings for the appointment of a guardian of his property. *Partello v. Holton*, 79 Mich. 372.

See also New York cases, *Re Demelt*, 27 Hun, 430 23 L. R. A.

Re Rogers, 9 Abb. N. C. 341, and *Re Cook*, 6 N. Y. Supp. 720.

English cases.

In *Ex parte Cranmer*, 12 Ves. Jr. 445, Erskine, Lord Chancellor, said: "The party certainly must be present at the execution of the commission. It is his privilege,"—but the question of notice does not seem to have been involved.

In *Ex parte Southcot*, 2 Ves. Sr. 401, Ambl. 111, a commission was issued as to the lunacy of a party beyond thesea, but as to notice it was merely stated that the laying hold of his lands is notice to him.

Notice given to one who acted as solicitor, whom it was sworn the alleged lunatic distrusted, was given in *Ex parte Hall*, 7 Ves. Jr. 261, and on a petition to quash the proceedings made by another person who was interested, the court refused to quash, but gave leave to traverse.

In proceedings to adjudge the lunacy of a non-resident, the court in *Re Lanwarne*, 45 L. T. N. S. 668, 30 Week. Rep. 759, ordered a registered letter to be sent to such person, and another to a step-father with whom she resided.

These cases indicate that personal notice to the alleged lunatic is not regarded as a jurisdictional necessity in England. This accords with the statement of Shelford in his *Work on Lunacy* that in ordinary cases notice is not given to the party "inasmuch as such proceedings are *ex parte* and not conclusive," and he adds that "it is a subject of surprise" that proceedings of this kind should be taken without any notice to the party to be affected or some of his relatives. B. A. E.

and delay of collection further than if Johnson should collect said notes. Now, the whole purpose of this instrument was to release the guardian, not Eliza L. Morgan. Instead of releasing him, it closed with a proviso looking to the probability of the collection of valid notes. As to any agreement between the mother and brothers of Evan Morgan, how could it release a debt due him? Who gave them power to stay the enforcement of the debt? The fact that they would be distributees in the event of Evan Morgan's death gave them no vested interest whatever to sell, release, or in any manner to affect the debt. The mother of Evan Morgan has kept him, not Eliza L. Morgan. It is claimed he paid her some money for keeping him. She positively denies it on oath. Why did not Eliza Morgan give evidence of it? A witness states a circumstance—a mere circumstance—tending slightly to show the probability that he made a payment; but it is inconclusive, very weak in effect. The amount is not shown. He must make it certain. No payment of the debt by Eliza L. Morgan, by paying Mrs. Morgan for keeping Evan or otherwise, is shown.

The argument that there is an adequate remedy by suit on the guardian's bond, forbidding a chancery suit, is without force. Equity is the proper forum to enforce the liens, and it is proper to enforce that lien to collect the debt before going on the guardian to make good the debt. There stands the land for the debt. The ultimate responsibility rests on Eliza L. Morgan and the land; and no court of justice would lodge the liability in the first instance on the guardian, Johnson, and exonerate the land, at the instance of Eliza L. Morgan, the debtor, who agreed to pay Johnson, and never paid him, or, at Pickenpaugh's instance claiming under Eliza L. Morgan, even without the existence of said paper releasing Johnson, which paper Eliza L. Morgan executed; and more surely yet would not do so in view of that release. With what justice can he or one claiming under him ask that the liability, at the first step, be saddled on Johnson? To do so would be inequitable, and against the contract of the parties.

It is suggested, if I am not in error as to the brief of counsel, that there is no privity between the plaintiff and Eliza L. Morgan and Pickenpaugh, as the notes were made to Johnson as guardian. If it is meant to say that because the notes were made to Johnson, a lawful committee of Evan Morgan cannot sue on them, I cannot concur in that view. When the guardianship ended, upon the majority of Evan Morgan, he was entitled to the debt, and even if we could say that the legal title to the debt under the notes was in Johnson, which I doubt (but have not examined the question, because immaterial), I am very sure that a court of equity would entertain a suit by a lawful committee, and having Johnson and other proper parties before it, would decree the debt into the hands of the committee.

The decree is reversed and the bill dismissed, without prejudice to any other suit by Evan Morgan or any lawful committee. No prejudice against the collection of the debt shall result from this decision.

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Dent, J., dissenting:

In so far as the foregoing decision is in effect a determination that a conceded idiot must have notice before the clerk of the county court can appoint a committee for him, I cannot concur. "An idiot or natural fool is one that hath had no understanding from his nativity, and therefore is presumed never likely to attain any." 1 Bl. Com. 301. "An idiot is known by his perpetual infirmity of nature, a nativitate, for he never had any sense or understanding." Elwell, Lead. Cas. 528. "Idiots are classified by themselves as mental infants with congenital obstacles to development." Ordronaux, Judicial Aspects of Insanity, 50. Evan Morgan is conceded in this case to be a helpless idiot from his birth, never having been able to hear, speak, or take care of himself. This is undeniable. Such being his undisputed state, a committee was appointed for him by the clerk of the county court of Taylor county at the instance of those having him in charge. This appointment is held void because the order of the clerk does not show that the idiot had been served with notice? Why give him notice? His capacity was less than a child's three months old, yet the court could hardly hold that a child of such an age must have notice before a guardian could be appointed for it. A dumb brute has more intelligence, and a notice served on such would be just as effective. The court answers, "So that, in case he is not an idiot or his sanity is in question, he may defend himself." In cases of doubtful sanity or insanity the clerk has no jurisdiction, and an order appointing a committee made by him, with or without notice, would be a nullity just as if he should appoint a guardian for an adult. The jurisdiction in cases of suspected insanity is conferred exclusively on justices and the circuit courts by sections 9, 33-35, chap. 58, of the Code, and there is no statutory enactment conferring such jurisdiction on county courts or their clerks. The clerk acts merely in a ministerial capacity in appointing a committee for a known idiot, and therefore a notice is neither required nor would it be otherwise than useless. An idiot needs no adjudication to establish the fact that he is so by nature, known and recognized by all men; and whenever notice is necessary, the clerk is without jurisdiction, and his proceedings are void, as the subject of the notice would not be an idiot. It is true that this court in the case of *Lance v. McCoy*, 34 W. Va. 416, under a misconception of the jurisdiction of the county court, finding a supposed hiatus in the law proceeded to legislate, at least impliedly, in favor of the jurisdiction of said court in cases of suspected insanity, and enacted, by a kind of parity of reasoning, that the county court should not appoint a committee without first giving five days' notice to the suspected; and now, by this decision, the provisions of this enactment are extended to include well-known idiots as well as suspected lunatics, not, however, for the purpose, in its result, of protecting the idiot or his estate, but to allow the appellant to escape his liability temporarily, with the sure promise of bringing him to certain justice later on. The justification of this exercise of legislative functions is section 24, art. 8, of the Consti-

tion, to wit: "They shall have jurisdiction in all matters of probate, the appointment and qualification of personal representatives, guardians, committees, and curators." And this is construed, without legislative enactment, to include authority to examine into cases of suspected insanity. The legislature did not so consider it, and hence it conferred exclusive power in such cases on the justices of the circuit courts. If it had deemed it wise or necessary to do so, it would have conferred

this power on the county courts by legislative enactment, as it was formerly under the laws of Virginia, but never has been the law of this state, except by judicial construction as aforesaid, directly in contravention of the will of the legislature. To my mind, such decisions as these are unjustifiable and unnecessary usurpation of legislative powers on the part of this court. As to the laws of Virginia, see Code 1860, chap. 85, §§ 50-53.

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

Grace Howard POTTER *et al.*

v.

THE MAJESTIC, Ocean Steamship Navigation Co., Claimant, *Appt.*

(60 Fed. Rep. 625.)

1. A contract for transportation from Liverpool to New York, made in Eng-

NOTE.—Notice to passenger of conditions on ticket.

It is plain that when a ticket is signed by a purchaser conditions therein are to be regarded as part of the contract of transportation, and no question of notice to the passenger by stipulations therein is really left open.

The question whether or not a ticket constitutes a contract is somewhat related to the question of notice to the passenger of stipulations printed on the ticket, but is, nevertheless, not the same question and is presented in different phases, as for instance in respect to oral evidence to show what the contract of transportation was. No attempt to consider this question of the nature of a ticket as a contract is made here, except so far as it is involved in the question of notice.

Steamship tickets.

A steamship ticket entitled "Passenger contract ticket," at the bottom of which appears the words, "The passenger's luggage is carried only on the conditions on the back hereof," while on the back was found among other things a provision that the company was not liable for loss of or injury to the passenger or his luggage, or delay in the voyage from any cause, was held to constitute notice to the passenger, although he did not sign the ticket, and there was a blank space for his signature and it was signed by the agent of the carrier. *Fonseca v. Cunard SS. Co. (Mass.)* 12 L. R. A. 340.

In this case the action was for loss of the passenger's trunk, but recovery was denied.

A ticket for passage to Europe, all printed on one side of the paper above the signature of the carrier's agent, was held to give notice of its provisions as to baggage to a passenger who had for several days before starting on the voyage had possession of the ticket. *Steers v. Liverpool, N. Y. & P. S. S. Co.* 57 N. Y. 1, 15 Am. Rep. 453.

The court said in this case that it could "take notice that an acknowledgment for a voyage across the ocean is a matter of more deliberation and attention than buying a railroad ticket or taking an express company's receipt for baggage or for freight." The contract in question limited liability for loss or damage to baggage, except in case of gross negligence, and limited the amount of liability to \$50 in any event, unless a bill of lading or receipt therefor was signed specifying the articles and their respective values, with a pro-

land between a citizen of the United States and a British shipowner, is an English contract governed by the laws of England, in the absence of anything to show an intent that it is to be controlled by the law of the United States.

2. A condition restricting the liability of a steamship company to a passenger by exempting it from liability for perils of the sea and negligence in navigation,

vision that money, jewelry, and valuables were entirely at the passenger's risk unless placed in the company's charge and a bill of lading or receipt signed therefor.

That an exemption from liability for baggage in a ticket for an ocean voyage, unless bills of lading are signed therefor, is binding on the passenger, is decided in *Wilton v. Atlantic Royal Mail Steam Nav. Co.* 10 C. B. N. S. 453, but the ticket is treated as a contract and there is no discussion in respect to the passenger's notice of the condition. See also *Nevins v. Bay State S. B. Co.* *infra*.

Railroad tickets.

Special terms and conditions printed on railroad tickets are not binding on passengers who are unable to read or understand the language, in the absence of any explanation, or of calling their attention to the provisions. *Mauritz v. New York, L. E. & W. R. Co.* 23 Fed. Rep. 765.

So notice on a railroad ticket that the baggage is at the owner's risk is not binding on a passenger if he is ignorant of the language. *Camden & A. R. Co. v. Baldauf*, 16 Pa. 67.

The mere delivery of a ticket which has a notice printed on the back of it does not raise a presumption of law that the passenger has actual notice of it; but this may be a question for the jury under the circumstances. *Wilson v. Chesapeake & O. R. Co.* 21 Gratt. 654.

Thus a condition on the back of a railroad ticket limiting liability for baggage is not notice to a passenger as a matter of law, but the question of notice may be left to the jury. *Brown v. Eastern R. Co.* 11 Cush. 97.

The words "Look on the back" printed on the face of a railroad ticket are not sufficient as matter of law to charge the passenger with notice of a stipulation on the back of the ticket limiting liability for baggage, but the question of notice may be submitted to the jury as one of fact. *Malone v. Boston & W. R. Corp.* 12 Gray, 383, 74 Am. Dec. 598.

And a mere notice, although on the face of the ticket, as to the terms upon which a passenger's baggage will be carried do not constitute a part of his contract with the railroad company or limit the liability of the carrier. *Rawson v. Pennsylvania R. Co.* 48 N. Y. 212, 8 Am. Rep. 543.

In *Nevins v. Bay State S. B. Co.*, 4 Bosw. 223, it was held that a memorandum on a ticket limiting

among other things, is so material a restriction of a carrier's liability that it cannot be made by notice on the back of a steamship contract ticket, although the words "See back" are conspicuously placed on the face of the ticket.

3. A regulation limiting the amount of liability for injuries to baggage of a passenger may be made by notice on the back of a steamship contract ticket, where attention is directed thereto by the words "See back" conspicuously printed on the face of the ticket, since the carrier's liability as to baggage not being exactly defined may be made definite and certain by reasonable restrictions. Reversed, 166 U. S. 375, 41 L. ed. 1039.

(March 12, 1894.)

APPEAL by the claimant of The Majestic from a decree of the District Court of the United States for the Southern District of New York in favor of libelants in a libel to recover for an injury to libelants' baggage, which was alleged to have been caused by defendant's negligence. *Modified.*

The facts are stated in the opinion.

Argued before Lacombe and Shipman, *Circuit Judges.*

Liability as to baggage is not a contract. In this case the ticket was from Boston to New York partly by rail and partly by steamboat.

In *Baltimore & O. R. Co. v. Campbell*, 36 Ohio St. 647, 38 Am. Rep. 617, also it was held that notice on a railroad ticket or baggage check attempting to limit liability for baggage is not binding on the passenger.

A limitation in a ticket called "a special limited ticket" as to the amount of liability for baggage is not necessarily notice to a passenger who does not sign the ticket, although there is a blank for his signature. *Kansas City, St. J. & C. B. R. Co. v. Rodebaugh*, 38 Kan. 45.

The court says "the object of that blank space being left there was, doubtless, that the attention of a purchaser might be called to the conditions of the ticket, and when called to sign it he would then know its contents. This would constitute a contract between them, but without it there would be no contract and no restriction or limitation of the liability of the company."

A restriction in small type on an omnibus check for baggage, on which the general object of the check is emblazoned in large letters is not sufficient notice to the passenger of the restriction, although by the law of Pennsylvania a general notice may operate to restrict liability. *Verner v. Sweitzer*, 32 Pa. 208.

A limitation on a railroad baggage check of the amount of liability for baggage does not constitute notice to the passenger. *Indianapolis & C. R. Co. v. Cox*, 29 Ind. 360, 95 Am. Dec. 640.

A baggage receipt given in exchange for a check to a passenger on a railroad train does not constitute a contract. *Madan v. Sherrard*, 10 Jones & S. 353.

Merely putting into the hands of a passenger a card in exchange for baggage checks which contained a stipulation limiting liability in addition to the numbers representing the baggage, the name of the expressman, and an advertisement of his business, does not charge the passenger with notice of the limitation. *Prentice v. Decker*, 49 Barb. 21. *Linburger v. Westcott*, Id. 233.

A receipt from the messenger of a baggage express company taken by a passenger, who surrenders to him his checks for baggage while on a railroad train, is not binding on the passenger as a contract restricting the amount of liability for the baggage, unless extra charge is paid, where the passenger did not know of such condition and it was printed obscurely, although on one end of the receipt were plainly printed the words "Read this receipt." *Blossom v. Dodd*, 43 N. Y. 264, 3 Am. Rep. 701.

Mr. Everett T. Wheeler for appellant.
Mr. Willard Parker Butler for appellees.

Shipman, Circuit Judge, delivered the opinion of the court:

The two ladies and their maid who are the three libelants took passage on January 20, 1892, at Liverpool for New York, on board the steamer *Majestic*. The vessel arrived in New York on January 28. The contents of their trunks were found to have been saturated with salt water, and to have been damaged to the amount of \$2,828.50. The baggage was stowed in compartment No. 8 of the orlop deck, where the mails were also stowed. This compartment is about 25 feet in length, has watertight bulkheads at each end, and is ordinarily a safe and convenient place for the baggage of passengers. On the morning of January 25, 1892, there was a pretty rough sea, and from 7 to 8 o'clock A. M. the vessel passed through a quantity of wreckage, apparently broken planks, and about 8 o'clock A. M. it was found that the after port in No. 8 had been broken, and that

baggage, unless extra charge is paid, where the passenger did not know of such condition and it was printed obscurely, although on one end of the receipt were plainly printed the words "Read this receipt." *Blossom v. Dodd*, 43 N. Y. 264, 3 Am. Rep. 701.

A receipt for a check given by a baggage transfer clerk to a girl who, after delivering her check, had come back and asked for a receipt, was held not notice to her of a stipulation therein limiting liability to the sum of \$100. The court said that if the clerk could not properly give what was asked for, he should have so explained, and held there was no implied assent on her part sufficient to create a contract. *Woodruff v. Sherrard*, 9 Hun. 323.

A ticket for luggage deposited in a railway cloak room, which contained a condition limiting liability was held binding on the passenger in *Harris v. Great Western R. Co.* L. R. 1 Q. B. Div. 515, 45 L. J. Q. B. 729, 34 L. T. N. S. 647, 25 Week. Rep. 68. In this case the passenger said he did not read the conditions, gave them no thought, but admitted that he believed there were conditions on such tickets.

And this is regarded as material in the later case of *Parker v. South Eastern R. Co.*, L. R. 2 Q. B. Div. 418, 46 L. J. C. P. 463, 37 L. T. N. S. 540, 25 Week. Rep. 584, in which it was held by two of the three judges that if a passenger had no information, or good reason to believe that there were any conditions on such a ticket, he was not bound to read the ticket to ascertain the fact.

That a railway ticket from London to Paris, stipulating against liability of a carrier beyond its own line, binds the passenger according to its terms, although he did not sign it, was decided in *Zunz v. South-Eastern R. Co.* L. R. 4 Q. B. 544, 38 L. J. Q. B. 209, 20 L. T. N. S. 873, and *Lord Cockburn* said that while it might appear hard that small print conditions should bind a man when he only obtained his ticket at the last minute and was nine times out of ten hustled out of his place by the next man, the court was bound by the authorities to hold that when a man takes a ticket with conditions on it, he must be presumed to know the contents and be bound by them.

But in *Henderson v. Stevenson*, 2 H. L. Sc. App. 48, 470, 32 L. T. N. S. 709, this statement of *Lord Cockburn*'s is criticised as not supported by authorities. In that case the house of lords held that

a large quantity of water had entered and damaged the mails and luggage. There were three port holes on each side of the compartment, which were closed in the usual way, with thick glass, and an iron cover or "dummy," screwed up tightly. The glass was broken in many fragments, and the iron dummy was forced from its hinges, and turned back,—an accident which could not have been caused by the sea alone. The ports are examined at the commencement of the voyage in Liverpool. The chief officer of the ship was at this compartment the day after the vessel left Queenstown. It was the custom to inspect the baggage rooms after heavy weather, and accordingly the chief officer opened the door on the morning of January 25, and discovered, by the wash of water, that an accident and injury had taken place. The facts that the glass was splintered into many fragments, and that the iron dummy was forced from the hinges, and thrown backward, show that the accident must have been caused by a violent blow coming from the ocean. It is reasonable to infer that it was caused by an apparent and adequate cause,

rather than by one which rests entirely upon surmise, and we are therefore led to conclude that a blow from one of the floating planks inflicted the injury. The district judge was of opinion, assuming that the accident was caused by wreckage, that the ship must be deemed guilty of negligence in not checking her speed when passing through material capable of inflicting such damage. If such an injury could have been anticipated, the speed should have been slackened, but it is apparent that the injury was of an extraordinary character, and that the propriety of taking precautions to avoid it would not naturally have occurred to the mind. It was an unanticipated peril of the sea.

The questions in the case which are of general importance arise upon alleged limitations of the carrier's liability, which are expressed in the notice printed upon the back of the libellant's ticket. One ticket was purchased in England, and was issued to the three libellants. It was a maritime contract, for the performance of which the ship became liable, entered into by a common carrier by sea, the terms of which were expressed in

a notice limiting liability as to baggage printed on the back of a ticket, which had on its face only the words "Dublin v. Whitehaven" was not binding on the passenger.

But where a second-class railroad ticket from London to Paris and return consisted of a little book of coupons, the whole book was held to constitute a contract, and a condition on the inside of the cover limiting the carrier's liability to its own line was held binding, although the passenger had not read it. *Burke v. South-Eastern R. Co.* L. R. 5 C. P. Div. 1, 49 L. J. C. P. 107, 41 L. T. N. S. 554, 23 Week. Rep. 306, 44 J. P. 258. The case of *Henderson v. Stevenson* was distinguished on the facts.

One who received a mileage ticket without actual knowledge of conditions therein, one of which required his signature to the ticket, is not chargeable with notice of the condition, and the carrier waives it by delivering the ticket and allowing him to use it several trips before objecting. *Kent v. Baltimore & O. R. Co.* 45 Ohio St. 284.

This case is very near the line of cases following in which on the other hand a passenger is held chargeable with notice of conditions in tickets purchased at reduced rates.

Where a special excursion ticket had on its face a notice to purchaser in large letters requiring the ticket to be stamped at destination before it could be accepted for return trip on presentation by the original purchaser, it was held that the passenger was charged with notice and that it was his duty to inform himself of the existence of the condition and comply with its terms. *Bowers v. Pittsburgh, Ft. W. & C. R. Co.* 158 Pa. 302.

In *Abram v. Gulf, C. & S. F. R. Co.*, 88 Tex. 61, it was held that a passenger was rightly put off for failure to have himself identified as required by a condition in his ticket before offering it on a return trip, although he had not signed the contract, which was made out in form for his signature. But the court declares that if he was in fact ignorant of the conditions of the ticket, and had been misled by the agent who sold it to him in regard to the necessity of being identified as the ticket required, he would be entitled to ride on the ticket, and under proper pleadings could show these facts in avoidance of his failure to comply with the requirements of the ticket.

The validity of a stipulation in a ticket sold at a reduced rate that in order to make it valid for a 23 L. R. A.

return passage the purchaser must identify himself at his destination and sign a contract that he is the original purchaser is upheld in *Edwards v. Lake Shore & M. S. R. Co.*, 81 Mich. 364, in which the passenger attempted to ride without complying with these conditions on the return trip, but in which nothing is said about the effect of this stipulation as notice to him, although it is said that the conditions rested upon a consideration in the reduced rate of fare.

One who purchases tickets of a broker at less than the regular fare, although he is not required to sign the contract in the usual way, is bound by the terms of the contract on the ticket prohibiting its transfer. *Drummond v. Southern Pac. R. Co.* 7 Utah, 118. In addition to the terms of the ticket as notice, it was said in this case that the fact that the broker gave the passenger a letter to the conductor was sufficient to suggest suspicion as to the validity of the ticket.

Where a ticket is sold at less than the usual rates, on the condition that it shall not be used after a limited time, if the passenger accepts and uses it he makes a contract with the company according to the terms stated, and the reduction in the rate is the consideration for his contract. *Pennington v. Philadelphia, W. & B. R. Co.* 62 Md. 85.

The court said in this case that there was evidence that the passenger did not read the ticket, but that he had ample opportunity to read it if he had chosen to do so, and that he could not on any principle hold the railroad company to any terms except those stated.

It was also said "that if there was a contract these terms were embraced in it; if there was no contract he had no right to the reduction in the fare."

Where the words "Good for this day only" were plainly printed on the face of a railroad ticket which a passenger had in his possession for several days, it was presumed that he had knowledge of them, but it was said that whether he did or not, he knew that he was bound to pay his fare or present a suitable voucher, and that a passenger should see to it, if he prefers not to pay in the cars, that he has a proper voucher. *Elmore v. Sands*, 44 N. Y. 512, 18 Am. Rep. 617.

A ticket having on its face stamped in red ink the words "Good only two days after date" which the passenger purchased from a connecting road under an arrangement between the carriers for the use

writing. The portion relating to the contract was headed "Cabin Passenger's Contract Ticket." Then follow the words: "These directions and the notices to passengers below form part of, and must appear on, each contract ticket." Five "directions" which are required by the British merchant shipping act are then inserted. The undertaking or agreement of the steamship company is next printed. The part of this agreement which is important to this case is as follows: "In consideration of the sum of £124 10, I hereby agree with the person named in the margin hereof that such person shall be provided with first-class cabin passage in the above-named British steamship, to sail from the port of Liverpool for the port of New York, in North America, with not less than twenty cubical feet for luggage for each person; . . . and I further engage to land the person aforesaid with their luggage at the last-mentioned port, free of charge beyond the passage money aforesaid. For and on behalf of the Oceanic Steam Navigation Company, Limited, of Great Britain.

"Thomas Henry Ismay,
"Per R. Martokellell."

The last name was written. Then follow two notices to cabin passengers, and a caution in regard to the care of their baggage and valuables. At the bottom of the face of the ticket are the words, in conspicuous, black-faced type, "See back." Upon the back of the ticket are the words: "Notice to Passengers. This contract is made subject to the following conditions." Seven important conditions are then stated. The third, fourth, and seventh are as follows:

"(3) Neither the shipowner nor the passage broker or agent is responsible for loss of or injury to the passenger or his luggage or personal effects, or delay on the voyage, arising from steam, latent defects in the steamer, her machinery, gear, or fittings, or from act of God, queen's enemies, perils of the sea or rivers, restraints of princes, rulers, and people, barratry or negligence in navigation, of the steamer or of any other vessel. (4) Neither the shipowner nor the passage broker or agent is in any case liable for loss of or injury to or delay in delivery of luggage or personal effects of the passenger beyond the amount of £10, unless the value of the same in excess of that sum be declared at or before

of through tickets, was held to limit the right of the passenger to the time stipulated. The court said that courts of law must enforce contracts as the parties make them and said nothing about notice or the passenger's knowledge of the limitation, although his counsel contended that there was nothing to show notice. *Boston & L. R. Co. v. Proctor*, 1 Allen, 307, 79 Am. Dec. 729.

A ticket marked "Good for this day only" was held binding in *Boice v. Hudson River R. Co.*, 61 Barb. 611, where the purchaser after taking it and finding out that the train was late requested the ticket agent to take the ticket back, and was told that he could use it on another day. No question is raised in the case, however, about the effect of such words as notice in case the passenger had no actual knowledge of them.

The doctrine that a ticket is only a token or voucher adopted for convenience and not in itself a contract is applied in *Nelson v. Long Island R. Co.*, 7 Hun, 140, to a case in which a passenger was put off the train on the ground that his ticket had expired.

So a time limit in a through ticket sold at less than local rates which is printed on the ticket is held binding on the purchaser, in *Shedd v. Troy & B. R. Co.* 40 Vt. 88.

And an excursion ticket at reduced fare, with a condition as to time limit, binds the passenger according to its terms. *Farewell v. Grand Trunk R. Co.* 15 U. C. C. P. 497.

The question as to the right of one who has purchased a through ticket for less than the fare charged for the same distance on separate tickets for portions of the trip does not depend upon his knowledge at the time of the purchase of his ticket of the difference in price between a through ticket and the corresponding tickets for separate portions of the trip. *Cheney v. Boston & M. R. Co.* 11 Met. 121, 45 Am. Dec. 190.

In this case, however, it appears that the passenger was fully apprised of the rules as to continuous passage on such ticket and the different rates of fare before he stopped off and claimed the right to continue on another train.

In *Johnson v. Philadelphia, W. & B. R. Co.*, 68 Md. 107, the right to change trains on a ticket sold at a reduced rate with a condition that it should

be good only for a continuous passage is denied. The court treats the ticket as a contract and does not touch the question of the passenger's notice of the conditions.

A limitation in an excursion ticket to the effect that it should not be good on certain trains was held binding in *Nolan v. New York, N. H. & H. R. Co.*, 9 Jones & S. 541, but without any discussion of the question of notice.

So it was held to be a reasonable regulation that an excursion ticket should be good only on an excursion train. *McRea v. Wilmington & W. R. Co.*, 88 N. C. 523, 45 Am. Rep. 745. And the court declared that in buying his ticket a passenger "should inform himself as to the usual mode of travel on the road," and that he must travel in accordance with the custom of the road.

Similar language was used in *Chicago & A. R. Co. v. Randolph*, 53 Ill. 515, 5 Am. Rep. 60, but in that case there was no question of notice by the ticket, but there was a question as to the right of the passenger to have a train stopped to let him off.

That a passenger is bound to inform himself of the rules and regulations of the company governing the transit of trains is declared in *Dietrich v. Pennsylvania R. Co.*, 71 Pa. 422, 10 Am. Rep. 711, but in this case there was no question of notice by conditions on a ticket, as the passenger knew of the regulations in question.

Somewhat connected with this subject of notice of conditions on tickets is the decision that where second-class tickets were given to a man who paid for first-class tickets, it was held that he was not chargeable with negligence in failing to discover the fact before attempting to use the tickets. *St. Louis, A. & T. R. Co. v. Mackie*, 1 L. R. A. 687, 71 Tex. 497.

Also that a passenger who, by mistake of the ticket agent, is given a ticket for the wrong route is not necessarily negligent in failing to discover the mistake before objection is made to the ticket by the conductor to whom he tenders it. *Gulf, C. & S. F. R. Co. v. Rather*, 3 Tex. Civ. App. 72.

A large number of other cases, like some of those above cited, have assumed that a passenger was charged with notice of conditions in railway tickets, or that his knowledge of such conditions was immaterial, without discussing at all the ques-

the issue of this contract ticket, and freight at current rates for every kind of property (except pictures, statuary, and valuables of any description, upon which one per cent will be charged) is paid." "(7) All questions arising on this ticket shall be decided according to English law, with reference to which this contract is made."

The signature of Thomas Bruce Ismay, for the steam company, is printed. The father of the two young ladies who were passengers bought the ticket. Neither he nor any of the three passengers read it, or knew its contents. The father and daughters had abundant opportunity to do so. The steamship company claims that, under the third condition, it is not liable for injury to any passenger's baggage which arises from perils of the sea or from negligence in navigation of the steamer or any other vessel, and that, under the fourth condition, the amount of liability to a passenger for injury to his baggage is limited to £10, unless the value of the same in excess of that sum was declared when or before the ticket was issued and freight was paid. No declaration was made in their case. The seventh condition specifies that the contract is an English one, and has particular reference to the limitation in regard to liability for negligence.

The contract was made in London or in Liverpool, where the shipowner had a place of business, between a British corporation, which was the shipowner, and a citizen of the United States. The contract was for the transportation, upon the high seas, of passengers and their baggage, from the city of Liverpool to the city of New York; and, if the statement that it was made with reference to English law had been omitted, nothing in the contract would have indicated an intent that it was to be controlled by the law of the United States. Under such circumstances, it was an English contract, and gov-

erned by the law of England. "The general rule that the nature, the obligation, and the interpretation of a contract are to be governed by the law of the place where it is made, unless the parties, at the time of making it, have some other law in view, requires a contract of affreightment, made in one country, between citizens or residents thereof, and the performance of which begins there, to be governed by the law of that country, unless the parties, when entering into the contract, clearly manifest a mutual intention that it shall be governed by the law of some other country." *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* 129 U. S. 897, 32 L. ed. 788; *Ponseca v. Cunard SS. Co.* 153 Mass. 553, 12 L. R. A. 840.

It is well known, and in the *Liverpool & G. W. Steam Co. Case* the Supreme Court has declared, that, by the law of England, common carriers, by land or sea, except so far as they are controlled by the provisions of the Railway and Canal Traffic Act of 1854, are permitted to exempt themselves, by express contract, from responsibility for losses occasioned by the negligence of their servants. A like exemption from other portions of their common-law responsibility can also be made by special contract. As negligence has been found not to have existed, it will not be necessary to dwell longer upon the part of the third condition which purports to relieve the carrier from responsibility occasioned by its servant's negligence.

In the absence of a special contract, the common carrier of merchandise was only exempted from liability for those losses which were occasioned by the act of God or the public enemy. *York Mfg. Co. v. Illinois Cent. R. Co.* 70 U. S. 8 Wall. 107, 18 L. ed. 170. The third condition extends these two exemptions to those occasioned by diverse other causes, one of them being "the perils of the sea." While it has been thought that

tion of notice. These are cases as to the right of stop-over, the limitation of time, continuous passage, or similar matters relating to the carrier's rules and regulations governing transportation. As to all this class of matters, the cases quite uniformly hold the passenger bound by such regulations, if reasonable, and seem to decide or assume that it is the passenger's business to inform himself concerning them and therefore that the terms of his ticket may be sufficient to charge him with knowledge of them.

As it is clear that the right of passage purchased by a passenger must be subject to reasonable regulations, such as those distinguishing between local and through trains, and to some limitation of time, there is some reason in holding the passenger chargeable with notice of conditions of this kind without holding him chargeable with notice of conditions which go beyond the mere regulation of passage and undertake to make a substantial change in the nature of his contract. At all events considering all the cases together in which the question is decided expressly or by implication it seems to be established, (1) that conditions on railroad tickets are binding on a passenger, when they refer to reasonable regulations of transportation; (2) that when tickets are purchased at reduced rates, regulations may be reasonable and binding and notice thereof on the tickets sufficient to bind 23 L. R. A.

the passenger in respect to matters in which he would not be bound if he purchased an ordinary ticket at full fare.

While the distinction above suggested does not seem to have been made in any of the cases, it seems to be necessary to harmonize them and at the same time to be a reasonable one. It is somewhat similar in the main case between conditions attempting to destroy the substance of the carrier's liability, and those in respect to the amount of liability for injuries to baggage. It will be noticed, however, that this limitation of liability in the main case in respect to baggage by notice on the back of the ticket is contrary to the decisions which have been made in respect to such notices on railroad tickets.

The validity of a stipulation in a free pass that the carrier shall not be liable for injury to personal property is upheld in *Mobile & O. R. Co. v. Hopkins*, 41 Ala. 488, 94 Am. Dec. 607, but the question whether such stipulation is constructive notice to the passenger is not touched upon.

A notice on the back of a free pass is held to constitute a contract when the pass is accepted. *Illinois Cent. R. Co. v. Read*, 37 Ill. 484, 87 Am. Dec. 280.

As to rights of passenger on pass, see note to *Muldoon v. Seattle City R. Co.* (Wash.) 23 L. R. A. 794. R. A. R.

the term "perils of the sea" had the same and no larger meaning than losses or injuries "by the act of God," it is now generally considered that it has a broader signification, and includes calamities which were not caused by a violence or convulsion of nature, such as lightning, flood, or tempest.

In *Parsons on Shipping* (vol. 1, p. 255), the learned author states what he conceives to be the proper definition, and the reason for it, as follows: "The 'act of God' is limited to causes in which no man has any agency whatever, because it was never intended to raise in the case of the common carrier the dangerous and difficult question whether he had any agency in causing the loss, for, if this were possible, he should be held."

In this case the district court thought that the injury was one from which the steamship could have turned aside. It certainly was not a peril of the same class as lightning or hurricane, from which there is no escape, and to call it an "act of God" would be a strained use of language. When, therefore, the third condition excludes from the carrier's liability losses from those perils of the sea which are not included in those occasioned by the act of God, it excluded what was included upon the face of the contract.

The next question is whether this limitation is one which was entered into by express contract, or is a mere notice by the carrier of a desired limitation. The reported English cases do not contain a construction of this ticket, or of a ticket of the same character. There are cases which construe the effect of conditions which the passenger has admitted by his signature (*Peninsular & O. Steam Nav. Co. v. Shand*, 8 Moore, P. C. N. S. 272), and also the legal meaning of a railroad pasteboard ticket or check, one side of which contains merely the names of the towns where the passenger's journey begins and ends, and the other side containing limitations upon the carrier's responsibility (*Henderson v. Stevenson*, 2 H. L. Sc. App. Cas. 470). Other cases construe the meaning of checks or vouchers for the return of parcels deposited in a railway office for temporary safe-keeping (*Parker v. Southeastern R. Co.* L. R. 2 C. P. Div. 416; *Harris v. Great Western R. Co.* L. R. 1 Q. B. Div. 515), and others construe the meaning of conditions contained upon the face of a railway ticket, or in a book of railway coupon tickets (*Zuns v. Southeastern R. Co.* L. R. 4 Q. B. 539; *Burke v. Southeastern R. Co.* L. R. 5 C. P. Div. 1); but no case declares the legal construction which the English courts place upon important conditions attached to a contract which expresses, in legal phrase, the undertaking of a carrier by sea to transport a passenger and his baggage from one point to another, the conditions not being referred to in the body of the contract, but referred to upon the bottom of the face of the paper by the words "See back," and indorsed upon the back of the ticket, the signature or assent of the passenger not appearing upon the paper. The general principle which controlled the various cases, and which is plainly stated in the discussions of the judge in 28 L. R. A.

Henderson v. Stevenson, *supra*, is that courts should insist upon the importance of a distinct declaration or reference by the carrier in that part of the ticket which contains his contract with respect to limitations in derogation of his common-law liability; so that it may manifestly appear that such limitations could not have been misunderstood and were accepted by the passenger. These exemptions must be directly stated, or the assent of the passenger will not be inferred. Attempts, "by indirection," to obtain an assent to exemptions, will not, unless the attempt is positively sanctioned by the passenger, receive the favor of courts. The principle is the one which is the foundation of the important decision in *Michigan Cent. R. Co. v. Mineral Springs Mfg. Co.* 88 U. S. 16 Wall. 818, 21 L. ed. 297. But there is a distinction between regulations for the conduct of business and limitations upon common-law obligations, and this rule is not intended to be so stringent as to prevent the carrier from prescribing reasonable regulations for the conduct of his business, not in derogation of his responsibility at common law, for the purpose of preventing imposition upon him, and of establishing proper charges adequate to the extent of the risks to be undertaken, provided such regulations are brought to the knowledge of the person who intrusts merchandise to the carrier. *York Mfg. Co. v. Illinois Cent. R. Co.* 70 U. S. 3 Wall. 107, 18 L. ed. 170.

Turning now to the ticket which was issued to the libelants, we find that certain directions are expressed in the body of the ticket, which, with two notices to passengers, are expressly said to form part of the contract, and no other condition is referred to in the body of the agreement. At the foot of the page, by the words "See back," the purchaser is referred, under the heading "Notice to Passengers," to important modifications of the carrier's liability as expressed in the face of the contract. If these conditions are to be construed as a part of the express contract, they make a clumsily and artificially drawn document. They are of such a vital character that they should have been embodied in the contract, or unmistakably made a part of it. There is no reason why agreements of this nature should not be so distinctly and definitely stated or referred to in the body of the contract as to remove all uncertainty on the part of courts, or cause of complaint on the part of the passenger. The modifications in the third condition of the agreement entered into upon the face of the ticket, and which did not allude to these proposed modifications, are so great that they cannot be considered to have been made by special contract, in the absence of evidence of positive assent upon the part of the purchaser of the ticket or of the passenger.

The regulation in regard to a limitation of liability for the value of baggage of which the carrier is not informed, and the amount of a risk for which he is not paid, rests upon a different principle. The common-law liability of common carriers for the safety of baggage of travelers is not exactly defined, but it is not unlimited. The carrier is not

to be called upon to take an unusual quantity of trunks, as the baggage of a single traveler, nor is he under obligations to pay large sums for the value of articles which are in excess of a traveler's ordinary wants. The rule which the common law laid down upon this subject is well understood. "The contract to carry the person only implies an undertaking to transport such a limited quantity of articles as are ordinarily taken by travelers for their personal use and convenience; such quantity depending, of course, upon the station of the party, the object and length of his journey, and many other considerations." *Hannibal & St. J. R. Co. v. Swift*, 79 U. S. 12 Wall. 272, 20 L. ed. 428. And therefore, as this obligation on the part of the carrier is not unlimited, but is at common law not exactly defined, the carrier has a right, "by reasonable regulations, of which the passenger has knowledge," to define and make certain to both parties the extent of an implied undertaking to carry baggage (*New York Cent. & H. R. R. Co. v. Fraloff*, 100 U. S. 29, 25 L. ed. 534), and of an express undertaking, where the contract includes baggage by name; for an express contract which simply mentions baggage would not be construed to mean baggage unlimited in quantity or in value. By the contract in question the amount of space which the baggage could occupy was expressly provided for. The power of the carrier to define by regulations, communicated to the traveler, the amount of his pecuniary liability for baggage, has been well understood in the law of England and in this country. "It is undoubtedly competent for carriers of passengers by specific regulations, distinctly brought to the knowledge of the passenger, which are reasonable in their character, and not inconsistent with any statute or their duty to the public, to protect themselves against liability, as insurers for baggage not exceeding a fixed amount in value, except upon additional compensation, proportioned to the risk." *New York Cent. & H. R. R. Co. v. Fraloff*, *supra*.

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The regulations or the notices upon the tickets or contracts which bring this class of limitations home to the knowledge of the passenger are of a very different character from the notices of which we have been speaking, and which limit or attempt to annihilate the common-law responsibility of a carrier. This class of regulations is intended to make certain what is uncertain, to define what is otherwise indefinite, to prevent mistakes, complaint, and litigation, and to promote fairness of dealing. The ticket was purchased by the father of the young lady passengers, a gentleman of large business experience, who had frequently used similar tickets. He kept the ticket for a while in his office in London, but did not read it, and had never read the tickets which he had purchased for his own use. He had abundant opportunity to read it, and to make himself familiar with the reasonable and ordinarily well-understood regulations of carriers by land or sea in regard to baggage. The regulation was distinctly brought to the knowledge of Mr. Potter by his reception of the ticket (which was far more than the ordinary railroad check, indicating the two points between which the passenger is to be carried), in ample time to make himself acquainted with its regulations. He was not hurried on board with no opportunity to know the rules of the company, and it cannot be safely asserted that with adequate means of knowledge placed in his hands, and with ample opportunity to possess himself of the information which the carrier gave him, knowledge of the regulations was not brought home to him.

The decree of the District Court is modified, with costs of this court, and the cause is remanded to the District Court, with instructions to enter a decree in favor of each libellant for the sum of \$48.67, and interest from January 25, 1892, and their costs in the District Court.

Reversed 166 U. S. 375, 41 L. ed. 1039.

KENTUCKY COURT OF APPEALS.

James CROAN *et al.*, Appts.,
v.PHELPS *et al.*

(14 Ky. L. Rep. 915.)

1. A statute providing that "bastards shall be capable of inheriting and transmitting an inheritance on the part of or to the mother" does not provide for the transmission of the estate through the mother to her collateral kindred.

2. The word "kindred," in a statute providing for the descent of property in the absence of kindred, means those who can lawfully inherit, and does not include illegitimate blood relatives, unless they are given the right by statute to inherit.

(March 26, 1893.)

APPEAL by James Croan and others from a judgment of the Circuit Court for Bullitt County distributing the estate of Wesley Phelps, deceased, to the devisees of his widow rather than to the collateral heirs of his deceased mother, he being an illegitimate child.

Affirmed.

The facts are stated in the opinion.

Messrs. Charles Carroll and J. W. Croan for appellants.

Messrs. Fairleigh & Straus for appellees.

Haselrigg, J., delivered the opinion of the court:

Wesley Phelps, at quite an advanced age, died intestate, and without issue, the owner of a large estate in Bullitt county, Ky. The

proof is clear that he was the illegitimate son of Alice McDaniel, whose death preceded his some years. He left a widow, who claims the entire property. It is also claimed by the descendants of the brothers and sisters of Phelps' mother, Alice; and the sole question presented upon this appeal is, Who takes the property? The lower court gave it to the widow, or rather to her devisees and legatees, she having died after instituting this action. The appellees base their claim to the estate under subsection 9, § 1, chap. 81, of the General Statutes, which provides that, if there be neither paternal nor maternal kindred, the whole estate shall go to the husband or wife of the intestate. They say that by "kindred" is meant such as can lawfully inherit. The mother being dead, and there being no legal father, and no provision for the transmission of inheritance from a bastard to collaterals, the appellees contend it is as if the paternal and maternal kindred were wholly extinct, and that the contingency arose upon which the widow became entitled to take the whole estate. The appellants contend that, under section 5 of the statute quoted, the mother, if living, would have taken, and that her brothers and sisters or their descendants must now take in her stead; that the intestate was capable under the statute of transmitting the estate to and through his mother on to them. That section is as follows: "Bastards shall be capable of inheriting and transmitting an inheritance on the part of or to the mother; and bastards of the same mother shall be capable of inheriting and transmitting an inheritance on the part of each other, as if such

NOTE.—*Inheritance by, through, or from illegitimate persons.*

On the part of the mother.

In construing the phrase illegitimates may inherit and transmit inheritance "on the part of the mother," there is some conflict of authority, many cases holding with the main case for a strict construction of this statute and extending its provisions no farther than absolutely required under the words of the act, as in Jackson v. Jackson, 78 Ky. 290, 30 Am. Rep. 246; Scroggin v. Allan, 2 Dana, 363; Allen v. Ramsey, 1 Met. (Ky.) 636; Berry v. Owens, 5 Bush, 432; Bent v. St. Vrain, 30 Mo. 268; Gibson v. Moulton, 2 Disney (Ohio) 158; Curtis v. Hewins, 11 Met. 294; Grubb's App. 58 Pa. 56; Steckel's App. 64 Pa. 492; Stover v. Boswell, 3 Dana, 233; Sutton v. Sutton, 87 Ky. 216; Remington v. Lewis, 8 B. Mon. 608; Little v. Lake, 8 Ohio, 239.

But in Lewis v. Eutsler, 4 Ohio St. 354, the court disapproves the decision of Little v. Lake, *supra*, and claims that any relative on the part of the mother could inherit of such child, but that was not necessarily involved in that case.

And this phrase is given a strict construction in Texas on account of another clause in the same section of the same statute, which provides that they may take personal estate of their mother as though lawfully begotten, the court holding that this limitation to a personal estate gives a qualifying construction to the phrase "on the part of the mother," and that his property does not descend to his brothers and sisters. Blair v. Adams, 50 Fed. Rep. 243.

And in Bacon v. McBride, 33 Vt. 535, it was held that it was intended by this phrase, that illegiti-

mates should only inherit from the mother and she from them, virtually overruling the case of Burlington v. Fosby, 6 Vt. 83, 27 Am. Dec. 536, which held that illegitimates might inherit from each other.

To the contrary, other states construe this phrase liberally and under it illegitimates inherit property from or through their mother and transmit it to or through their mother as though they were legitimate. Grundy v. Hardfield, 16 R. I. 579; Briggs v. Greene, 10 R. I. 495; Garland v. Harrison, 8 Leigh, 366; Bennett v. Toler, 15 Gratt. 583, 78 Am. Dec. 638; Brewer v. Blougher, 30 U. S. 14 Pet. 173, 10 L. ed. 408; Stevenson v. Sullivan, 18 U. S. 5 Wheat. 207, 5 L. ed. 70; Kingsley v. Broward, 19 Fla. 722.

In Dickinson's App., 43 Conn. 491, 19 Am. Rep. 553, it discusses that question on the part of the mother, whilst it does not appear that such a statute was in force in Connecticut and the court refused to follow the strict construction based upon such a statute by the courts which held that it does not mean through mother.

These cases will be found *infra* under the appropriate subdivisions.

Marriages null.

Under statute legitimating the issue of a marriage deemed null in law, the children may inherit as if legitimate. Hartwell v. Jackson, 7 Tex. 578; Dyer v. Brannock, 66 Mo. 391, 27 Am. Rep. 859; Buchanan v. Harvey, 35 Mo. 376; Wright v. Lore, 12 Ohio St. 619; Abston v. Abston, 1 La. Ann. 137; Workman v. Harold (Ky.) Jan. 20, 1887; Heckert v. Hiles (Va.) Jan. 11, 1894; Eubanks v. Banks, 34 Ga. 407; Harris v. Harris (Ky.) Jan. 18, 1887; Sneed v. Ewing, 5 J. J. Marsh. 460, 22 Am. Dec. 41.

bastards were born in lawful wedlock of the same parents."

It is insisted that the expression "on the part of or to the mother" must be construed liberally, and as meaning transmissibility of estate, not only "to," but through, the mother, and on to her collateral kindred. In determining the meaning of these words and the proper legal exposition of the statute, we must keep in mind that by the rules of the common law a bastard had no inheritable blood, and could neither receive from nor transmit an inheritance to his father, mother, brothers, or sisters. The Kentucky Statute of Descents of December, 1796, was an innovation on the common law, and reads as follows: "Bastards also shall be capable of inheriting, or transmitting inheritance, on the part of their mother, in like manner as if they had been lawfully begotten of such mother." This was a copy of the Virginia Statute of 1787, and with reference to which

the Supreme Court of the United States, in *Stevenson v. Sullivan*, 18 U. S. 5 Wheat. 255, 5 L. ed. 82, said: "We understand it to be that they [bastards] shall have a capacity to take real estate by descent immediately or through their mother in the ascending line, and transmit the same to their line as descendants, in like manner as if they were legitimate." The expression "on the part of their mother" was not held to confer the right to inherit on the mother from her bastard child, but the whole effect of the section and this expression was simply to enable the bastard to take by inheritance from or through the mother in the direct line, and to pass that inheritance with the same directness to his own issue; and the illegitimate brothers in that case were denied the right to inherit from their legitimate brother. While quasi legitimate in some limited respects, they were nevertheless said to be bastards in all others, and as such could have neither father,

By the Spanish law, children begotten after both parents know of impediments to the marriage are illegitimate, and cannot inherit, but may where either party is ignorant. *Patton v. Philadelphia & New Orleans*, 1 La. Ann. 98.

Legitimizing illegitimates by statute and recognition.

Subsequent marriage and recognition legitimate the children under a statute so providing, and they may inherit as though legitimate. *United States v. Skam*, 5 Cranch, C. C. 387; *Ash v. Way*, 2 Gratt. 204; *Caldwell v. Miller*, 44 Kan. 12; *Rice v. Efford*, 3 Hen. & M. 225; *Jackson v. Moore*, 8 Dana, 170.

Although born before the act legalizing such children. *Sleigh v. Strider*, 5 Cal. (Va.) 439.

The New York act providing that illegitimate children in default of lawful issue may inherit real and personal property from their mother as if legitimate does not affect any vested right as the act so provides. *Ferrie v. The Public Administrator*, 3 Bradf. 249.

The child born within ten months after the death of the intestate, from his widow, inherits from his father under Ky. Gen. Stat., chap. 31, providing for such inheritance. *Messie v. Hiatt*, 68 Ky. 814.

Under a statute legitimating the issue where parents marry and recognize the offspring, the recognition must take place after passage of act. *Edwards v. Gaulding*, 38 Miss. 118; *Brown v. Belmarde*, 3 Kan. 42; *Stevenson v. Sullivan*, 18 U. S. 5 Wheat. 207, 5 L. ed. 70; *Hartinger v. Ferring*, 24 Fed. Rep. 15.

And the bastard cannot inherit from his father who does not comply with the statutes, in regard to his illegitimate children. *Dupre v. Caruthers*, 6 La. Ann. 156; *Willoughby v. Motley*, 88 Ky. 207.

A child may be legitimated by the act of legislature, and rendered capable of inheriting. *Beall v. Beall*, 8 Ga. 210; *Shelton v. Wright*, 25 Ga. 633; *McGinnigle v. McKee*, 77 Pa. 81, 18 Am. Rep. 428; *Lee v. Shankle*, 51 N. C. 313; *Miller's App.* 52 Pa. 113.

Although the act does not say they are legitimated to the person who is recited in the act to be their father. *Perry v. Newsum*, 36 N. C. 23.

But in *Edmondson v. Dyson*, 7 Ga. 512, where the child was made legitimate and capable of inheriting without being legitimated to any particular person, she could not inherit as the act did not say from whom she could inherit.

The act of congress does not repeal the Utah act, authorizing children of polygamous marriages to inherit. *Chapman v. Handley*, 7 Utah, 49; *Cope v. Cope*, 137 U. S. 682, 34 L. ed. 832, rev'g 7 Utah, 68, and *Re Pratt's Estate*, Id. 273.

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An illegitimate child takes from his father where there are no brothers and sisters under 1 Ind. Rev. Stat. 1876, providing for such descent if there are no resident heirs in the United States. *Borroughs v. Adams*, 78 Ind. 160.

Bastard children legitimated by decree of the county court, under Tenn. Code, chap. 3640-3642, inherit as if born in wedlock. *McKanne v. Baskerville*, 36 Tenn. 459.

The collaterals who have recognized the child of a married woman as legitimate cannot thereafter question his right of succession. *Saloy's Succession*, 44 La. Ann. 433.

Inheritance by illegitimate from his mother.

Some states provide that illegitimate children may take and inherit from their mother. *Opdyke's App.* 49 Pa. 373; *Jenkins v. Drane*, 121 Ill. 217; *Farie v. Dawes*, 8 Md. Ch. 230; *Blacklaws v. Mline*, 82 Ill. 508, 15 Am. Rep. 339; *Goodwin v. Colby*, 64 N. H. 401; *McCalla v. Bane*, 45 Fed. Rep. 823; *McGuire v. Brown*, 41 Iowa, 650.

In *Helms v. Franciscus*, 2 Bland, Ch. 544, 20 Am. Dec. 402, it was stated in 1818, that bastards have the capacity to take from their mother as next of kin, but the statute is not given, and this is not the question involved.

An illegitimate child can inherit from her mother in Connecticut. *Heath v. White*, 5 Conn. 223.

And most states now provide by statute that an illegitimate child may inherit from the mother as though legitimate.

Inheritance by illegitimate under will.

By the term "child or children" means legitimate children. *Cartwright v. Vawdry*, 5 Ves. Jr. 530; *Orthwein v. Thomas* (Ill.) Sept. 27, 1887; *Swaine v. Kennersley*, 1 Ves. & B. 466; *Godfrey v. Davis*, 6 Ves. Jr. 43; *Porter v. Porter*, 7 How. (Miss.) 106.

By the term "issue" is meant legitimate children. *Black v. Cartmell*, 10 B. Mon. 183; *Kingsley v. Broward*, 19 Fla. 722.

But an illegitimate child will take under a devise to a daughter for life, and at her death to her children, under Va. Rev. Code, 355, providing that bastards shall be capable of inheriting and transmitting on the part of the mother as if lawfully begotten. *Bennett v. Toler*, 15 Gratt. 583, 78 Am. Dec. 638.

And where a devise was to his daughter Mary, and after her death to such of her children as she should by will appoint, those born before the will could take, although the mother married her de-

brothers, nor sisters, and their inheritable blood was confined within the narrow limits of the very letter of the law. This restricted construction was followed by the Kentucky courts until the Act of 1840, though not without a strong dissent in *Seroggin v. Allen*, 2 Dana, 368 (decided in 1834). This act provided "that the mother shall be and is hereby rendered capable to inherit as heir or distributee of her bastard child; and brothers and sisters of the same mother born out of wedlock shall be capable to inherit, and take by descent a distribution from each other, as though born in wedlock, and as brothers and sisters of the whole blood." And notwithstanding the seeming generous intention of the statute to make the illegitimate child legitimate *ex parte materna* to all intents and purposes as though born in wedlock yet in *Remington v. Lewis*, 8 B. Mon. 606 (decided in 1848), the court used this language: "It is impossible, upon any admissible construc-

tion of the language of the act, to consider it as establishing a legal relationship for the purpose of inheritance between a bastard and any other of his bastard relations but his mother and such other illegitimate issue as she may have." It does not operate to establish a right either in the legitimate children to inherit from the legitimate or in the illegitimate children to inherit from the illegitimate. "Under this construction," says the court, "the bastard has, in view of the law of descents, no brothers or sisters except the illegitimate children of the same mother, and no other collateral kindred who can take his estate as heirs; and upon his death without issue, without lineal maternal ancestor alive, and without brother or sister, the illegitimate issue of his mother, or the descendants, his wife, if he leaves one, is his heir, under the fourteenth section of the statute, and not the legitimate son of his mother."

If the legitimate son of the mother of the

ceased sister's husband. *Crook v. Hill*, L. R. 6 Ch. 311, 40 L. J. Ch. 216, 24 L. T. N. S. 488, 19 Week. Rep. 649.

Illegitimate children born after the date of the will do not take as against the will. *Kent v. Barker*, 2 Gray, 536; *Mortimer v. West*, 3 Russ. 370, 5 L. J. Ch. 131; *Metham v. Devon*, 1 P. Wms. 529.

But an after-born child takes his portion without regard to the will, under N. Y. Laws 1890, chap. 22, providing that where a child is born to the testator, and after making a will, unprovided for in it, they shall take under statute of descent and distribution. *Gardner v. Heyer*, 2 Paige, 11, 2 L. ed. 792; *Bunce v. Bunce*, 14 N. Y. Supp. 659, 20 N. Y. Civ. Proc. Rep. 332.

And the same was held in *Milburn v. Milburn*, 60 Iowa, 411; *Bunce v. Bunce*, *supra*; *McCulloch's App.* 113 Pa. 247.

Under the South Carolina Act of 1795, availing gifts to a mistress or the bastard children of all over $\frac{1}{4}$ one fourth, where the wife and legitimate children do not avoid it, the next of kin cannot. *Brethaupt v. Bauskett*, 1 Rich. Eq. 465; *Ford v. McElroy*, Id. 474.

And under this act the excess only is void. *Bouknight v. Brown*, 16 S. C. 155.

And this act does not control a divorced husband who is the father of legitimate children. *Hull v. Hull*, 2 Strobb. Eq. 174.

Illegitimate children may take under a will, where they are sufficiently described. *Bentley v. Blizard*, 4 Jur. N. S. 652; *Clifton v. Goodburn*, L. E. 6 Eq. 273; *Beachcroft v. Beachcroft*, 1 Madd. 430; *Stewart v. Stewart*, 51 N. J. Eq. 398; *Rivers's Case*, 1 Atk. 410; *Dawson v. Dawson*, 6 Madd. 292.

And a devise to children which I may have living at my decease, by A. was sustained. *Wilkinson v. Adam*, 1 Vea. & B. 422, affirmed 12 Price, 470.

A bequest to a child of which a woman was *en ventre* was sustained. *Gordon v. Gordon*, 1 Meriv. 141; *Medworth v. Pope*, 27 Beav. 71; *Pratt v. Flamer*, 5 Harr. & J. 10.

But an illegitimate child not begotten cannot take under a will by any description. *Re Connor* 2 Jones & L. 456; *Kingsley v. Broward*, 19 Fla. 732; *Pratt v. Mathew*, 23 Beav. 823, 2 Jur. N. S. 364, 25 L. J. Ch. 409, 4 Week. Rep. 418; *Blodwell v. Edwards*, 2 Cro. Eliz. 509, F. Moore, 430; *Wilkinson v. Wilkinson*, 1 Young & C. Ch. Cas. 667, 6 Jur. 921.

And in *Earle v. Wilson*, 17 Ves. Jr. 528, it was held that a bastard could not take as the issue of a particular person before its birth.

Notwithstanding a declaration in a devise that the testator's daughter is illegitimate, it may be 23 L. R. A.

shown that she was legitimate, so as to take under the devise. *Ehringhaus v. Cartwright*, 30 N. C. 39.

Inheritance by illegitimates from brothers and sisters.

Under a statute providing that a bastard shall inherit or transmit inheritance on the part of the mother as though legitimate, illegitimate children may inherit from each other. *Garland v. Harrison*, 8 Leigh, 368; *Burlington v. Fosby*, 6 Vt. 83, 27 Am. Dec. 535; *Briggs v. Greene*, 10 R. I. 485.

See subdivision "*in the part of the mother.*"

They may inherit from each other under Ill. Stat. 1853, providing that the property vests in next of kin to the mother. *Miller v. Williams*, 66 Ill. 91; *Rogers v. Weller*, 5 Bias. 169.

They inherit from each other under Md. Act 1825, providing that they inherit from their mothers as if born in lawful wedlock. *Brewer v. Blougher*, 39 U. S. 14 Pet. 178, 10 L. ed. 406.

And in Connecticut they are heirs of each other. *Brown v. Dye*, 2 Root, 230.

And illegitimates inherit from each other under N. C. Bat. Rev., chap. 35, providing that the estate descends to such person as would inherit if he was born in wedlock. *McBryde v. Patterson*, 73 N. C. 412.

Where the bastard dies intestate leaving the daughter of a bastard brother born of the same mother, and bastard's widow, they take his property under N. C. Act 1836, providing that if natural born children die intestate without issue, his estate is divided among his brothers and sisters born of the same mother, as if born in lawful wedlock. *Coor v. Starling*, 54 N. C. 243.

And a child may inherit through his grandmother his brother's estate in Connecticut where a bastard has inheritable blood, for the purpose of collateral as well as lineal descent through him. *Dickinson's App.*, 42 Conn. 491, 19 Am. Rep. 553.

But in *Woltemate's App.*, 36 Pa. 219, it was held that they do not inherit from each other under Pa. Act 1855, providing that they and their mother shall respectively take or inherit from each other.

And do not take as against a husband, under Tenn. Code, § 2423, providing that if there is no wife or husband then it goes to their mother, and if none then to brothers and sisters by the mother. *Scoggins v. Barnes*, 8 Baxt. 560.

Illegitimates do not inherit from legitimate children of the same mother under a statute providing that bastards shall be capable of inheriting and transmitting inheritance on the part of the mother. *Bacon v. McBride*, 32 Vt. 565.

bastard cannot inherit his estate through their common mother, how can the collateral kindred of the mother in his case hope to do so? It cannot be contended that our statute is more liberal than that of 1840. Indeed, it is only by a forced construction that the mother herself can be said to inherit from her bastard child. The plain Act of 1840 confers for the first time that right on her, in its opening clause, thus: "That the mother shall be and is hereby rendered capable to inherit as heir of her bastard child" which was not inserted in the Revised Statutes (1852) or the General Statutes (1878). Instead thereof, the old eighteenth section of the Kentucky Act of 1796, copied from the Virginia Act of 1787, was adopted with the interpolation of the words "or to" after the words "on the part of." And suppose we adopt the construction given this statute by the Supreme Court of the United States in *Stevenson v. Sullivan*, *supra*, and followed by a majority of this court in

Soroggin v. Allen, above quoted, we would have this state of the case: Bastards shall be capable of taking real property by descent immediately or through their mother, or on the part of their mother, and of transmitting that same estate without alleviation to their own issue and "to the mother." The old statutes were consistent and harmonious, simply empowering the bastard, though within narrow limits, to inherit property from his mother, which under the common law he could not do, and transmit the same to his own issue. Now, singularly enough, after so inheriting it, he is permitted to transmit it "to the mother" from whom he has just inherited it. The well-known legal meaning of the expression "on the part of the mother," as construed by the courts, must therefore be discarded, and it must be supposed that they were used in the statute in the sense of "from the mother;" hence the meaning is as if the reading was: "Bastards shall be capable of

See subdivision "On the part of the mother," *supra*.

The same was held under Tenn. Act 1819, providing for the descent of property of an illegitimate to brothers and sisters. *Grimes v. Orrand*, 2 Helsk. 286; *Melton v. Davidson*, 86 Tenn. 122; *Woodward v. Duncan*, 1 Coldw. 522.

Inheritance by illegitimates through mother or father.

In some states illegitimates cannot inherit through their mother, from their mother's collaterals. *Jackson v. Jackson*, 78 Ky. 380, 39 Am. Rep. 246; *Allen v. Ramsey*, 1 Met. (Ky.) 635.

And the same was held under a statute providing the estate shall descend to the relatives on the part of the mother. *Gibson v. McNeely*, 11 Ohio St. 181.

And the same was held under Mass. Stat. 1851, providing that he shall be heir of his mother and of any maternal ancestor, and that his issue may take by descent of such ancestor. *Pratt v. Atwood*, 108 Mass. 40.

And cannot inherit from any collateral relative of the mother, under Tenn. Act 1819, providing that if they die intestate without children, his or her brothers take his or her estate. *Brown v. Kerby*, 9 Humph. 460.

And cannot take from collateral kindred of their mother under statute providing that bastards shall be capable of inheriting or of transmitting inheritance on the part of their mother as if born in lawful wedlock. *Gibson v. Moulton*, 2 Disney (Ohio) 158.

And cannot claim his nephew's estate in Massachusetts under statute, providing only for descent from his mother or her lineal ancestors. *Haraden v. Larrabee*, 113 Mass. 480.

But in *Grundy v. Hadfield*, 16 R. I. 579, and *Sutton v. Sutton*, 87 Ky. 216, it was held that they could take from their mother's brother under statute, providing that bastards may inherit or transmit on the part of the mother as if legitimate.

See subdivision, *supra*, "On the part of the mother."

And may take under Ill. Rev. Stat., chap. 80, providing that illegitimate person shall take any estate which the parents might have taken if living. *Jenkins v. Drane*, 121 Ill. 217.

And in Connecticut they inherit and transmit on the part of the mother collaterally like other persons. *Dickinson's App.* 42 Conn. 491, 19 Am. Rep. 652.

Illegitimate children inherit property through the mother equally with legitimates, under Fla. M. C. Dig. p. 470, and Ind. Rev. Stat. 1881, providing 23 L. R. A.

that they shall inherit from the mother as if legitimate. *Parks v. Kimes*, 100 Ind. 148; *Keech v. Enriquez*, 28 Fla. 597.

But such child does not inherit his grandfather's estate through his mother where she died before her father, as N. C. Rev. Stat., chap. 64, provides for the descent of a mother's estate to her legitimate children of which she dies possessed. *Waggoner v. Miller*, 26 N. C. 480.

And cannot inherit from his grandfather through his father under Vt. Gen. Stat., chap. 55, providing that an illegitimate as respects the father shall be capable of inheriting as though born in lawful wedlock. *Safford v. Houghton's Estate*, 48 Vt. 226.

Inheritance by brothers and sisters of mother or father of illegitimate.

The brothers and sisters of the mother of an illegitimate do not inherit under Ohio Act 1821, providing that bastards shall be capable of inheriting or transmitting inheritance on the part of their mother as if born in wedlock. *Little v. Lake*, 8 Ohio, 289. See subdivision *supra*, "On the part of the mother."

And do not inherit under Tex. Rev. Stat., art. 1657, providing that they may inherit from and through their mother. *Blair v. Adams*, 50 Fed. Rep. 248.

And do not inherit under Ind. Rev. Code 1831, providing that in want of father, mother, brothers, and sisters, the estate goes to the wife as at common law he has no father, mother, brothers, or sisters. *Doe v. Bates*, 6 Blackf. 532.

And do not inherit under Pa. Act 1855, providing that the mother and her illegitimate child shall be next of kin to each other. *Grubb's App.* 68 Pa. 55.

And do not inherit under La. Code, which makes no disposition in favor of natural collateral kindred except brothers and sisters and descendants, preferring a wife. *Montegut v. Bacas*, 42 La. Ann. 158.

But the brothers and sisters of a mother inherit the estate of her illegitimate child under Mass. Pub. Stat., chap. 125, providing that his estate goes to the person who would have been entitled through the mother if he had been legitimate. *Parkman v. McCarthy*, 149 Mass. 502.

The brothers and sisters of a father may inherit the estate of an illegitimate child under N. C. Rev. Stat., chap. 38, providing that if such children die after issue his estate descends to his or her brothers born of the same mother. *Sawyer v. Sawyer*, 28 N. C. 407.

inheriting and transmitting an inheritance from or to the mother." And even this solution is well-nigh spoiled by the rejection of the alternative "or" properly used in the old statute, and inserting the word "and" in the present one, thus requiring the same estate to be inherited and transmitted to or from the mother. However, the statute must be construed to mean that bastards shall be capable of inheriting from the mother, and of transmitting an inheritance to the mother, and so must be held to embody, in substance, the provisions of the Acts of 1796 and of 1840, but certainly not to extend or broaden them. In the case of *Sutton v. Sutton*, 87 Ky. 217, some progress was made towards liberalizing this section, and there the legitimate children of a bastard take what he, if alive, would have taken from an illegitimate brother of the same mother. But it was done under the statute making bastards capable of inheriting and transmitting an inheritance on the part

of each other as if born in lawful wedlock of the same parents. There is no such statute in aid of the collateral kindred of the mother. In *Allen v. Ramsey*, 1 Met. (Ky.) 635, and *Berry v. Owens*, 5 Bush, 452, the right of the bastard to inherit from the mother's collateral kindred was very decidedly negatived. In *Jackson v. Jackson*, 78 Ky. 390, 39 Am. Rep. 246, this court, through Judge Cofer, held that the bastard could not inherit through his mother from her ancestors. "It must be regarded," says the court, "as the settled law of this state that a bastard cannot inherit from collaterals from whom his mother, if living, would have inherited; and it would seem to follow, as a necessary logical sequence, that he cannot inherit from the ancestors of his mother." And while the exact question was not before the court, the learned judge added: "And this construction is somewhat fortified by the fact that a bastard can only transmit an inheritance in the as-

Inheritance by mother from an illegitimate child.

A mother may inherit from an illegitimate child, under Va. Code 1819, providing that bastards shall be capable of inheriting on the part of the mother and transmitting on the part of the mother as though lawfully begotten. *Garland v. Harrison*, 8 Leigh, 368. See subdivision *supra*, "On the part of the mother."

And may inherit to the exclusion of a half brother under similar act. *Stover v. Boswell*, 3 Dana, 238.

And may inherit the property of an illegitimate who died without descendants, in Texas. *Pettis v. Dawson*, 83 Tex. 18.

And may inherit under Pennsylvania Act 1855, providing that illegitimate children with their mother may take and inherit from each other as next of kin. *Nell's App.* 63 Pa. 193.

The mother is the sole heir of a bastard who has no brothers or sisters. *Langmade v. Tuggle*, 78 Ga. 770.

A mother inherits to the exclusion of natural brothers, under La. Code, art. 916, providing that the estate of a natural child without posterity, belongs to the father or mother who has acknowledged it. *Nolasco v. Lurty*, 13 La. Ann. 100.

But she cannot inherit from an illegitimate child under North Carolina Act 1799, providing that his estate shall be divided among his brothers and sisters born of the same mother. *Flintham v. Holder*, 16 N. C. 345.

A mother cannot inherit from an illegitimate child under Md. Act 1823, providing that illegitimate children and their issue take from their mother or from each other. *Miller v. Stewart*, 8 Gill, 128.

In *Cooley v. Dewey*, 4 Pick. 98, 16 Am. Dec. 828, and *Jones v. Burden*, 4 Desaus. 420, and *Barwick v. Miller*, Id. 424, in 1814, it was held that a mother could not inherit from her illegitimate child.

The natural parents cannot claim as heir of an illegitimate child who disposes of his estate by will. *Wood v. January*, 15 La. Ann. 516.

Inheritance through illegitimate.

The child of an illegitimate may inherit through his mother under a statute making him heir of his mother or parents. *Magee's Estate*, 68 Cal. 414; *Brewer v. Hamor*, 53 Me. 261.

The uncle and aunt on the father's side inherit the estate of a child of an illegitimate under N. C. Rev. Stat., chap. 32, providing that if such illegitimate die without issue his estate shall descend to 23 L. R. A.

his or her brothers born of the same mother, and the inheritance by collaterals on the maternal side is excluded by the illegitimacy of the mother. *Sawyer v. Sawyer*, 22 N. C. 407.

The child of an illegitimate may inherit through his mother, under Illinois Act 1872, providing that an illegitimate child shall be heir of any person from whom his mother might have inherited if living, and the lawful issue may take her part. *Bales v. Elder*, 118 Ill. 428.

But in *Berry v. Owens*, 5 Bush, 452, it was held that the child of an illegitimate cannot inherit from her mother's brother.

The child of a bastard does not inherit through his mother or from his mother, under Pennsylvania Act 1855, providing that illegitimate children or their mother may take or inherit from each other. *Steckel's App.* 64 Pa. 493.

A child of a bastard does not inherit from a bastard's mother, under Mass. Rev. Stat., chap. 61, § 2, providing that every illegitimate child shall be heir of his mother, as this does not apply to grand-children. *Curtis v. Hewins*, 11 Met. 294.

The brothers and sisters of a bastard do not take the estate of his son as against a bastard's wife, under an act providing that the mother shall not succeed to an estate if there are brothers and sisters of his father as these are not recognized as brothers and sisters. *Scroggin v. Allan*, 2 Dana, 368.

Inheritance by widow or husband of illegitimate.

The widow of an illegitimate takes under Pa. Act 1833, providing that in default of known heirs the estate vests in the widow. *Kennedy's Estate*, 9 Pa. Co. Ct. Rep. 230.

And takes under Mich. Act 1832, providing that in default of issue or lineal descendants, or father, mother, brother, or sister, the husband or wife shall take. *Keeler v. Dawson*, 73 Mich. 600.

And takes under La. Code, art. 911, providing that where deceased has no descendants nor ascendants, nor collaterals, the estate goes to the husband or wife. *Briscoe's Succession*, 2 La. Ann. 268.

And she takes under Ill. Act 1872, providing that on the death of an illegitimate without descendants the estate will vest in the widow or husband. *Evans v. Price*, 118 Ill. 503.

And the husband takes under Maryland Act 1820, providing that if there are no descendants or kindred the estate shall go to the husband or wife. *Southgate v. Aunan*, 31 Md. 113.

But the mother of an illegitimate cannot take under Maine Laws 1821, providing that if there is

cending line, 'to his mother,'—and, to preserve harmony in the construction of the statute, the court was constrained to adopt this confessedly strict construction. Whatever might have been the original intention of the lawmakers towards broadening the inheriting capacity of these innocent off-spring of their

mother's incontinence, it must be confessed that a rather illiberal view of the statutes respecting them has obtained, which, however must now be adhered to.

Let the judgment below giving the estate to the wife's beneficiaries be confirmed.

no kindred the widow shall take. *Hughes v. Decker*, 38 Mo. 153.

Inheritance by legitimate children from illegitimate children of the same mother.

Legitimate children inherit property of illegitimate children of the same mother under N. C. Bat. Rev., chap. 30, providing that when any person shall die leaving none who can claim as heirs his widow shall inherit. *Powers v. Kite*, 33 N. C. 156.

And they inherit in Indiana. *Ellis v. Hatfield*, 20 Ind. 101.

And they inherit under Ala. Code 1886, § 1922, providing the mother, or kindred on the part of the mother in default of descendants of illegitimate, inherit. *Butler v. Elyton Land Co.* 84 Ala. 384.

And they inherit under Ohio Act 1841, providing that bastards shall be capable of inheriting or transmitting inheritance on the part of the mother. *Lewis v. Rutledge*, 4 Ohio St. 354.

And they take under Tennessee Act 1819, providing should bastard die without issue his and her brothers take his estate. *Riley v. Bryd*, 3 Head, 20.

But they do not inherit under Kentucky Act 1840, authorizing illegitimate children to inherit from each other. *Remington v. Lewis*, 8 B. Mon. 606.

But in *Bent v. St. Vrain*, 30 Mo. 263, it was held under Mo. Rev. Code 1845, providing that bastards shall be capable of inheriting and transmitting inheritance on the part of their mother, that the brothers could not take.

And do not inherit under Mississippi Act 1843, providing only for inheritance between legitimates. *Irvine v. Newlin*, 63 Miss. 192.

And do not inherit under a statute providing that this child shall be upon equal footing of other children of the father. *McCormick v. Cantrell*, 7 Yerg. 615.

The grandchildren of the brother of a bastard may inherit his property under Ga. Code 1791-1792, providing that legitimates and illegitimates inherit from the mother, as the Act of 1816 provides that collaterals take as though the deceased was born in wedlock, and the Act of 1859 extends the distribution to collaterals and embraces the children of the intestate's nephew. *Houston v. Davidson*, 45 Ga. 574.

In this note cases in regard to evidence as to legitimacy, and conflict of laws as to who will be held legitimate in certain states are omitted.

I. T.

WEST VIRGINIA SUPREME COURT OF APPEALS.

John H. FISHER

WEST VIRGINIA & PITTSBURGH
R. CO., *Plff. in Err.*

(.....W. Va.....)

*1. A railroad company chartered by the state cannot, without legislative authority, by lease, or by any other contract or arrangement, turn over to another company its road, and the use of its franchises, and thereby exempt itself from responsibility for the conduct and management of the road.

2. A railroad company, as a carrier of passengers, is not an insurer, but its duty is to carry them safely, using the utmost care, as far as human skill, diligence, and foresight can reasonably be required to go, but the passenger must not be guilty of contributory negligence.

3. A passenger is riding on the platform of a car in such a state of intoxication as to be careless and heedless of the danger to which he is exposed. It is the duty of the railroad company after the conductor has notice of his condition and exposure to danger, to use the

ordinary precautions for his safety, such as calling his attention to the danger, and the rules of the company forbidding such exposure, and inviting him to go inside of the car.

4. It is the duty of a passenger unnecessarily riding on the platform of a car in motion to go into the car when requested by the conductor or other person having charge of the train, when there is standing room inside; and if by reason of such refusal, and by going down onto the steps of the car without the knowledge of the conductor or other person having charge of the train, he loses his balance, falls overboard, and is injured, he is guilty of contributory negligence, such as will preclude his recovery for such injury.

5. The question of contributory negligence is a mixed question of law and fact, and while it is a question for the jury to determine, it must be determined by them by applying the law to the facts; and where instructions are given by the court, pertaining to the questions at issue, which propound the law correctly, they cannot be disregarded in reaching their verdict, and if instructions asked for by the plaintiff, and given, are calculated to mislead the jury as to the questions at issue, which are excepted to by the defendant, a verdict in accordance therewith will not be sustained.

*Headnotes by ENGLISH, J.

NOTE.—The duty of carriers toward drunken passengers has been touched in several cases in this series. One somewhat similar to the present being a case of a drunken passenger falling from a moving train, in *Cincinnati, I. St. L. & C. R. Co. v. Cooper* (Ind.) 6 L. R. A. 241.

As to exposure of drunken passenger to danger 33 L. R. A.

by ejection from car, see *Roseman v. Carolina Cent. R. Co.* (N. C.) 19 L. R. A. 327, and *note*.

As to right to remove drunk and disorderly passengers, see *Sullivan v. Old Colony R. Co.* (Mass.) 1 L. R. A. 513, and *note*; *Louisville & N. E. Co. v. Logan* (Ky.) 3 L. R. A. 38.

6. One cannot voluntarily incapacitate himself from ability to exercise ordinary care for his own self-protection, and then set up such inability as an excuse for his failure to use care; and if the intoxication contributed to the injury, as a proximate cause thereof, it is a complete bar to any action for any damages sustained in consequence of it.

(*Holt, J., dissents.*)

(April 11, 1894.)

ERROR to the Circuit Court for Lewis County to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. John Brannon and W. W. Brannon, for plaintiff in error:

Although instructions No. 1 and 2 may be correct as mere abstract propositions of law, they are not based upon the evidence in the case.

Johnson v. Jennings, 10 Gratt. 1, 60 Am. Dec. 823; *Kincheloe v. Tracewells*, 11 Gratt. 587; *Kerr v. Lunsford*, 2 L. R. A. 668, 81 W. Va. 683; *Pasley v. English*, 10 Gratt. 236; *Rea v. Trotter*, 26 Gratt. 594; 1 Barton, Law Pr. 656, and *note 5*.

Where the facts, although undisputed, are of such character that different minds may draw different inferences therefrom as to whether such facts establish negligence, it is a proper question for the jury and not for the court, but the inference of negligence must be a reasonable one, and the question of its reasonableness—that is to say, whether the particular act of negligence charged can be found from the established facts of the case, without reasoning irrationally, and without rejecting common sense as well as the rules of cause and effect, is one exclusively for the court.

Chicago, B. & Q. R. Co. v. Landauer, 86 Neb. 642.

Plaintiff now complains that he was treated by the defendant as a rational and intelligent being. He complains the defendant did not treat him as a child and put him under restraint.

Malcom v. Richmond & D. R. Co. 106 N. C. 63; 2 Wood, Railway Law, 303; Beach, Railway Dig. 1889, p. 205, § 65.

If a passenger violates a reasonable rule, and such violation contributes to his injury, he cannot recover therefor.

Buswell, Personal Injuries, § 156; *Wills v. Lynn & B. R. Co.* 129 Mass. 351.

On the question of exposure of person to danger, see—

Patterson, Railway Accident Law, 272, 273; 2 Beach, Railways, §§ 860, 993; Beach, Contrib. Neg. 149; *Malcom v. Richmond & D. R. Co. supra*; 2 Wood, Railway Law, § 303; *Weber v. Kansas City Cable R. Co.* 7 L. R. A. 819, 100 Mo. 194; *Deering*, Neg. 92; *Dun v. Seaboard & R. Co.* 78 Va. 645, 49 Am. Rep. 388; *Carrioco v. West Virginia Cent. & P. R. Co.* 35 W. Va. 389; *Schouler*, Bailm. § 652, p. 707, *note 3*.

Where it appeared that the plaintiff had been drinking, was riding on the front platform, although without objection, and stepped

to the lower step to permit persons to pass, and that a sudden movement of the car, by which he was injured, was not unusual, and should not have been unexpected, it was held that a nonsuit should have been granted.

Beach, Contrib. Neg. 286, and *note 3*. See also 4 Am. & Eng. Encyclop. Law, p. 78, § 34; *Butcher v. West Virginia & P. R. Co.* 18 L. R. A. 519, 37 W. Va. 180.

Messrs. J. J. Davis and C. C. Higginbotham for defendant in error.

English, J., delivered the opinion of the court:

This was an action of trespass on the case brought by John H. Fisher, an infant acting by his next friend, John S. Fisher, against the West Virginia & Pittsburgh Railroad Company, in the circuit court of Lewis county, to recover from the defendant damages alleged to have been occasioned by the negligence of the defendant in carrying the plaintiff, as a passenger over its road, from the town of Weston to the town of Buckhannon, in this state. The defendant appeared at rules, demurred to the declaration, and pleaded not guilty; also, filed a special plea in writing, setting up therein that at the time the injury occurred, and before that time, the defendant had leased its road to the Baltimore & Ohio Railroad, and the said last-named road was the lessee in possession, and operating the said road, at the time the alleged injury occurred, and should have been made sole defendant, which plea was rejected, and issue was joined upon the plea of not guilty. The case was tried before R. G. Linn, special judge. The defendant's demurrer to the declaration was overruled, and, it appearing that said John H. Fisher was then over the age of twenty-one years, it was ordered that the case proceed in the name of said John H. Fisher. On the 15th day of March, 1893, the case was submitted to a jury, which resulted in a verdict for the plaintiff, assessing his damages at \$3,500; and thereupon the defendant moved the court to set aside the verdict, and grant it a new trial, on the ground that the same was contrary to the instructions of the court and to the evidence, and for other grounds set forth in the bill of exceptions, which motion was overruled; and judgment was rendered for the plaintiff on the verdict, and this writ of error was applied for and obtained.

The first error assigned by the plaintiff in error is that the court erred by rejecting the plea in writing filed by the defendant. This assignment, however, I do not regard as well taken, as the question raised by this plea was before this court in the case of *Ricketts v. Chesapeake & O. R. Co.*, 38 W. Va. 433, 7 L. R. A. 354, in which it was held that "a railroad company chartered by a state cannot, without distinct legislative authority, by lease, or any other contract or arrangement, turn over to another company its road, and the use of its franchises, and thereby exempt itself from responsibility for the conduct and management of the road;" the plea relied on in this case averring that the defendant had leased its road and rolling stock, etc., to the Baltimore & Ohio Rail-

road Company before this injury occurred, and the Baltimore & Ohio Railroad Company was the lessee of the defendant at the time supposed grievance occurred, etc.

The next assignment of error pertains to the action of the court in giving instructions No. 1 and 2 asked for by the plaintiff, which read as follows: Instruction No. 1: "The court instructs the jury that, in the transportation of passengers, a railroad company is bound to exercise more than ordinary care and diligence, and is liable for the slightest negligence, against which prudence and foresight could have guarded." Instruction No. 2: "The court instructs the jury that although the plaintiff may have been guilty of negligence, and although that negligence may in fact have contributed to the injury, yet if they find from the evidence that the defendant, after having notice of plaintiff's dangerous exposure, did not exercise ordinary care and diligence to prevent his injury, the plaintiff's negligence will not excuse nor relieve the defendant from liability,"—which instructions were objected to by the defendant, the objection was overruled by the court, the instructions given to the jury, and the defendant excepted. Do these instructions propound the law correctly? As to instruction No. 1, in my opinion the circuit court erred in giving it to the jury without qualification. While it is true that it is the duty of a common carrier of passengers to use the utmost care in providing for their safety, yet I can well see how a jury might be misled by the instruction referred to. To instruct the jury that, in the transportation of passengers, a railroad company is bound to exercise more than ordinary care and diligence, is a proposition we can readily accede to; but to add, without qualification, that it is liable for the slightest negligence, against which prudence and foresight could have guarded, appears to me to have a direct tendency to mislead the jury to the prejudice of the defendant, especially under the state of facts disclosed in this case, unless the jury had been further instructed that the plaintiff could not recover if he himself was guilty of contributory negligence. The facts proved in this case clearly show that the plaintiff was guilty of contributory negligence; and instruction No. 1, taken by itself, leaving out any reference to the question of contributory negligence, would have a strong tendency to mislead the jury, and should not have been given. Barton states the law, in his Law Practice, as follows (in volume 1, p. 656): "The court is not bound to give an instruction upon a mere abstract question, and, if it does so under circumstances calculated to mislead the jury, such an instruction will be error for which the judgment will be reversed;" citing *Pasley v. English*, 10 Gratt. 236. Again, in the case of *McKelvey v. Chesapeake & O. R. Co.* 85 W. Va. 501 (sixth point of syllabus), this court held that a bad instruction is not cured by a good one; though they be given on the motion of adverse litigants, the bad instruction should be withdrawn. Brannon, J., delivering the opinion of the court in that case, says: "I find it stated in 28 L. R. A.

Illinois Cent. R. Co. v. Magfit, 67 Ill. 481, that the fact that the law is accurately stated on one side will not obviate errors in instruction on the other side; and in *Inhoff v. Chicago & M. R. Co.* 20 Wis. 344, 'Error in instructions is not cured by the court afterwards instructing directly to the contrary, and so leaving the jury to digest the contradiction. The error should be retracted;' also, in *Clay v. Miller*, 8 T. B. Mon. 146, 'An erroneous instruction cannot be corrected by another instruction which may state the law accurately, unless the erroneous instruction be thereby plainly withdrawn;' citing *Kingen v. State*, 45 Ind. 518; *Southern R. Co. v. Kendrick*, 40 Miss. 374, 90 Am. Dec. 383; *Pendleton Street R. Co. v. Stallmann*, 22 Ohio St. 2.

In considering the propriety of instruction No. 2, which was asked for by the plaintiff, and given to the jury by the court, it becomes necessary to inquire what is intended in said instruction by the words "dangerous exposure," of which it is implied the defendant had notice by the wording of said instruction, and what was the proximate cause of the injury complained of; and first let us inquire what was the condition of the plaintiff at the time he took passage on the cars, and at the time the accident occurred. On cross-examination the plaintiff himself was asked, "Had you been drinking when you were making that trip?" His reply was, "I had a drink or two." He was asked, "You were a little intoxicated?" and answered "I wasn't drunk." Again the question was propounded, "Where did you drink?" and he said in reply, "I don't know but that I took a drink or two on the train. I think I did." He also stated that his father was in the car. Now, when we consider the fact, shown by the testimony, that the car was running at the rate of ten miles an hour, and that this young man met with his sad misfortune only seven miles and a half from Weston, and that he had taken two drinks in traveling that distance, the strong inference is that his object in remaining on the platform was not to get fresh air, as he stated, but that he might take an occasional drink as he went along. The quantity he took at these drinks does not appear. Neither does it appear that the conductor had notice that he had liquor with him. But the inference is plain that his condition at the time of the accident may have been very different from what it was at the time the conductor took up his ticket. Now, then, as to the position the plaintiff was occupying at the time of the accident. He says: "I was standing on the platform; may be, one step down on the steps. Had one hand hold of the iron next to the coach, and one in front of the coach, on the left side, going to Buckhannon." That he was standing there, and let loose with his left hand, still holding with his right hand, and the train made a sudden tilt, and threw him right face first. That he held on, but his hand slipped down to the bottom of the rail, as far as it would go, and he let loose and fell. And on cross-examination, in answer to the question, "You say you were on the steps, and went out?" answered "Yes, sir."

Now the exposed position the plaintiff took upon the steps of the car was manifestly the proximate cause of his injury, and no witness in the case states that the conductor, or any other officer of the car or train, had notice of the fact that the plaintiff was on the steps, holding to the iron railing on the sides thereof. This court has frequently held that instructions which are not based upon or applicable to the facts proven should not be given to the jury, although they may be correct, as abstract principles of law. See *Coffman v. Hedrick*, 33 W. Va. 120; *Kinsley v. Monongalia County* Ct. 31 W. Va. 464, *Kerr v. Lungford*, 31 W. Va. 662, 2 L. R. A. 668; *Evans' Case*, 33 W. Va. 417; *Wheeling Bridge Co. v. Wheeling & B. Bridge Co.* 34 W. Va. 155.

In the case of *Carrico v. West Virginia Cent. & P. R. Co.* 35 W. Va. 390, in the seventh point of the syllabus, this court held as follows: "The general rule in regard to contributory negligence is that, if the negligence be mutual on the part of the plaintiff and defendant, there cannot be a recovery. But if the injury would have happened just the same, although the plaintiff had been in no wise negligent, his negligence will not prevent his recovery, or if the defendant, after he has discovered the dangerous exposure, refuses or neglects to practice any care or precaution to prevent the injury, he will be held liable." The instruction we are considering in this case should not have been given to the jury, because it is not based upon, or applicable to, the facts proven. It assumes that the evidence shows that some officer of the train had notice of the plaintiff's exposed position on the steps of the car, and no witness proves such notice. The fact that the conductor had notice of the fact that the plaintiff was on the platform of the car will avail him nothing, unless he received his injury from occupying that position. We can well see a great difference, so far as danger is concerned, between occupying a position on the steps of a moving car, and occupying the platform, which the evidence shows was surrounded by railing; and notice of one would be no notice whatever of the other, and the defendant could not have been expected to exercise ordinary care or diligence to prevent the plaintiff's injury until it had notice of his dangerous position. The plaintiff might have gone onto the engine or the cowcatcher, and thus exposed himself to imminent danger, but if he had done so without the knowledge of the defendant, although he had been injured, as a consequence, the defendant would not be liable. And for these reasons I think said instruction No. 2 should have been rejected.

The next assignment of error is to the action of the court in refusing instructions Nos. 4 and 5 asked for by the defendant. These instructions, as asked for by the defendant, were modified by the court, and given as follows: Instruction No. 4. "If the jury believe from the evidence that both the plaintiff and defendant were guilty of negligence; that such negligence of both was concurrent, or running together, and co-operated to produce the injury complained of,

they should find for the defendant, unless it appears from the evidence that the defendant had notice of the negligence of the plaintiff, and refused or neglected to practice any care or precaution to prevent the injury." Instruction No. 5: "If the jury believe from the evidence that the injury in the declaration mentioned was the result of the concurrent negligence of both the plaintiff and the defendant, the jury has no right to apportion the fault, and to find a verdict for the plaintiff upon that ground. But in such case they should find for the defendant, unless they further find that the defendant had knowledge of the danger of the plaintiff, and refused or failed to practice any care or precaution to prevent the injury." The modification in each of these instructions consists in the words following the word "unless," and these instructions, in the form in which they were given, as modified, were erroneous, and should have been rejected, because the modification is not supported by, or applicable to, the evidence in the case. The defendant, by its counsel, moved the court to set aside the verdict of the jury and grant it a new trial on several grounds, and, among others, because the verdict was contrary to the instruction of the court, and the court, at the instance of the defendant, instructed the jury that, "as a matter of law, a regulation of a railroad company which forbids passengers to stand upon the platform while the car is in motion is a reasonable and proper rule; and if a passenger, in violation of such regulation, unnecessarily exposes himself, he does so at his own peril." Now, Mr. Jeffries, the conductor, on cross-examination, when asked what he said to the plaintiff, replied that he took plaintiff's ticket up, and told him to go inside and ride; that it was against the rules; and after going three miles he again asked him to go in; that it was against the rules of the railroad company; and he talked very mildly, and said he wanted to ride out there, and get some air. Upon the question of fact, as to whether the conductor told plaintiff it was against the rules of the company, the plaintiff himself, when placed on the stand, does not contradict the conductor, and there is no conflict upon that point of evidence. Upon this question, *Beach on Contributory Negligence*, in section 151, states the law as follows: "If the passenger would hold the carrier to the full measure of his responsibility for safe carriage, he must conform to all the reasonable rules the carrier makes, looking to the passenger's safety and convenience; and, if he violates such rules and regulations by riding where he has no right to ride, it is no very harsh rule that requires him to do it at his own peril." After commenting on the law, in the same section, as to where the conductor or trainmen consent or encourage a passenger to ride in a place of danger, the section concludes with a quotation from the opinion of the court in the case of *Pennsylvania R. Co. v. Langdon*, 92 Pa. 21, 37 Am. Rep. 651, as follows: "We are unable to see how a conductor, in violation of a known rule of the company, can license a man to occupy a place of danger, so as to make the

company responsible." Beach on Contributory Negligence (page 874) says: "Where it appeared that the plaintiff had been drinking, was riding on the front platform (although without objection), and stepped to the lower step to permit persons to pass, and that a sudden movement of the car, by which he was injured, was not unusual, and should not have been unexpected, it was held that a nonsuit should have been granted." Wood on Railway Law (vol. 2, § 804, p. 1277) states the law on this point thus: "A passenger who voluntarily rides in a baggage car or other known place of danger in violation of the known rules of the company, and is injured in consequence of such violation, cannot recover damages therefor, even though he is there by permission of the conductor; and, in the absence of any proof upon that point, it will be presumed that the passenger knew of the danger, and the regulations forbidding passengers from riding in the baggage car;" citing *Houston & T. O. R. Co. v. Clemmons*, 55 Tex. 88.

The rule is also stated—as we think, properly—in Patterson's Railway Accident Law (page 250, § 248), where it is said: "It is both the right and the duty of the railway to make regulations for the safe conduct of its business; but those regulations must be reasonable in themselves, and must be so published that all persons who are to be affected thereby may have an opportunity of learning the existence and effect of such regulations. Where the regulations are in themselves reasonable, and have been properly published, the passenger is bound to inform himself as to their effect, and he must conform thereto. Thus, in *Sullivan v. Philadelphia & R. R. Co.*, 30 Pa. 238, 72 Am. Dec. 698, Woodward, J., said the passenger's consent is implied to all the company's reasonable rules and regulations for entering, occupying, and leaving their cars; and, if injury befell him by reason of his disregard of regulations which are necessary to the conduct of the business, the company are not liable in damages, even though the negligence of their servants concurred with his own negligence in producing the mischief;" citing *Britton v. Atlantic & C. Air Line R. Co.* 88 N. C. 536, 43 Am. Rep. 749; *Burlington & M. R. R. Co. v. Ross*, 11 Neb. 177.

So far as publishing the rules is concerned, in the case under consideration, that was not necessary, for the reason that the conductor gave the plaintiff personal notice that it was against the rules to ride outside of the passenger car. Wood, Railway Law (vol. 2, p. 1272, § 803), under the heading, "Injuries Resulting from Passenger Putting Himself Voluntarily in a Dangerous Position," says: "Railroad companies are only bound to exercise due care that a passenger is not injured through their fault, and are not required to exercise such a supervision over him as absolutely prevents his being injured by his own fault;" citing *Malcom v. Richmond & D. R. Co.* 106 N. C. 68, where the text is quoted with approval. In other words, if a passenger puts himself in a dangerous position, he cannot claim indemnity from the company. In a case where a stock drover

was riding on an engine with several others, when another engine suddenly came in sight, round a curve, and all the others jumped off, but the decedent, who remained and was killed, the court charged the jury that if the defendant's employes were negligent, and the decedent was rightfully riding on the engine, the plaintiff could recover; and this was held, under the pleadings, to be erroneous, as it disregarded the question of contributory negligence of the decedent. *Wabash, St. L. & P. R. Co. v. Shacklet*, 105 Ill. 367, 44 Am. Rep. 791.

In the case of *Malcom v. Richmond & D. R. Co.*, supra, it was held that a passenger on a freight train, who stands on the rear platform without holding to anything, is guilty of contributory negligence, and cannot recover for any injury which he may sustain by reason of the sudden starting of the train. The court, in its opinion, says, after speaking of the duty of the railroad to give signals when starting: "Apart from this, we are of opinion that the plaintiff was guilty of contributory negligence." "Railroad companies are only bound to exercise due care that a passenger is not injured through their fault, and are not required to exercise such a supervision over him as absolutely prevents his being injured by his own fault. In other words, if a passenger puts himself in a dangerous position, he cannot claim indemnity from the company." 2 Wood, Railway Law, § 803. The company, as held in some of the cases, cannot be expected to treat its passengers as children, or to put them under restraint. Passengers must take the responsibility of informing themselves concerning the every-day incidents of railway traveling; the company could do business on no other basis. *Mitchell v. Chicago & G. T. R. Co.* 51 Mich. 236, 47 Am. Rep. 566. The court further says: "The plaintiff must have been aware of the dangerous position in which he placed himself. He was warned of the danger by the regulations of the defendant forbidding passengers to ride upon platforms. He must have known of the sudden startings and joltings peculiar to freight trains, and he must also have known when he placed himself upon the platform, that the train was likely to start at any moment. Notwithstanding all this, he leaves his seat in the coach, and puts himself in this dangerous position, without even taking the simple precaution of supporting himself by holding to the railing, or anything else. That no recovery can be had, under such circumstances, is, it seems to us, too plain for further discussion." On the question of the duty of the passenger, it was held in the case of *Graville v. Manhattan R. Co.*, 105 N. Y. 525, 59 Am. Rep. 516, that "it is the duty of the passenger standing on the platform of a steam-railroad car to go inside, when requested so to do by a person having charge of the train, if there is standing room inside, although there are no vacant seats. The fact that the passenger has a well-founded ground of complaint against the railroad company, for not providing adequate accommodations for passengers, does not release him from the duty of leaving the

platform. As to whether, where a passenger refuses to go inside the car when so requested, the brakeman or conductor has the right to force him to do so, *quære*."

Returning to the point as to the position occupied by the plaintiff at the time the accident occurred, it may be said that the steps of the car form a part of the platform, and that being on the steps was the same as being on the platform. The steps, however, constitute no part of the platform. The steps might be removed or broken off, and the platform might still remain. The steps are the means of ingress and egress to and from the platform, and we cannot say that a party who was standing on the steps of the car was standing on the platform. The steps must be regarded as a more dangerous place for a passenger to occupy while the car is moving than the platform; and a conductor might be under the impression that a passenger was on the platform, and act very differently from what he would if he had notice that he was standing down on the steps. It is true that when the plaintiff refused to go inside the car, upon request of the conductor, the conductor might, under the regulations, have stopped the car, and put the plaintiff off; but no conductor, under the circumstances of this case, would feel warranted in resorting to such an extreme measure. While it is true this young man was not conducting himself altogether as he should,—was drinking to some extent,—yet the conductor could not say that he was so much under the influence of liquor as to render him incapable of taking care of himself, and the plaintiff himself swears that he was not drunk. His father was present in the car, and was evidently trying to get his erring son to return to his home; and a conductor possessing the instincts of a gentleman would not feel warranted in seizing the young man, and forcibly ejecting him from the cars, because he objected to going on the inside, and by so doing he might have incurred the risk of a suit against his company. He says he was not drunk, and his counsel say the same, by putting him on the stand to contradict the conductor as to what passed between them when requested to go in the cars, and also as to whether there were vacant seats in the car. It is presumed, however, that his father would not have done such an idle thing as to request the conductor to get him to come in, if there was no room in the car. The evidence, however, shows that he was drinking before he came on the car, and after he came on the car; and the court instructed the jury that, in determining the question of contributory negligence, they might take into consideration the condition of the plaintiff at the time,—that is, if he were intoxicated at the time of the injury, or partly so, they might take this fact into account, in determining whether he was guilty of contributory negligence. Upon this question, Wood, Railway Law (vol. 2, p. 1457) states the law as follows: "The fact that the person injured was at the time intoxicated does not necessarily constitute contributory negligence on his part, though this fact is to be considered with others in

determining whether or not he exercised ordinary care to protect himself. One cannot voluntarily incapacitate himself from ability to exercise ordinary care for his own self-protection and then set up such incapacity as an excuse for his failure to use care; and if the intoxication contributed to the injury, as a proximate cause thereof, it is a complete bar to an action for damages sustained in consequence of it,"—citing *Illinois Cent. R. Co. v. Cragin*, 71 Ill. 177; *Little Rock & Ft. S. R. Co. v. Pankhurst*, 86 Ark. 371; *Witgerald v. Weston*, 52 Wis. 354; *Chicago, R. I. & P. R. Co. v. Bell*, 70 Ill. 102, and other cases.

Now, while it is true that negligence is a mixed question of law and fact, and Wood, Railway Law (vol. 2, p. 1458) so states the law, and says that when there is no dispute about the facts, nor any doubt as to the proper inference to be drawn from them, the question as to what is proper care may be a question of law; but where either the facts, or the conclusions to be drawn therefrom, are at all doubtful, the question must always be submitted to a jury. And because, in determining the character of plaintiff's conduct, it is necessary to find whether or not he acted as a man of ordinary prudence would have acted under the same circumstances, the question is necessarily one for the jury, except in very plain cases, where there is no room for a reasonable difference of opinion. If the facts are such that a verdict for the plaintiff could not be sustained, the question is one of law, and should be determined by the court. Upon this question the case of *Chicago, B. & Q. R. Co. v. Landauer*, 86 Neb. 642, states the law as follows (this case was from the supreme court of Nebraska): "It is the settled rule in this state that where different minds may draw different inferences from the same state of facts, as to whether such facts establish negligence, it is a proper question for the jury, and not for the court; but that rule is subject to the qualification that the inference of negligence must be a reasonable one. Where it is impossible to infer negligence from the established facts without reasoning irrationally, and contrary to common sense and the experience of average men, it is not a question for the jury, and the court should direct a verdict for the defendant." Now, what negligence was the defendant guilty of in this case? If the injury resulted from intoxication, this was the fault of the plaintiff, and not of the defendant. If he was slightly intoxicated when he took the train, and increased his intoxication after he became a passenger, this fact does not appear to have been known to the defendant; and it is held in the case of *Milliman v. New York Cent. & H. R. R. Co.* 86 N. Y. 648, that "the fact that a man is intoxicated does not, alone, deprive him of the right to ride upon a railroad car, nor does it free the company from its duty to render him, as a passenger, due care. It is the duty of a carrier of passengers to observe the same care to a drunken as to a sober passenger." It does not appear that any officer of the train knew of the dangerous position the plaintiff had taken upon the steps. It does appear that he refused to go in the

car, when politely invited so to do; and he does not complain that the car was not stopped, and himself ejected therefrom. It cannot be said that the defendant, after it discovered the dangerous exposure, refused or neglected to practice any care or precaution to prevent the injury. Neither can we say that the injury would have happened just the same, although the plaintiff had been in no wise negligent. Therefore, the defendant cannot be held liable, under our ruling in the case of *Carrico v. West Virginia Cent. & P. R. Co.*, 85 W. Va. 890. As we have seen, the question of contributory negligence is a mixed question of law and fact; and, while it may be a question for the jury, yet the jury must take the questions of law involved in the case from the court, and apply them to the facts, in reaching their conclusion, and if, at the instance of the plaintiff, instructions are given to the jury which are misleading, and not in accordance with the law, or if the jury disregards instructions which are given at the instance of the defendant, and which propound properly the law, the question becomes a question for the court, and the verdict may be set aside. My conclusion, therefore, is that the court erred in refusing to set aside the verdict in this case, and award the defendant a new trial.

The judgment complained of is reversed, the verdict set aside, and a new trial awarded the defendant; and the defendant in error must pay the costs of this writ.

Holt, J., dissenting:

This is a suit brought in the circuit court of Lewis county on the 29th of August, 1891, by John H. Fisher, by his next friend, against the West Virginia & Pittsburgh Railroad Company for injury inflicted on plaintiff, by defendant's negligence, while being carried as a passenger on its train. A trial by jury, on plea of not guilty, resulted in a verdict for plaintiff for \$8,500, for which the court gave judgment, having overruled defendant's motion for a new trial, and this writ of error was allowed. As to the material facts, there was but little, if any, conflict of testimony. But giving the plaintiff the vantage ground of his verdict, where and if such conflict exists, the facts are, in substance, as follows: On the 18th day of October, 1890, defendant ran a local mixed train—freight and passenger car—from Weston to Buckhannon; but one passenger car, and that in the rear. Plaintiff and his father, John S. Fisher, bought tickets, and were passengers. The father had a seat, but the car was crowded full of people; but little, if any, sitting room. There was standing room. Perhaps a seat could have been found, but plaintiff was drinking,—was intoxicated. He did not enter the car, but rode standing out on the front platform. He was under the influence of whiskey; at least, seemed to be so to the conductor; according to his testimony, had whiskey with him, and took two or three drinks on the platform. The father knew that plaintiff had been drinking some, and, being uneasy, went out to where his son was, on the front platform, and told him he had better come in the car. Plaintiff said he

would do so in a few minutes; but, not coming in, the father requested the conductor to go out and bring him in. The conductor stood around for a short time, and then went out on the platform where plaintiff was. He came back without him; told John S. Fisher, the father, that he was in no danger; "that, as long as they did not stagger, they were all right." The conductor states in his testimony that the platform is regarded as a very dangerous position to occupy, and that the rules of his company required him to make plaintiff come into the car; and if he refused it was his duty to stop the train, and put him off. Plaintiff remained on the platform; and about seven and one half miles out on the road, about halfway back to Buckhannon, in running at ten or twelve miles an hour round a sharp curve plaintiff was thrown out, or fell out, to the left. The hind truck ran over both feet, making amputation of both feet, back to the heels, necessary. He was taken up, and carried to his home at Buckhannon, where this surgical operation was at once properly performed, leaving him a bad cripple for life, unable to stand or walk without crutches and artificial feet, which he has, at a cost of \$100. He was about twenty years of age, earning about \$1.25 per day. He can now do nothing requiring him to walk or to stand; and the left foot, not being healed, will, in all likelihood, soon require some further amputation. His condition shows that he was intoxicated to such a degree as not to realize the danger of falling off, to which he was exposed. He stood upon the step, holding with one hand. He was plainly, to some extent, unconscious of his exposure to the danger of falling off, and did not anticipate, and therefore was heedless of, the accident likely to ensue. The conductor noticed his intoxication, and, telling him that it was against the rule to ride there, asked him to go in. The brakeman noticed, when he got on the train, that he had been drinking; he acted like he was intoxicated; asked him to go into the car. And, as we have already seen, the father, seeing that his son had not come into the car, and knowing his condition, felt uneasy for his safety, and requested the conductor to go out and bring him in. The conductor went out on the platform where the plaintiff was, and came back without him, and told John S. Fisher, the father, as already stated, that plaintiff was in no danger. "As long as they did not stagger, they were all right." The foregoing statement of facts is intended to present "the exact anatomy of the case." As is usual in such cases, this one has opened up a wide field for discussion, as appears from the cases and books cited. Still, in my view, in the attitude in which it is here presented, giving the plaintiff the vantage ground of a verdict and judgment in his favor, in an action for negligence against a carrier of passengers conceded to be to some extent in fault, its determining factors, both of law and fact, ought to lie within a narrow compass. Four grounds of error are assigned by plaintiff in error: No. 1. The court erred in rejecting a special plea. No. 2. In giv-

ing to the jury the two instructions asked by plaintiff. No. 8. In modifying defendant's instructions Nos. 4 and 5. No. 4. In overruling defendant's motion for a new trial.

No. 1: This special plea averred, in substance, that at the time of the accident and injury complained of the Baltimore & Ohio Railroad Company was the lessee, owner, and operator of the West Virginia & Pittsburgh Railroad, by virtue of a deed of lease before that time duly signed, sealed, and delivered; that if there was any cause of action, as averred, the Baltimore & Ohio Company, alone, ought to be made defendant,—praying judgment that the writ and declaration might be quashed, etc.; that is, that, without reference to the merits, the suit has been brought against the wrong person, in an improper manner, as to the party made defendant. This, if true, would go in support of the general issue, as it contradicts the declaration on a material point. Nor does it in its nature belong to that class of defenses which are good in bar or abatement, at the option of the defendant. A judgment on the plea for defendant that the writ and declaration be quashed must, in its nature, in such a case, if it amounts to anything, be conclusive of the right of action against defendant, either alone or conjointly with another: for it would not have been good if it had averred as the ground that the Baltimore & Ohio Company was a joint doer of the thing complained of, for, in such case of tort, plaintiff may sue one or both. It was intended, no doubt, to give notice of one of the grounds of defense, or rather to raise in advance the question of defendant's liability under the state of facts averred in the plea. As a plea in abatement, it was excepted to for want of affidavit; for, by the statute (sec. 89, chap. 125), "no plea in abatement or plea of *non est factum* shall be received, unless it be verified by affidavit." But the true question on the merits is settled by the case of *Ricketts v. Chesapeake & O. R. Co.*, 83 W. Va. 488, 486, 7 L. R. A. 854: "We think it may be stated, as the just result of the decided cases, and on sound principle, that a railroad corporation cannot, without distinct legislative authority, by lease or any other contract, turn over to another company its road, and the use of its franchises, and thereby exempt itself from responsibility for the conduct and management of the road." For, if the defendant railroad corporation still conducts the business of the road as owner, it is liable; if as agent of the lessee, it is liable for its torts; and if the lessee conducts the business in that name, and under the defendant's charter, then, according to the averments contained in the plea, it would be liable under that charter, and in that name. There was no error in rejecting the plea.

Error No. 2: The two instructions given for plaintiff against the objection of defendant are as follows: No. 1: "The court instructs the jury that, in the transportation of passengers, a railroad company is bound to exercise more than ordinary care and diligence, and is liable for the slightest negligence, against which prudence and foresight could have guarded." No. 2: "The court instructs the jury that although the plaintiff

may have been guilty of negligence, and although that negligence may in fact have contributed to the injury, yet if they find from the evidence that the defendant, after having notice of plaintiff's dangerous exposure, did not exercise ordinary care and diligence to prevent his injury, the plaintiff's negligence will not excuse nor relieve the defendant from liability." Both are taken from the case of *Carrico v. West Virginia Cent. & P. R. Co.* 35 W. Va. 389. It is conceded in argument that these instructions do, perhaps, propound the law correctly; but the contention is that they are abstract, not being based upon any evidence in the cause.

The court, at the instance of defendant, gave ten several instructions, which, as modified, were not objected to, and which read as follows: No. 1: "The jury are instructed that the plaintiff, as passenger on the defendant's car, as a matter of law, is presumed to have taken upon himself all the risks necessarily incident to that mode of traveling; and if the jury believe from the evidence that without the fault of the defendant, but by inevitable accident, plaintiff was injured, the jury should find for the defendant." No. 2: "The court instructs the jury, as a matter of law, that a passenger upon a railroad train takes all the risk attending that mode of travel, except such as may be caused or incurred by the negligence of the railroad company or its servants; and, unless such negligence by the defendant is shown by the evidence, the jury should find for the defendant." No. 3: "The court instructs the jury that, as a matter of law, a regulation of a railroad company which forbids passengers to stand upon the platform while the car is in motion is a reasonable and proper rule; and if a passenger, in violation of such regulation, unnecessarily exposes himself, he does so at his own peril." No. 6: "The court instructs the jury that railroad companies are only required to exercise due care that a passenger is not injured through their fault, and they are not required to exercise such supervision over him as absolutely prevents him from being injured by his own fault." No. 7: "The court instructs the jury that a railroad company has no right or authority, under the law, to impose upon its passengers any restraint, even to enforce its reasonable rules." No. 8: "The court instructs the jury that, in determining the question of whether the plaintiff was guilty of contributory negligence, they may take into consideration the condition of the plaintiff at the time; that is, if he were intoxicated at the time of the injury, or partly so, they may take this fact into account, in determining whether he was guilty of contributory negligence." No. 9: "If the jury find that the injury complained of was contributed to by plaintiff's own negligence, and did not result by act of defendant purposely, intentionally, wantonly, maliciously, or recklessly done, they should find for the defendant." No. 10: "The plaintiff, to recover, must have observed ordinary care to avoid the injury, and, if he does not do so, he cannot recover."

One of the lines of argument and presen-

tation of their case made by plaintiff's counsel is as follows: The evidence showed there was only one passenger car on the train. There was no mail car or baggage car, but mail and baggage were piled in one end of the passenger car, and that was full of people. That defendant was negligent in not providing a proper place, and in not publishing or making known its rule against riding on the platform, and that although plaintiff's intoxication may have contributed to his taking his place and riding on the front platform, and, together with such dangerous exposure, may have caused his falling off, yet defendant had notice of his dangerous exposure, and that he was under the influence of liquor, yet did nothing to prevent such dangerous exposure to injury, and, so far from enforcing the rule of the company which prohibited the conductor from allowing any one to ride on the platform, and made it his duty to make the passenger go in, or get off, the conductor misled the father, who otherwise might have had the plaintiff (his minor son) brought in out of such danger. The other line of argument of plaintiff's counsel proceeds upon the theory that their case is made out without reference to the one crowded car, and the failure of the defendant to publish its rule against riding on the platform. It seems to be as follows: The conductor knew that plaintiff had been drinking, and was under the influence of liquor; that plaintiff was on the platform in that condition; that it was a dangerous place for a sober man,—much more, for one intoxicated. The conductor knew that the rules of his company prohibited him from allowing any one to ride on the platform, in consideration of its being a dangerous place. He knew it was his duty to get plaintiff to go in, and, on his refusal, to stop the train, and put him off. In other words, if the conductor had done his plain and simple duty, he would have prevented the accident, and injury resulting therefrom. The case was evidently tried, and the jury instructed, on the theory that it involved the doctrine of contributory negligence, as laid down and applied in the case of *Carrioco v. West Virginia Cent. & P. R. Co.*, 85 W. Va. 389 (see point 7), viz., that if the defendant, after he has discovered the plaintiff's exposure to danger, refuses or neglects to practice any care or precaution to prevent the injury, he will be liable; for instructions No. 1 and No. 2, given for the plaintiff, are taken literally from the *Carrioco Case*, and the qualifications appended by the court to defendant's instructions No. 4 and No. 5 are the same as plaintiff's instruction No. 2. In that case there was evidence tending to show that plaintiff received his injury by riding with his elbow out of the window, beyond the line of the body of the car, by reason of which it was struck and broken in two places by a pile of stone recently quarried, and piled up close to the track for the purpose of being loaded and transported. There was also evidence tending to prove that defendant, by its employés, had knowledge of the stone piled up close to the track, and saw plaintiff's elbow protruding, but failed to give him any warning.

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The court held that "it is legal negligence for a passenger to ride in a fast-going passenger coach with his arm protruding out of the window, and beyond the line of the body of the car" (point No. 5), and that "if the defendant, after he has discovered the dangerous exposure refuses or neglects to practice any care or precaution to prevent the injury, he will be held liable" (point No. 7). The case was sent back, retried, and again appealed; and in the same case, at this term, the same doctrine has been again laid down. See same case, 39 W. Va. —. In that case the evidence showed that plaintiff, Carrioco, was riding with his elbow in the open window at the time of the accident, but, as to whether it was protruding or not, the direct evidence was somewhat conflicting; and, in addition to that conflict, it was also conflicting as to the fact of the conductor having discovered plaintiff's dangerous exposure of his arm before the accident, but there was enough for the case to go to the jury. In this case three questions of fact were involved: (1) Was the plaintiff riding on the platform in such a state of intoxication as to be, in an obvious degree, unconscious or heedless of his danger? (2) If so, was such fact in any way brought home to the knowledge of the conductor? (3) If the conductor had such knowledge of plaintiff's dangerous exposure, did he refuse or neglect to practice the proper care or precaution to prevent the injury? If so, the court, by its instruction, told the jury that the defendant would be liable. I have carefully re-read the record, and the briefs, and, in my view, no other material facts were involved. These the jury, on the evidence, found for the plaintiff, and the court approved the finding. I do not well see how the jury could have done otherwise, unless it would be on the supposition that the conductor had done all to bring him in, or put him out of danger, that was incumbent on him to do; and this is a question of law, for what he did do in that behalf appears affirmatively, and without dispute. What, then, is the duty of carriers of passengers for hire? For this state the question was authoritatively answered, in 1854, in the case of *Farish v. Reigle*, 11 Gratt. 697, 62 Am. Dec. 686; again, in 1859, in the case of *Virginia Cent. R. Co. v. Sanger*, 15 Gratt. 230. They are bound to use the utmost care and diligence of cautious persons to prevent injury to passengers, and are bound to carry their passengers safely, so far as human care and foresight can go, being liable for injuries resulting from the slightest negligence. See *Pennsylvania Co. v. Roy*, 102 U. S. 451, 26 L. ed. 141. See also *Baltimore & O. R. Co. v. Wightman* (1877) 29 Gratt. 431, 445, 26 Am. Rep. 384. The law, in tenderness to human life and limb, holds railroad companies liable for the slightest negligence, and compels them to repel by satisfactory proof any imputation of such negligence. They are held to the highest degree of practical care, under the circumstances presented, and to this standard a philanthropic age must adhere. See *Thomp. Carr.* p. 197, § 7, notes, et seq.; *Ingalls v. Bills*, 9 Met. 1, 43 Am. Dec. 346, notes.

Although the term "ordinary care," properly qualified and explained, may be made to measure perhaps more accurately the amount of care, foresight, diligence and skill required in the particular case, according to its facts, yet the term "extraordinary care" may have a wholesome effect; for one is then more apt to bear in mind the care exacted of a carrier in so perilous a business, and not to confound this particular ordinary care with ordinary care in general, and especially to note that the distinction involved may be one of kind, as well as of degree, so the common mind understands it. I believe it is not claimed that the conductor used the utmost care. I do not see how it can, by this record, be said that he performed his whole duty, was wholly without fault in the matter, whatever be the degree of negligence such fault may imply, or the degree of diligence exacted. But it is answered that plaintiff cannot recover because he was guilty of contributory negligence. He was negligent in becoming intoxicated, for that was his own voluntary wrong. He was negligent in riding upon the platform, for the conductor told him it was against the rules of the company. And although there was but one car, and that was full of people, with one end used to carry baggage, yet, no doubt, he could have found standing room inside, if not a seat. Why did he not go in? He was, in a plainly obvious degree, unconscious of the danger in riding on the platform in his condition, and therefore heedless of it. We need not consider to what extent the conductor had discovered these facts by his own observations; for there is not a particle of evidence, direct or inferential, in contradiction of what the father of the young man said to him, and of the request he made. The knowledge then imparted, if not known before, and the request of the father then made, imposed upon the conductor a new duty. This new duty he violated; not only willfully neglected to perform it, but, in all likelihood, prevented the father from securing its performance in some other way by lulling his apprehensions of the danger to which his son was exposed, soon resulting in the accident that caused the injury. In such a case, plaintiff's negligence was not the proximate cause, in whole or in part, of the injury, but the remote cause; the inducing cause; the condition which gave rise to the new duty, the existence of which the new duty, from its nature, necessarily presupposed. If plaintiff's negligent exposure to danger imposes upon the conductor the new duty to take the proper care or precaution to prevent injury resulting from it, such negligence of plaintiff cannot at the same time be, in whole or in part, the proximate cause of the injury, the happening of which as the result of plaintiff's negligence, the new duty exists only to avoid or avert. See *Downey v. Chesapeake & O. R. Co.* 28 W. Va. 732, 737. Such a test of the proximate cause, in whole or in part, of the injury, is, in my view, just as much out of place in this case as it would have been in the *Carrieco Case*, supposing the plaintiff in that case to have been riding with his elbow protrud-

ing out of the window, and, in the language of Dr. Bishop (Non-Cont. L. § 476), "Reverse the result in numberless plain cases," from the *Donkey Case* (*Davies v. Mann*, 10 Mees. & W. 545) and the case of *Radley v. London & N. W. R. Co.* L. R. 1 App. Cas. 754, down to the case of *Carrieco v. West Virginia Cent. & P. R. Co.* 35 W. Va. 389, and the same case decided at this term, not yet officially reported. 39 W. Va.—See 2 Thomp. Neg. 1104, *et seq.* For a discussion of the character and test of contributory negligence, see, among others, Bishop, Non-Cont. Law, § 458, *et seq.*; Cooley, Torts, 2d ed. *816; Whart. Neg. 300 *et seq.*; Bigelow, Torts, 4th ed. p. 332; Buswell, Personal Injuries, § 97; Whittaker, Smith, Neg. chap. 5, p. 373; Pollock, Torts, p. 374, and Appendix D, p. 484; Beach, Contrib. Neg. 2d ed. § 7 *et seq.*

This duty thus cast upon the conductor by the request of the father is no relaxation of any duty of plaintiff, nor excuse of his negligence, but, on the contrary, a new duty, which presupposes and springs out of such negligence of plaintiff, calling upon the conductor to anticipate and avert the injury likely to ensue therefrom. It will not do to say, under the peculiar circumstances of such request, plaintiff's intoxication is his own voluntary and wrongful incapacitation. Apart from the father's special request, "it is consistent, not only with common humanity, but with the legal obligations of the carrier, that if a passenger is known to be in any manner affected by a disability, physically or mentally, whereby the hazards of travel are increased, a degree of attention should be bestowed to his safety, beyond that of an ordinary passenger, in proportion to the liability to injury from the want of it." Thomp. Carr. pp. 270, 271, § 5. But the condition of the passenger calling for it must be made known. "It may call for special care arising from the particular danger." Bishop, Non-Cont. Law, § 513. See 4 Am. & Eng. Encyclop. Law, p. 79; *Milliman v. New York Cent. & H. R. Co.* 66 N. Y. 648.

If the plaintiff had been, not a drunken passenger on the platform, but a drunken trespasser on the track, known to be unconscious or heedless of his dangerous exposure,—say near Miller's crossing, where the accident occurred,—it will not be denied that the duty would have arisen to take such precautions as were proper to avoid inflicting injury. Is the duty to a passenger less? The conductor is, in a sense, an officer of the common law; and that law is not only tender of life and limb, but also considerate toward human frailties, as far as may be. And besides being the conductor, and, as such, in command of the train he is also an officer by statute (Code, chap. 146, § 31), made so expressly that he may the more efficiently discharge his duties, and meet more effectually the exigencies of such cases as this; and, as I read the law, it does not hear to any such excuses as are offered on his behalf. A helpless passenger on the platform and steps is certainly entitled to not less care and precaution to avert the dangerous ex-

posure, of which he is unconscious or heedless, than the helpless or unconscious trespasser on the track. Apprehending the danger,—as it appears from his own testimony he did foresee and apprehend it,—it was his plain duty to take the ordinary steps, such as the occasion might have required, to make the young man go in off the platform, which he could have done without trouble, or, if that could not have been done, make him get off at one of the several stations or stopping places.

I have given the facts proved fully. They correspond, in substance, with the essential facts alleged. The two instructions given for plaintiff are short, and to the point; both taken, literally, from a recent case three times argued here, and twice affirmed. The jury applied the law given them by the court to the facts as found by themselves from the evidence; and the result is a verdict by the jury, and a judgment by the court, containing, impliedly, the point of law involved correctly drawn, as I think, from the case as made. Ten instructions were given for defendant. To two of them the court added a qualification in order to make them consistent with the instructions given for plaintiff.

If any of them are faulty,—and I dare say some flaw can be found in so long a list,—the plaintiff does not, and defendant cannot, complain. Under such circumstances, it would seem hard to let the defendant's fault spoil the plaintiff's verdict. However, amid the confusion that seems to prevail on the subject of contributory negligence, I may be mistaken in my view of it, especially in the application attempted to be made, for here, as in other cases, but perhaps to a larger extent, the difficulty lies. The loitering on the platform of passengers is matter of common observation, and it is well understood that they do so at their own risk, and therefore I concede the danger of giving verdicts in such cases. This one, however, has a clearly-defined and strongly-marked exceptional feature. On that I have, for the main, rested my view of this case; for I cannot bring myself to believe that the conductor discharged the obligation of the new duty imposed upon him by his knowledge of plaintiff's negligent exposure to danger, and the father's request.

Brannon, P., did not sit.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

ATCHISON, TOPEKA & SANTA FÉ R. CO., *Plff. in Err.*,

v.

David B. REESMAN.

(60 Fed. Rep. 370.)

1. **A railroad is liable to a brakeman** on a train for its failure to maintain fences as required by statute, in consequence of which an animal gets upon the track, causing a derailment of a train and injury to the brakeman.
2. **Evidence in rebuttal, which further refers to repairs made by a railroad company to an alleged defective fence after an accident, will not require reversal,** if the company first gave evidence of such repairs.
3. **Disobedience by a brakeman of the company's rules, which contributes to an injury received by him, will constitute contributory negligence, although his disobedience was with the knowledge and consent of the conductor of the train.**

(January 2, 1894.)

ERROR to the Circuit Court of the United States for the Eastern District of Missouri to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Argued before Brewer, *Circuit Justice*, and Sanborn, *Circuit Judge*.

Messrs. Gardiner Lathrop and Ben Eli Guthrie for plaintiff in error.

Messrs. B. R. Dysart, John F. Mitchell, Joseph Park, and R. G. Mitchell, for defendant in error:

A statute requiring companies to fence their rights of way is not only to protect domestic animals, but to protect the passengers on the trains.

Thornton, Railway Fences & Private Crossings, § 167, p. 271.

The statute positively requires the erection and maintenance of a lawful fence on each side of the track, sufficient to prevent cattle and other stock from getting on the railroad, and the failure to comply with the lawful statutory provision is negligence *per se*, and renders the company liable for all damages resulting from any such failure.

Murray v. Missouri Pac. R. Co. 101 Mo. 286; 2 Thomp. Trials, § 1672, p. 1218; **Karl v. Kansas City, St. J. & C. B. R. Co.** 55 Mo. 476.

The master is required to furnish the servant a safe place in which to work—a safe and unobstructed track.

Tries v. Hannibal & St. J. R. Co. 49 Mo. 488; **Barnett v. Atlantic & P. R. Co.** 68 Mo. 56, 30 Am. Rep. 778; **Rutledge v. Hannibal & St. J. R. Co.** 78 Mo. 286; **Sileo v. Kansas City, St. L. & C. R. Co.** Id. 528, 47 Am. Rep. 118; **Rozzelle v. Hannibal & St. J. R. Co.** 79 Mo. 849; **Isabel v. Hannibal & St. J. R. Co.** 60 Mo. 475; **Schmidt v. Milwaukee & St. P. R. Co.** 23

NOTE.—As to duty to fence railroad tracks in general, see **Gallagher v. New York & N. E. R. Co.** (Conn.) 5 L. R. A. 787, and *note*; **State v. Chicago M. & N. R. Co.** (Wis.) 12 L. R. A. 180, and *note*; **Perkins v. St. Louis, I. M. & S. R. Co.** (Mo.) 11 L. R. A. 423, and *note*; also as affecting liability to brakeman, **Donegan v. Erhart** (N. Y.) 7 L. R. A. 529.

Wis. 186, 99 Am. Dec. 158; *Singleton v. Eastern Counties R. Co.* 7 C. B. N. S. 287; *Keyser v. Chicago & G. T. R. Co.* 56 Mich. 559, 56 Am. Rep. 405; *Hayes v. Michigan Cent. R. Co.* 111 U. S. 228, 28 L. ed. 410; *Donnegan v. Erhardt*, 7 L. R. A. 527, 119 N. Y. 468; *Blair v. Milwaukee & P. du C. R. Co.* 20 Wis. 262; *Fordyce v. Jackson*, 56 Ark. 594; *Lackawanna & B. R. Co. v. Chenoweth*, 52 Pa. 382, 91 Am. Dec. 168; *Gulf, C. & S. F. R. Co. v. Wilson*, 11 L. R. A. 486, 79 Tex. 871.

The brakemen or other trainmen come within the protection of the statute.

Donnegan v. Erhardt, *supra*; *Jetter v. New York & H. R. Co.* 2 Keyes, 154; *Henry v. Wabash Western R. Co.* 109 Mo. 488; *Wood, Mast, & S. 677*; *Wabash R. Co. v. McDaniels*, 107 U. S. 454, 27 L. ed. 605; *Atchison, T. & S. F. R. Co. v. Wilson*, 4 U. S. App. 25, 48 Fed. Rep. 57.

To insure such protection railroads are imperatively required to fence their track.

Trice v. Hannibal & St. J. R. Co. 49 Mo. 440, affirmed in *Barnett v. Atlantic & P. R. Co.* 68 Mo. 56, 30 Am. Rep. 773; *Rutledge v. Hannibal & St. J. R. Co.* 78 Mo. 290; *Silver v. Kansas City, St. L. & C. R. Co.* Id. 532, 47 Am. Rep. 118; *Rozelle v. Hannibal & St. J. R. Co.* 79 Mo. 85.

The violation of a statutory requirement is negligence *per se*, and damages caused by an omission to perform a statutory duty renders the company liable.

Bowman v. Chicago & A. R. Co. 85 Mo. 533; *Karle v. Kansas City, St. J. & C. B. R. Co.* 55 Mo. 476; *Robertson v. Wabash, St. L. & P. R. Co.* 84 Mo. 119.

Experience shows that a railroad company may and can at small cost and inconvenience, make and keep its track reasonably safe and unobstructed, and free from the dangerous presence of cattle upon it, either by a fence or by watchmen on the sections, and one or the other they must provide.

Hayes v. Michigan Cent. R. Co. 111 U. S. 228, 28 L. ed. 410; *Donnegan v. Erhardt*, *Fordyce v. Jackson*, *Gulf, C. & S. F. R. Co. v. Wilson*; *Atchison, T. & S. F. R. Co. v. Wilson*; *Henry v. Wabash Western R. Co. supra*.

The doctrine of exemption for the fault of a fellow servant can have no application in this case.

Reesman was not the fellow servant of the conductor, Agnew.

Chicago, M. & St. P. R. Co. v. Ross, 112 U. S. 377, 28 L. ed. 787; *Dayharsh v. Hannibal & St. J. R. Co.* 108 Mo. 570.

Reesman was not the fellow servant of the section hands, whose duties were to inspect and repair the fence.

Chicago, M. & St. P. R. Co. v. Ross, supra; *Dixon v. Chicago & A. R. Co.* 18 L. R. A. 792, 109 Mo. 413; *Henry v. Wabash Western R. Co. supra*.

Brewer, Circuit Justice, delivered the opinion of the court:

This was an action to recover damages for personal injuries. Plaintiff below (defendant in error) was on the 17th day of June, 1891, in the employ of the railroad company as brakeman. He had been in such employ for about three years. At the time of the

injury he was on a ditching train, composed of an engine and four cars, the engine pushing the cars. Just in front of the engine was a flat car, then a car on which the ditching machine was placed, then a box car fitted up for the men to sleep in, and in front of that a way car or caboose. Plaintiff had been at work on this train only eight or ten days, though for two years he had been acting as brakeman between Marceline, Mo., and Ft. Madison, Iowa, and was therefore familiar with the track at the place where the injury happened. On the morning of June 17 the train left Marceline for the purpose of doing work at a place six miles east thereof. The track, for some distance, was nearly straight. After going about a mile and a half, and while running at a rate of speed of from fifteen to eighteen miles an hour, the train ran over a steer, which derailed it, and caused the plaintiff's injury. The crew of the train consisted of the engineer and fireman, conductor, head brakeman, and the plaintiff,—the rear brakeman. From the time of leaving Marceline up to the time of the accident, the conductor and the plaintiff were on the platform of the caboose at the head of the train. The head brakeman was on the inside, in the cupola, while there was no one on top. The ditching machine had arms or dippers extending on either side in such a manner and to such an extent as to interfere with the view of the engineer of the front end of the train.

Rule 104 of defendant's rules was in force at the time of the accident, and is as follows: "When a train is being pushed by an engine (except when shifting and making up trains in yards) a flagman must be stationed in a conspicuous position on the front of the leading car, so as to perceive the first sign of danger, and immediately signal the engineer!"

There was testimony on the part of the defendant tending to show that the conspicuous place on the ditching train, within the meaning of that rule, was on top of the caboose, where the flagman could be seen by the engineer whenever he made any signals, and that it was the plaintiff's duty to be at that place. The burden of the plaintiff's case was that the defendant company had negligently suffered the fences along its right of way to become and remain out of repair, and insufficient to keep cattle off the track; that in consequence thereof a steer broke through such insufficient fence, got upon the track, and derailed the train, causing the injury to plaintiff. The defendant denied that this steer entered onto the track through any defective or insufficient fence; claimed that, even if it did, the duty to erect and maintain a fence was not one which would avail one of its employes in an action for damages resulting from a neglect of such duty; and, third, that the plaintiff was guilty of contributory negligence, in not being in his proper place, on top of the caboose, and in a place where he could see the danger, and give the signal to the engineer.

The provision of the Missouri statutes in reference to the fencing of railroad tracks is found in Mo. Rev. Stat. 1889, p. 659, § 2611. The first part of the section is as follows:

"Every railroad corporation formed or to

be formed in this state, and every corporation to be formed under this article, or any railroad corporation running or operating any railroad in this state, shall erect and maintain lawful fences on the sides of the road where the same passes through, along, or adjoining inclosed or cultivated fields or uninclosed lands, with openings and gates therein, to be hung and have latches or hooks, so that they may be easily opened and shut, at all necessary farm crossings of the road, for the use of the proprietors or owners of the land adjoining such railroad, and also to construct and maintain cattle-guards, where fences are required, sufficient to prevent horses, cattle, mules, and all other animals from getting on the railroad; and until fences, openings, gates, and farm crossings and cattle-guards as aforesaid shall be made and maintained, such corporation shall be liable in double the amount of all damages which shall be done by its agents, engines, or cars to horses, cattle, mules, or other animals on said road, or by reason of any horses, cattle, mules, or other animals escaping from or coming upon said lands, fields, or enclosures occasioned in either case by the failure to construct or maintain such fences or cattle-guards. After such fences, gates, farm crossings, and cattle-guards shall be duly made and maintained, said corporation shall not be liable for any such damage unless negligently or willfully done."

Following this provision are others, giving adjoining proprietors the right to construct the fences on the failure of the railroad company so to do, and recover the cost thereof from the company, and declaring that any person leading or driving stock onto the track within such fences should forfeit and pay a sum not exceeding \$10, and should also pay to the party injured all damages sustained thereby.

In respect to the liability of the company under this section, the court gave this instruction to the jury: "If the jury believe from the evidence that the defendant suffered the fence along its right of way to become and remain out of repair in the manner described by plaintiff's witnesses, so that cattle could with little difficulty get through or under the fence, and if you believe from the evidence that, by reason of its being so out of repair and defective, a steer did in that manner go upon defendant's right of way and track, and cause the derailment of the ditching train, by which plaintiff was injured, then you will be authorized to return a verdict in plaintiff's favor, provided you further believe from the evidence that defendant's section men in charge of that section had knowledge of the defect in the fence in time to have repaired it before the accident, or that such defect in the fence had existed for such length of time that, by the exercise of ordinary care, they ought to have had knowledge of it, and repaired it, before the derailment," and refused an instruction that, under the pleadings and evidence, the plaintiff was not entitled to recover.

In this is presented the most important question arising in this case. The contention of the company is that the fence statute

referred to was enacted for the benefit of the proprietors of adjoining lands, and that the plaintiff, as an employe of the railroad company, takes nothing by reason of the failure of the company to comply with its terms. It is doubtless true that, when a right is given by statute, only those to whom the right is in terms given can avail themselves of its benefits, but it does not follow that when a duty is so imposed a violation of that duty exposes the wrongdoer to liability to no person other than those specifically named in the statute. On the contrary, it is not unreasonable to say that every party who suffers injury by reason of the violation of any duty is entitled to recover for such injuries. At any rate, it is clear that the fact that certain classes of persons were intended to be primarily protected by the discharge of a statutory duty will not necessarily prevent others, neither named nor intended as primary beneficiaries, from maintaining an action to recover for injuries caused by the violation of such legislative command. It may well be said that, though primarily intended for the benefit of one class, it was also intended for the protection of all who need such protection. In this case a technical argument might be made from the mere language of the section. It provides that the corporation shall be liable in double the amount of all damages, not only for those "done by its agents, engines, or cars to horses, cattle," etc., but also for those done "by reason of any horses, cattle," etc., "escaping" from such contiguous fields. As the presence of the steer on the track was the cause of the derailling of the train, and as that steer escaped from the adjoining field through the defective fence, it may plausibly be argued that the recovery in this case comes within the express language of the statute, as being for damages done by reason of the escape of the steer from the adjoining field through the defective fence. But we do not care to rest our conclusions upon this technical construction. The purpose of fence laws, of this character, is not solely the protection of proprietors of adjoining fields. It is also to secure safety to trains. That there should be no obstruction on the track is a matter of the utmost importance to those who are called upon to ride on railroad trains. Whether that obstruction be a log placed by some wrongdoer, or an animal straying on the track, the danger to the trains, and those who are traveling thereon, is the same. To prevent such obstruction being one of the purposes of the statute, any one whose business calls him to be on a train has a right to complain of the company, if it fails to comply with this statutory duty. The authorities are clear on this proposition. In the case of *Hayes v. Michigan Cent. R. Co.*, 111 U. S. 228, 28 L. ed. 410, the facts were these: A railroad company was required by an ordinance of a municipal corporation to erect a fence upon the line of its road, within the corporate limits. It failed to comply with this ordinance, and the plaintiff, a boy of tender years, while running near the track, fell on it, and was run over by the passing cars. An action having been brought to recover for

such injuries, the trial court directed a verdict and judgment for the defendant, but this judgment was reversed by the supreme court. *Mr. Justice Matthews*, in the course of his opinion, discussed the question of general liability in these words: "It is said, however, that it does not follow that, whenever a statutory duty is created, any person who can show that he has sustained injuries from the nonperformance of that duty can maintain an action for damages against the person on whom the duty is imposed; and we are referred to the case of *Atkinson v. New Castle & Gateshead Water Co.*, L. R. 2 Exch. Div. 441, as authority for that proposition, qualifying, as it does, the broad doctrine stated by *Lord Campbell in Couch v. Steel*, 8 El. & Bl. 403. But accepting the more limited doctrine admitted in the language of *Lord Cairns* in the case cited,—that whether such an action can be maintained must depend on the 'purview of the legislature in the particular statute, and the language which they have there employed,'—we think the right to sue, under the circumstances of the present case, clearly within its limits. In the analogous case of fences required by the statute as a protection for animals, an action is given to the owners for the loss caused by the breach of the duty. And although, in the case of injury to persons by reason of the same default, the failure to fence is not, as in the case of animals, conclusive of the liability, irrespective of negligence, yet an action will lie for the personal injury, and this breach of duty will be evidence of negligence. The duty is due, not to the city as a municipal body, but to the public, considered as composed of individual persons; and each person specially injured by the breach of the obligation is entitled to his individual compensation, and to an action for its recovery. 'The nature of the duty,' said *Judge Cooley* in *Taylor v. Lake Shore & M. S. R. Co.*, 45 Mich. 74, 'and the benefits to be accomplished through its performance, must generally determine whether it is a duty to the public in part or exclusively, or whether individuals may claim that it is a duty imposed wholly or in part for their especial benefit.' See also *St. Louis, J. & C. R. Co. v. Terhune*, 50 Ill. 151, 99 Am. Dec. 504; *Schmidt v. Milwaukee & St. P. R. Co.* 28 Wis. 186, 99 Am. Dec. 158; *Siemers v. Eisen*, 54 Cal. 418; *Galena & C. U. R. Co. v. Loomis*, 13 Ill. 548, 56 Am. Dec. 471; *Ohio & M. R. Co. v. McClelland*, 25 Ill. 140; *St. Louis, V. & T. H. R. Co. v. Dunn*, 78 Ill. 197; *Massoth v. Delaware & H. Canal Co.* 64 N. Y. 524; *Baltimore & O. R. Co. v. State*, 29 Md. 252, 96 Am. Dec. 528; *Potlock v. Eastern R. Co.* 124 Mass. 158; *Cooley, Torts*, 657."

And again, answering the objection that the want of a fence was not the proximate cause of the injury, observes as follows: "It is further argued that the direction of the court below was right, because the want of a fence could not reasonably be alleged as the cause of the injury. In the sense of an efficient cause, *causa causans*, this is no doubt strictly true, but that is not the sense in which the law uses the term in this connection. The question is, Was it *causa sine qua non*? (a

cause which, if it had not existed, the injury would not have taken place,—an occasional cause); and that is a question of fact, unless the causal connection is evidently not proximate. *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. ed. 256. The rule laid down by *Willes, J.*, in *Daniel v. Metropolitan R. Co.*, L. R. 8 C. P. 216, 222, and approved by the exchequer chamber (*Id.* 591) and by the house of lords, L. R. 5 H. L. 45, was this: It is necessary for the plaintiff to establish by evidence circumstances from which it may fairly be inferred that there is reasonable probability that the accident resulted from the want of some precaution which the defendant might and ought to have resorted to."

Another case—and it is exactly in point—is that of *Donnegan v. Erhardt*, 119 N. Y. 468, 7 L. R. A. 537. In discussing this question the court said: "A railroad company, for the safety of its passengers, as well as its employes upon its engines and cars, is bound to use suitable care and skill in furnishing, not only adequate engines and cars, but also a safe and proper track and roadbed. The track must be properly laid and the roadbed properly constructed, and reasonable prudence and care must be exercised in keeping the track free from obstructions, animate and inanimate; and if, from want of proper care, such obstructions are permitted to be and come upon the track, and a train is thereby wrecked, and any person thereon is injured, the railroad company, upon plain common-law principles, must be held responsible. Experience shows that animals may stray upon a railroad track, and, if they do, there is danger that the train may come in collision with them, and be wrecked. Adequate measures, reasonable in their nature, must be taken to guard against such danger. Independently of any statutory requirement, a jury might find, upon the facts of a case, that it was the duty of a railroad company to fence its track to guard against such danger. But, whatever the rule would be independently of the statute, there is no reasonable doubt that it imposes the absolute duty upon a railroad company to fence its tracks. That duty, it is reasonable to suppose, was imposed, not only to protect the lives of animals, but also to protect human beings upon railroad trains. It is made an unqualified duty, and for a violation thereof, causing injury, the railroad company incurs responsibility. The sole consequence of an omission of the statutory duty is not specified and was not intended to be specified, in the statute. Responsibility for injury to animals was specially imposed because in most cases there would, independently of the statute, have been no such responsibility, as at common law the owner of animals was bound to restrain them, and if they trespassed upon the railroad there was no liability for their destruction, unless it was willfully or intentionally caused. We are therefore of the opinion that the railroad company was responsible to the plaintiff for the injuries he received without any fault on his part, and for this conclusion there is much authority in judicial utterances;" citing a large num-

ber of cases, and overruling the case of *Tanglois v. Buffalo & R. R. Co.*, 19 Barb. 364, so far as it holds a different doctrine. See also *Quackenbush v. Wisconsin & M. R. Co.*, 62 Wis. 411.

In *Thornton on Railway Fences & Private Crossings*, p. 571, it is said: "The cases are full of expressions touching the object of a statute requiring railroad companies to fence their rights of way, and there is an almost unanimous opinion that it is not only to protect domestic animals, but to protect the passengers on the trains."

So, also, in Missouri,—the state where this cause of action arose. In *Trice v. Hannibal & St. J. R. Co.*, 49 Mo. 438, 440, the court, referring to the claim that the provisions of a section substantially like the one in controversy were for the exclusive benefit of the landowner observed: "But such is not the theory upon which this statute has been uniformly sustained. While the protection of the property of adjacent proprietors is an incidental object to the statute, its main and leading one is the protection of the traveling public. To insure such protection, railroads are imperatively required to fence their tracks, and the penal liability deemed necessary to enforce this requirement is a matter of legislative discretion."

To like effect are the cases of *Isabel v. Hannibal & St. J. R. Co.* 60 Mo. 475; *Barrett v. Atlantic & P. R. Co.* 68 Mo. 56, 30 Am. Rep. 778; *Rutledge v. Hannibal & St. J. R. Co.* 78 Mo. 286; *Silber v. Kansas City, St. L. & O. R. Co.* Id. 528, 47 Am. Rep. 118; *Rozelle v. Hannibal & St. J. R. Co.* 79 Mo. 849.

Nor is there anything in the cases of *Berry v. St. Louis, S. & L. R. R. Co.* 65 Mo. 172; *Harrington v. Chicago, R. I. & P. R. Co.*, 71 Mo. 384; *Johnson v. Missouri Pac. R. Co.* 80 Mo. 620; *Peddico v. Missouri Pac. R. Co.* 85 Mo. 160,—cited by plaintiff in error,—antagonistic to the views expressed in the cases cited. The proposition is laid down, it is true, that remote landowners were not within the protection of the statute, and that it was intended for the owners of contiguous lands, but nowhere is it said that protection to the traveling public was not also one of the objects intended to be secured by the statute. And, if the purpose is to protect the traveling public, a party riding upon a train may invoke the statute, in case injury results to him through the failure of the company to comply with its requirements, because he is one of the parties for whose benefit it was enacted. Within the reasoning of all these authorities, and by the express decision of *Donnegan v. Erhardt*, and *Quackenbush v. Wisconsin & M. R. Co.*, *supra*, an employé has the same right as a passenger to complain of injuries caused by a violation of duties imposed by such a statute. The purpose is protection to the train. All who are on that train are exposed to equal danger. It is not a case where the employé has the means of protecting himself, and the traveler not, for if the train be derailed the danger to each is equal. It is urged, however, by the defendant, that the failure to keep the fence in repair is the negligence of a coemployé,

and that, therefore, it is not responsible.

But the duty is cast by the statute upon the company, and it is cast as an absolute duty. It must erect and maintain safe and secure fences. It is a duty whose object is the securing a safe place for the employés on the train to do their work, and that, as is known, is an absolute duty cast upon the company, responsibility for neglect of which cannot be evaded by intrusting it to some employé. Our conclusion, therefore, is that there was no error in the instructions of the court in respect to this matter, and that the law is that if, through a failure of the company to erect and maintain a sufficient fence as required by the statute, an animal gets onto the track, whereby a train is derailed, and an employé on that train is injured by such derailment, the latter is entitled to maintain his action for damages against the company.

A second objection is to the admission of testimony as to work done subsequently to the accident in the way of repair to the fence at the place where the steer entered upon the track, and we are referred to the two cases of *Columbia & P. S. R. Co. v. Hawthorne*, 144 U. S. 202, 36 L. ed. 405, and *Alcorn v. Chicago & A. R. Co.* 108 Mo. 81, as authorities for the proposition that proof of such subsequent repairs is not admissible in evidence for the purpose of showing the existence of a defect. But the difficulty with the objection is that this testimony was introduced, at least in the first place, by the company itself. After proof of such repairs had been made by the company, the mere fact that the plaintiff, on his rebuttal, introduced further testimony in reference to the matter, is not sufficient to justify any interference with the verdict. It is unnecessary to inquire whether the court erred in not giving, when requested, an instruction as to the consideration to be given to this testimony, for on the new trial, which we are compelled to award, probably no such question will be presented.

The only remaining matter that we notice is in respect to the instructions concerning contributory negligence. This instruction was asked by the defendant, and refused: "If the jury believe from the evidence that plaintiff voluntarily assumed his position on the platform of the way car, and that, under defendant's rules, his proper place was on top of that car, and if the jury further believe from the evidence that he was not in such position, and that, by reason of his failure to be on top, he was unable to immediately signal the engineer on first perceiving the steer, and thereby contributed in any way to produce the wreck and his consequent injury, then he cannot recover."

It is obvious that if there was in the charge no reference to the matter of contributory negligence, and the case stood alone upon the refusal to give this instruction, the ruling could not be sustained. But the court did refer to the matter; and the question to be determined is whether the charge, as given, fully and accurately stated the law in respect to contributory negligence, so as to obviate any objection which arises from the

failure to give this instruction. This was its language: "Again, it is suggested (and it seems to be claimed) that Reesman was guilty of contributory negligence in not taking a proper position on the way car, and with reference to that specification of negligence the court gives you this instruction: It was the duty of Reesman to comply with the rules made by the defendant company for the government of its brakemen. If a rule of the company required Reesman to be on top of the way car on the occasion of the accident, and he was on the rear platform, without the consent of the conductor, then he was guilty of such contributory negligence as will prevent a recovery, provided you believe that his being on the platform, instead of on the top of the way car, helped, in any direct way, to occasion the derailment; but if being on the platform, instead of on the top of the car, did not in any way help to occasion the accident, or if Reesman was on the platform with the knowledge and consent of the conductor of the train, under whose orders he worked, then he was not guilty of contributory negligence merely because he was on the platform, though the rule did require him to be on the top or roof of the car. In other words, gentlemen, although they may have had rules requiring him to be on the roof of the car, and he was not on the roof, yet, unless you are able to say that if he had been on the roof the accident would not have occurred, why the fact that he was not on the roof is no defense. It is not contributory negligence, such as will preclude the plaintiff from recovering. If the position which he took on that rear platform on the morning of the accident was a position which he took with the knowledge and consent of the conductor who had charge of the train, the fact that he was there, and not on the roof of the car, does not make him guilty of contributory negligence, notwithstanding the rule which has been read in evidence."

The proposition here plainly stated is that if plaintiff disobeyed the rules of the company, and such disobedience contributed directly to the injury, he may nevertheless recover, and cannot be held guilty of contributory negligence, providing that such disobedience was with the knowledge and consent of the conductor of the train. Or, in other words, if the conductor fails to enforce the rules of the company the employé may knowingly disregard them, and yet in no manner be barred from recovering for injuries which would not have resulted but for such disobedience. With that doctrine we cannot concur. It is not pretended that the conductor directed the plaintiff to remain on the platform, and not go onto the top of the caboose. A different question may arise in case the violation of the rules of the company is in obedience to a direct command from the immediate superintendent, but a decision of that question is unnecessary in this case. The duty of obedience to the rules of the employer is one resting alike upon all employés; and, when an employé claims to recover from his employer for injuries resulting through the latter's negligence, he cannot escape the consequences of his own act

contributing to such injury—an act done in known violation of the rules of such employer—on the ground that his immediate superintendent knew and assented to such act of violation. If it were otherwise, then the supineness and negligence of any superintending officer of a corporation would relieve a subordinate from responsibility for his own conduct. In other words, the wrong of one employé is excused by a like wrong of another. The employé injured through his own omission of duty escapes liability for such omission because some other employé is equally careless. The question has not infrequently arisen whether knowledge and assent on the part of the conductor, or other official on a train, of a violation of one of the rules of the company by a passenger, relieves the latter from the burden of contributory negligence arising from such violation, and the response has almost uniformly been in the negative. It is true that in those cases the party injured was not an employé, subject to the control of the officer whose knowledge and assent to the violation was relied upon as an excuse, but the principle underlying is the same. The question is not one of obedience to orders, but of a compliance with rules; and, generally speaking, the duty of compliance is not waived by the mere fact that some controlling official has knowledge of the failure to comply. In the case of *Baltimore & P. R. Co. v. Jones*, 95 U. S. 489, 24 L. ed. 506, the party injured, who though an employé was not employed on the train or subject to the control of the conductor, was riding on the pilot of the locomotive, contrary to the directions of his employer, but with the knowledge and assent of the persons in charge of the train; and it was held that his thus riding was contributory negligence and not excused, the court observing, "The knowledge, assent, or direction of the company's agents as to what he did is immaterial." In *Pennsylvania R. Co. v. Langdon*, 92 Pa. 21, 87 Am. Rep. 651, the plaintiff, a passenger, was injured while riding in the baggage car in violation of the rules of the company. It was held that he could not recover although such riding was with the knowledge of the conductor of the train. In the course of the opinion the court said, "We are unable to see how a conductor in violation of a known rule of the company, can license a man to occupy a position of danger so as to make the company responsible." See also the following cases: *Hickey v. Boston & L. R. Co.* 14 Allen, 429; *Houston & T. C. R. Co. v. Moore*, 49 Tex. 81, 30 Am. Rep. 98; *Virginia Midland R. Co. v. Roach*, 83 Va. 875; *Shenandoah Valley R. Co. v. Lucado*, 86 Va. 390; *Georgia Pac. R. Co. v. Davis*, 92 Ala. 300. Nor is there anything in the case of *Northern Pac. R. Co. v. Nickels* (decided by this court) 4 U. S. App. 369, 50 Fed. Rep. 718, in conflict with the views herein expressed. In that case a brakeman was injured while coupling a car, and on the trial an instruction was asked of the court to direct a verdict for defendant on the ground of the contributory negligence of the plaintiff, in failing to use a stick in making such coupling, as required by the

rule of the company, which instruction was refused and the matter of negligence submitted to the jury. There was testimony tending to show that the rule was universally disregarded, and that the superintendent of the road was fully aware of its constant violation; and it was held that under the circumstances the jury were at liberty to consider whether the rule was not, in effect, abrogated. The court thus disposed of the question (page 382, 4 U. S. App., and page 718, 50 Fed. Rep.): "To hold that this defendant company could make this rule on paper, call it to plaintiff's attention, and give him written notice that he must obey it, and be bound by it, one day, and know and acquiesce, without complaint or objection, in the complete disregard of it by the plaintiff, and all its other employes associated with him on every day he was in its service, and then escape liability to him for an injury caused by its own breach of duty

towards the plaintiff, because he disregarded this rule, would be neither good morals nor good law. Actions are often more effective than words, and it will not do to say that neither the plaintiff nor the jury was authorized to believe, from the long-continued acquiescence of the defendant in the disregard of this rule, that it had been abandoned, and that it was not in force. The evidence of such abandonment was competent and ample, and the ruling and charge of the court below on this subject were right."

It is unnecessary to pursue this matter further. It may be laid down as a general rule that the mere knowledge and assent of his immediate superior to a violation by an employé of a known rule of the company—the employer—will not, as a matter of law, relieve such employé from the consequences of such violation.

The judgment of the court below must be reversed, and the case remanded for a new trial.

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

W. R. HAILE, Curator, etc., of James T. Haile, *Plff. in Err.*,

v.

TEXAS & PACIFIC R. CO.

(60 Fed. Rep. 557.)

Insanity resulting from the shock and excitement caused by a railroad accident to a passenger who sustained no bodily injury will not make the railroad company liable.

(January 23, 1894.)

ERROR to the Circuit Court of the United States for the Eastern District of Louisiana to review a judgment in favor of defendant in an action brought to recover damages for insanity alleged to have been produced by the negligent acts of defendant. *Affirmed.*

Statement by Toulmin, District Judge:

In his petition the plaintiff in error (also plaintiff in the lower court) avers: That on or about January 29, 1892, in company with James T. Haile, his ward, he took passage on the passenger train of the defendant company, at Dallas, Tex., and paid fare, and provided tickets, for himself and his brother, to Baton Rouge, La., in consideration of which fare the said company contracted and bound itself to convey them safely, and without delay and harm, to such destination. "That this trip was undertaken under directions of a physician, who advised that rest, quiet, and change of scene would restore to full vigor of mind and body the said James T. Haile, who had for some time previous been suffering from an attack of grippe, and

was at this time, and in consequence thereof, greatly depressed, mentally and physically, and in an intense nervous condition. That the greater part of said journey had been accomplished in safety, and without any bad effect upon the said James T. Haile, until on the next day, January 30, 1892, about 8 A. M., when near the town of Robeline, La., the said train was suddenly, and without warning, precipitated through a burning bridge, and was completely wrecked, and immediately after caught fire and was destroyed. That the shock from the accident was so great that it hurled said James T. Haile from his seat to the floor, where he lay utterly helpless and prostrated by the shock, and unable to move. The train having in the mean time caught fire, petitioner was forced to carry his brother out of the car, and, on account of the marshy condition of the surrounding country, and his nervous and prostrated condition, to place him on the roadbed, where he was in full view of the burning wreck, and in the midst of the wounded and dying, whose cries and lamentations, added to his already intense nervous state, caused by the accident itself, threw him into a state of excitement, so that petitioner, and those around him, were unable to control or quiet him. That his nervous state became greatly worse during the several hours they were forced to wait on the scene of the wreck for conveyance to the town of Robeline, where they were to wait for the relief train to be sent out by the railroad company. After a further delay of some hours, the relief train arrived, consisting, as petitioner afterwards found, of what is

NOTE.—The present case is akin to those respecting a right of action for mere fright which are collected in the note to *Ewing v. Pittsburg, C. C. & St. L. R. Co.* (Pa.) 14 L. R. A. 686.

But the present case more nearly approaches *Purcell v. St. Paul City R. Co.* (Minn.) 16 L. R. A. 203, 23 L. R. A.

in which nervous convulsions and illness resulting from fright were held to constitute an actionable injury.

The question is a nice one and the authorities have not clearly developed the answer.

known as an 'emigrant coach,' drawn by a freight engine. The coach was overcrowded with passengers from the wrecked train. The seats and other accommodations were of the crudest kind, entailing great discomfort and inconvenience upon the passengers, and especially upon petitioner's ward, who, in his exhausted, excited, and overwrought state of mind and body, was forced to use same. That the hardships, together with the constant and sudden jerkings and stoppings of the train, caused by the engine used not being properly constructed for such purposes, or because it was improperly handled, kept petitioner's ward and the passengers in constant fear and excitement; and finally, on entering the company's yard in Algiers, La., the train on which was petitioner and his ward was suddenly and violently run into from the rear by a switch engine, through the negligence of defendant's employes. The shock was so violent as to knock petitioner's ward off the seat, to the car floor, and caused great excitement among the passengers, who feared another accident had befallen them. Now, petitioner alleges that since this time his ward has become rapidly worse, as a result of the shock, excitement, and hardship he suffered from the said accident, and he is now insane, and confined in a bettering house, with little or no hope of recovery; and he has therefore been interdicted, and petitioner duly appointed his curator. Petitioner therefore alleges and charges that the present state of his ward's mind was caused and brought about by the injuries and sufferings he underwent on account of the accidents and hardships aforesaid; and he alleges that the said accidents and injuries were caused by the negligence of the defendant company, its employes and agents, for the reason that, by the exercise of due care and caution in the management of its road and the selection of agents, the said accidents could have been avoided. That the said road employed no track walkers to guard against such accidents, and to see that the road was in proper condition, and safe for travelers on the company's trains, as it was in duty bound to do. And by reason of the fact that this section of the road was made up of wooden trestle work, which needed constant vigilance and care to keep it in safe condition, the burning of this bridge for hours before the accident was evidence of gross negligence on the part of the company. That the train to which the accident happened was running at a rate of speed that was dangerous and negligent, considering the character of the roadbed, and the fact that a dense fog obscured the view of the trainmen. For these reasons, and for the conduct of the company and its agents in the careless transportation of petitioner and his ward, the said company is chargeable with gross negligence. Petitioner alleges and avers that for the pain, anxiety, and loss of his mind, the expense he has incurred, and in the future must incur, petitioner's ward has been damaged in the sum of twenty-five thousand dollars by the said company." The defendant company, also defendant in error, excepted or demurred to the petition on the following grounds: "Because said

petition, on its face, shows no cause of action against defendant. Because, under the law, no right of action can arise for damages for the insanity of a human being. Because said petition does not show any right to recover damages for insanity. Wherefore, defendant prays that these exceptions may be maintained, and plaintiff's suit dismissed, with costs." The exceptions were sustained by the lower court, and judgment was rendered dismissing the suit. This ruling is assigned as error.

Argued before McCormick, *Circuit Judge*, and Locke and Toulmin, *District Judges*.

Messrs. W. B. Spencer, Charles E. Fenner, Samuel Henderson, Jr., and Charles Payne Fenner, for plaintiff in error:

The plaintiff in this case is not seeking to recover for the mental pain or anxiety of his ward, but for his insanity or loss of mind, the absolute destruction of his intellect.

"A man's mind is no less a part of his person than his body," says the supreme court of Connecticut (*Seger v. Barkhamsted*, 23 Conn. 298), and any injury resulting in the loss of mind or insanity is as much a subject of legal damage as injury to any other part of his person.

The petition charges physical as well mental suffering which, considering the condition of his ward's health, might have been sufficient to cause his insanity and the case should have been given to the jury on that issue.

Fitzpatrick v. Great Western R. Co. 12 U. C. Q. B. 645.

The failure to carry passengers safely is in the nature of a tort, and to be treated as such independently of the contract of carriage, the courts seeming to regard it as a breach of public duty, rather than as a violation of a particular contract.

16 Am. & Eng. Encyclop. Law, 416, 417, and notes 1, 2; *Brown v. Chicago, M. & St. P. R. Co.* 54 Wis. 847, 41 Am. Rep. 41; *Wood v. Milwaukee & St. P. R. Co.* 33 Wis. 398; *Watah v. Chicago, M. & St. P. R. Co.* 42 Wis. 23, 24 Am. Rep. 876; *Craker v. Chicago & N. W. R. Co.* 36 Wis. 657.

In *Rigby v. Hewitt*, 5 Exch. 243, where the learned judge said: "Every person who does a wrong is, at least, responsible for all the mischievous consequences that may be reasonably expected to result under ordinary circumstances from such misconduct." From this guarded expression the converse of this proposition has been drawn by some courts, viz., that unless the consequences of an act might have been reasonably foreseen by the defendant himself, no liability accrues. But the very gist of actions for mere negligence is, that the consequences of the act could not be reasonably expected, for if these consequences could reasonably have been foreseen and expected, an intention to produce these consequences could properly be inferred, and the act would be a malicious tort.

Simpson v. London General Omnibus Co. L. R. 8 Q. B. 890.

In suits for mere actionable negligence there is no ground to charge the defendant with a deliberate attempt to injure, but only that though there was only a slight chance that

such an injury would result, he was so negligent or heedless as not to provide against such chance.

Smith v. London & S. W. R. Co. L. R. 6 C. P. 14; *Simpson v. London General Omnibus Co. supra.*

It is no defense that the particular consequence is improbable and not to be reasonably expected, if it really appear that it naturally followed from the negligence under examination.

Whart. Neg. 1st ed. § 77; *Pittsburgh v. Grier*, 22 Pa. 54, 60 Am. Dec. 65; *McGrew v. Stone*, 53 Pa. 442; *Higgins v. Dewey*, 107 Mass. 494, 9 Am. Rep. 68; *White v. Ballou*, 8 Allen, 408; *Luce v. Dorchester Mut. F. Ins. Co.* 105 Mass. 297, 7 Am. Rep. 522; *Dowell v. General Steam Nav. Co.* 5 El. & Bl. 195; *Burrows v. March Gas & Coke Co.* L. R. 5 Exch. 67.

He who commits a tort must be held to contemplate all the damages which may legitimately flow from his illegal act, whether he may have foreseen them or not, and so far as plainly traceable thereto, he must repair them.

Hill v. Winsor, 118 Mass. 251; *Eten v. Luyster*, 60 N. Y. 252; *Lane v. Atlantic Works*, 111 Mass. 186; *Keenan v. Cavanaugh*, 44 Vt. 268; *Little v. Boston & M. R. Co.* 66 Me. 289; *Col-lard v. South Eastern R. Co.* 7 Hurlst. & N. 79; *Hart v. Western R. Corp.* 18 Met. 99, 46 Am. Dec. 719; *Wellington v. Downer Kerosene Oil Co.* 104 Mass. 64; *Metallic Compression Casting Co. v. Fitchburg R. Co.* 109 Mass. 277, 13 Am. Rep. 689; *Kellogg v. Chicago & N. W. R. Co.* 26 Wis. 228, 7 Am. Rep. 69; *Williams v. Vanderbilt*, 28 N. Y. 217, 84 Am. Dec. 838; *Bowas v. Pioneer Tow Line*, 2 Sawy. 21; *Schumaker v. St. Paul & D. R. Co.* 12 L. R. A. 257, 46 Minn. 38; *Brown v. Chicago, M. & St. P. R. Co.* 54 Wis. 342, 41 Am. Rep. 41.

Nor is the defendant excused, because he did not know the state of the injured man's health, and the result its negligence would have upon him.

Brown v. Chicago, M. & St. P. R. Co. 54 Wis. 357, 41 Am. Rep. 41; *Stewart v. Ripon*, 88 Wis. 591; *Baltimore City Pass. R. Co. v. Kemp*, 61 Md. 74, 48 Am. Rep. 184.

The test of reasonable anticipation or foresight is, considering all the circumstances of the case, this result in the ordinary natural sequence from the negligence complained of. If it is, then the damage is the proximate result of the negligence.

1 Smith, Lead. Cas. Eng. ed. 182.

Is it not likely that "in the long run" such a result as that in this case would happen from a series of such negligent acts as that charged against the defendant?

Whart. Neg. § 78.

Injuries resulting from fright are actionable.

Oliver v. La Valle, 86 Wis. 597; *Purcell v. St. Paul City R. Co.* 16 L. R. A. 203, 48 Minn. 189; *Mitchell v. Rochester R. Co.* 4 Misc. 575.

Meers. W. W. Howe and S. S. Prentiss, for defendant in error:

This is a case where, by an accident which injured some one else, the plaintiff's ward was excited and alarmed.

In such a case the law does not afford any action for damages,—and, *a fortiori*, where as in the case at bar the parties contracting could not have contemplated the result alleged.

28 L. R. A.

Ewing v. Pittsburg, C. C. & St. L. R. Co. 14 L. R. A. 666, 147 Pa. 40.

In no case has it ever been held that mental anguish alone, unaccompanied by injury to the person, afforded a ground of action.

Wood's note on Mayne, Damages. See also *Wyman v. Leavitt*, 71 Me. 227, 36 Am. Rep. 303; *Fox v. Borkey*, 126 Pa. 164; *Lynch v. Knight*, 9 H. L. Cas. 577; *Indianapolis & St. L. R. Co. v. Stables*, 63 Ill. 313; *Canning v. Williamstown*, 1 Cush. 451; *Johnson v. Wells, Fargo & Co.* 6 Nev. 224, 3 Am. Rep. 245.

Damages for mental suffering alone are too remote, uncertain, and speculative.

Western U. Tele. Co. v. Wood, 21 L. R. A. 706, 57 Fed. Rep. 471.

In *Scheffer v. Washington City, V. M. & G. S. R. Co.* 105 U. S. 249, 26 L. ed. 1070, by reason of a negligent collision of railway trains, a passenger sustained terrible physical injuries, resulting in nervous prostration and disorder which induced suicide.

It was held that the collision was not the proximate cause of the death.

In order to warrant a finding that negligence or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances.

Pittsburg, C. & St. L. R. Co. v. Staley, 41 Ohio St. 118; *Jackson v. Nashville, C. & St. L. R. Co.* 18 Lea, 491, 49 Am. Rep. 663; *Eames v. Texas & N. O. R. Co.* 63 Tex. 660; *Cooley*, Torts, p. 69.

Toulmin, District Judge, delivered the opinion of the court:

The first and third grounds of exception to the petition are, in effect, the same, and if they are well taken the judgment of the court below must be affirmed. The plaintiff claims damages for the pain, anxiety, and loss of mind alleged to have been suffered by his ward, James T. Haile, and avers that this state of said Haile's mind, which is now one of insanity, "was caused and brought about by the injuries and sufferings he underwent on account of the accidents and hardships" complained of. He avers that the shock of the accident was so great as to hurl Haile from his seat to the floor of the car, where he lay prostrated by the shock. A shock is a sudden agitation of body or mind. It may affect the body or mind. The petition avers that Haile lay helpless and prostrated, but whether from a bodily or mental shock is left somewhat uncertain by the averments of the petition. The shock averred may reasonably be construed to mean the one or the other. But there is no charge that any bodily injury was sustained by the shock, and no claim for damages for any such injury. The charge is that Haile's insanity was caused and brought about by the injuries and sufferings he underwent on account of the accidents and hardships complained of; and the claim for damages is for the pain, anxiety, and loss of his mind, and the expenses incurred and to be incurred incidental thereto. The learned counsel for the plaintiff concedes "that pain

and anxiety of mind the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone." They say that the plaintiff, in this case, is not seeking to recover for the mental pain or anxiety of his ward, but for his insanity,—the loss of his mind,—and they present to the court an able argument to show that "the two are entirely separate and distinct phenomena." They contend that insanity is not to be "placed in the same category with such trivial mental phenomena as mere anxiety and worry." They say, "It is a disease of the mind, and the law could as well weigh and determine the damage a man has as suffered by the loss of his mind as it could the loss of his leg, or of the power of sight," etc. It is not necessary for us to decide the question raised by this contention, which is whether, under the law, any right of action can arise for damages for the insanity of a human being. The question we are called on now to decide is whether the facts set forth in the petition show any right to recover damages for insanity, as is therein claimed. That question we will proceed to consider.

The negligence of defendant, as charged, being admitted by the exceptions, the question is, Was that negligence the proximate cause of the injury complained of? It is well settled that the damages sustained by a wrongful act must be the natural result of the act,—such a consequence as, in the ordinary course of things, would flow from it. As expressed by some of the authorities, "Proximate damages are those that are the ordinary and natural results of the negligence, such as are usual, and might therefore have been expected." "Remote damages are such as are the result of an accidental or unusual combination of circumstances, which would not be reasonably anticipated, and over which the negligent party had no control." *Boring v. Pittsburg, O. C. & St. L. R. Co.* 14 L. R. A. 668, 147 Pa. 40; *Victorian R. Co. v. Coultas*, L. R. 18 App. Cas. 222; *Cooley, Torts*, 69; 2 Thomp. Neg. 1088.

The contention is that the insanity for which damages are claimed was caused by the excitement, hardship, and suffering which resulted from the accident. According to the great current of modern medical authorities, insanity is a disease,—a disease of the mind,—the existence of which is a question of fact, to be proved, just as much as the possible existence of any other disease. As said by Dillon, *Oh. J.*, in *Fetter's Case*,

25 Iowa, 68, "That insanity is the existence of mental disease, both medicine and law now recognize." While the defendant, as a common carrier, had reason to anticipate that an accident would cause physical injury, and would produce fright and excitement, it had no reason to anticipate that the latter would result in permanent injury, as a disease of the mind, or any other disease that might be caused by excitement, exposure, and hardship sometimes incident to travel. If the disease was not likely to result from the accident, and was not one which the defendant could have reasonably foreseen, in the light of the attending circumstances, then the accident was not the proximate cause. The defendant had no reason to anticipate that the result of an accident on its road would so operate on Halle's mind as to produce disease,—the disease of insanity,—any more than that the exposure and hardships he suffered would produce gripe, pneumonia, or any other disease. He sustained no bodily injury by the accident, so far as the petition shows; but it caused a shock and an excitement, which, under his peculiar mental and physical condition at the time, resulted in his insanity. The defendant owed him the duty to carry him safely,—not to injure his person by force or violence. It owed him no duty to protect him from fright, excitement, or from any hardship that he might subsequently suffer because of the unfortunate accident.

The case of *Scheffer v. Washington City, V. M. & G. S. R. Co.*, 105 U. S. 249, 26 L. ed. 1070, was where, by reason of a collision of railway trains, a passenger was injured; and, becoming thereby disordered in mind and body, he, some eight months thereafter, committed suicide. The court held in a suit by his personal representative against the railroad company, that as his own act was the proximate cause of his death, there could be no recovery. In the opinion the court said: "The suicide of Scheffer was not a result naturally and reasonably to be expected from the injury received on the train. . . . His insanity, as a cause of his final destruction, was as little the natural or probable result of the negligence of the railway officials, as his suicide, and each of these are casual or unexpected causes, intervening between the act which injured him, and his death."

There was no error in the ruling of the Circuit Court, and the judgment is affirmed.

WEST VIRGINIA SUPREME COURT OF APPEALS.

John G. BOGGESS, *Plff. in Err.*,

v.

CHESAPEAKE & OHIO R. CO.

(37 W. Va. 297.)

*1. A person having a ticket for pas-

*Headnotes by BRANNON, J.

sage upon a railroad, who boards a freight train which does not carry passengers believing the ticket good on that train, is to be treated as a passenger, and is not a trespasser.

2. The conductor orders such persons to get off the train while running at a speed which would endanger him in getting off, the conductor refusing to stop the

NOTE.—For cases similar to the above except in respect to the good faith of the person injured and his intent to ride lawfully as a passenger, see *Farber v. Missouri Pac. R. Co.* (Mo.) 20 L. R. A. 360; 23 L. R. A.

Plans v. Boston & A. R. Co. (Mass.) 17 L. R. A. 385. For exhaustive note on injuries received in getting on or off railroad trains, see *Carr v. Bel River & R. R. Co.* (Cal.) 21 L. R. A. 354.

train to allow him to get off, and in violent and insulting language threatens to eject the person from the train by force if such order is not obeyed, and has force at his command to execute such threat, and the person jumps from the train to avoid ejection by force. This is sufficient compulsion or show of force to excuse the person from the charge of contributory negligence in so jumping from the train.

(December 10, 1902.)

ERROR to the Circuit Court for Kanawha County to review a judgment in favor of defendant in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. Okey, Johnson and A. Burlew, for plaintiff in error:

The defendant is liable notwithstanding the negligence of the plaintiff, if an injury could be prevented by ordinary care on the part of the defendant.

Baltimore & P. R. Co. v. Jones, 95 U. S. 489, 24 L. ed. 506; *Twomley v. Central Park N. & E. R. Co.* 69 N. Y. 158, 25 Am. Rep. 162; *Northern Cent. R. Co. v. State*, 29 Md. 420, 96 Am. Dec. 545; *Kay v. Pennsylvania R. Co.* 65 Pa. 269, 8 Am. Rep. 628; *Lynch v. Nurdin*, 1 Q. B. 29.

If there be negligence on the part of the plaintiff, yet, if at the time the injury was committed, it might have been avoided by the defendant in the exercise of reasonable care and prudence, an action will lie for the injury.

Huelsenkamp v. Citizens R. Co. 37 Mo. 537, 90 Am. Dec. 899; *Macon & W. R. Co. v. Davis*, 18 Ga. 679; *Morrissey v. Wiggins Ferry Co.* 43 Mo. 380, 97 Am. Dec. 402, 47 Mo. 521; *Brown v. Hannibal & St. J. R. Co.* 50 Mo. 461, 11 Am. Rep. 420; *Harlan v. St. Louis, K. C. & N. R. Co.* 65 Mo. 22; *Hicks v. Pacific R. Co.* 64 Mo. 480; *Vicksburg & M. R. Co. v. McGowan*, 62 Miss. 683, 52 Am. Rep. 205; *Chicago & A. R. Co. v. Gretener*, 46 Ill. 75; 2 Rorer, Railroads, pp. 1040, 1054.

A person taking passage on the wrong train cannot be expelled as a trespasser although he had no right to a passage on that train, but having a ticket, had a right of passage on the proper train.

Lake Shore & M. S. R. Co. v. Rosenzweig, 118 Pa. 519.

The commission of a trespass does not justify the infliction of an injury by way of punishment, or revenge, or out of mere recklessness.

Toomey v. Southern Pac. R. Co. 10 L. R. A. 139, 86 Cal. 374, and cases there cited; *Williams v. Southern Pac. R. Co.* 72 Cal. 120; Patterson, Railway Accident Law, § 198, p. 189; *Hoffman v. New York Cent. & H. R. R. Co.* 87 N. Y. 25, 41 Am. Rep. 337; *Louisville, N. A. & C. R. Co. v. Dunkin*, 92 Ind. 601; *Schultz v. Third Ave. R. Co.* 89 N. Y. 243; *Western & A. R. Co. v. Turner*, 72 Ga. 292, 53 Am. Rep. 842; *Carter v. Louisville, N. A. & C. R. Co.* 98 Ind. 552, 49 Am. Rep. 790; *Kansas City, Ft. S. & G. R. Co. v. Kelly*, 86 Kan. 655, 59 Am. Rep. 596; *Lake Shore & M. S. R. Co. v. Rosenzweig*, *supra*.

In *Benton v. Chicago, R. I. & P. R. Co.* 55 Iowa, 502, it was held a proper case for the jury, when a boy was roughly ordered off a

moving train, and in attempting to obey was killed.

The same was held in California in *Kline v. Central Pac. R. Co.* 37 Cal. 400, 99 Am. Dec. 282.

Mr. J. E. Chilton, for defendant in error: The plaintiff alleges that he got on a freight train of the defendant. This was a known dangerous place and not such a train as any person could believe or suppose was intended to carry passengers. The company had the right to refuse to carry passengers on its freight trains.

Hobbs v. Texas & P. R. Co. 49 Ark. 357; *Hutchinson*, Car. 538, note 2.

The plaintiff alleges that he undertook to jump from a train running at a dangerous rate of speed—at a speed, to use his language, that made it extremely dangerous for him to attempt to get off—and was hurt while doing so.

It is negligence to attempt to get off a moving train, especially when running at an extremely dangerous rate of speed.

Cram v. Metropolitan R. Co. 112 Mass. 38; *Ginnon v. New York & H. R. Co.* 3 Robt. 25; *Southwestern R. Co. v. Singleton*, 67 Ga. 306.

It is not sufficient to allege that the plaintiff believed that the conductor would do an unlawful and improper act, by putting him off a moving train, but he must show that the conductor or some employé of the company used some force or made some "demonstration of force sufficient to impress a reasonable person with the belief that force would be employed."

Kline v. Central Pac. R. Co. 37 Cal. 405, 99 Am. Dec. 282; *Cauley v. Pittsburg, O. & St. L. R. Co.* 95 Pa. 398, 40 Am. Rep. 664.

Brannon, J., delivered the opinion of the court:

John G. Boggess brought an action of trespass on the case in the circuit court of Kanawha county against the Chesapeake & Ohio Railway Company, and a demurrer to the declaration was sustained, and judgment rendered for the defendant, and the case was brought here by the plaintiff. The declaration alleges that the plaintiff purchased of the defendant a ticket for his passage upon its railroad from Brownstown to Charleston, and got upon a freight train to go to Charleston, and that he believed that the ticket entitled him to ride upon said train, and that while the train was running at a speed which made it extremely dangerous for one to get off it without suffering serious bodily injury, the conductor "ordered and directed the plaintiff to leave said train, and refused to stop said train to enable said plaintiff to do so without injury, and there and then, in violent and insulting language, threatened to put said plaintiff off said train by force if he declined to obey said order; and believing that said agent, with such force as he could command, would be able to and would eject the plaintiff from said train by force if he undertook to resist him, and believing, also, that an attempt to resist said agent would result in more serious injury to the plaintiff than he would be likely to receive by attempting to get off said train without collision with said agent, and to avoid being forcibly ejected from said train, he undertook

to get off said train, and in doing so used every care and precaution possible, but said train was running at such a rapid rate that in jumping from it he was injured," etc.

We cannot regard the plaintiff a trespasser, if that be material; for even a trespasser on a train must be ejected at a proper time and in a proper manner. Having a ticket, and getting aboard a wrong train, believing his ticket would entitle him to ride upon it, he is not a trespasser, but a passenger. There is no question that a railroad company may make reasonable rules and regulations for the conduct of its business, nor that it has the right to appropriate certain of its trains for freight exclusively, and others for passengers, and refuse to carry passengers on freight trains; but when a person with a ticket giving no notice of such rule is on a freight train, believing he has a right to ride on it, he is a passenger, and entitled to a passenger's rights while on it. 2 Rorer, Railways, 984; 2 Wood, Railway Law, 1047. We do not question the right of a conductor of a freight train, which, by the rules of the company, is forbidden to carry passengers, to require a passenger to leave it, and even forcibly eject him, if necessary, in a manner such as is required by law; but it must be in that manner. In this case the declaration states that the train was running at a speed rendering it extremely dangerous to get off it, and that the conductor refused to stop it to enable the plaintiff to get off it and that the conductor nevertheless required the plaintiff, under such circumstances of imminent danger, to leave the train. Certainly, we are compelled to say that in this the conductor was in the wrong. If determined that the plaintiff must leave the train at once, he must stop it for the purpose, or if that was inconvenient, or he did not choose to do so, he must allow the passenger to remain on the train until his next stopping place is reached, and not compel him, at risk of his life, to jump from the rapidly moving train. It needs no authority, though it is abundant, to show that neither a passenger nor trespasser can be expelled from a train under circumstances imperilling his life or limb. Thus the company is in the wrong.

But it is said that while this may be true, and while, if the plaintiff had been ejected from the train by force, or a demonstration of force equivalent thereto, the company might be liable, yet the declaration does not show this to be the case, and that the plaintiff, without actual compulsion, though capable of seeing and judging the danger of the act, voluntarily risked that danger, and jumped from the running train. Instead of acting prudently and standing his ground until ejected by actual force, and therefore he is guilty of contributory negligence preventing recovery in this case. Here, in fact, is the crucial point in the case. Now, first, it may with force be said that it lies not in the company's mouth to say, after giving a command to the plaintiff to leave the train, that he ought not to have obeyed, but ought to have waited until the actual forcible compulsion came. It gave the command. Can it complain that it was obeyed? But the quotation

above from the declaration requires us to interpret it as stating that the conductor ordered the plaintiff to get off the train, and besides threatened to put the plaintiff off by force, conveying such threat in insulting and violent language, indicative of earnestness and determination to execute the threat, and that the plaintiff believed he would execute it, and that the conductor, with help at his command, could execute it, and that the plaintiff, under all the circumstances, believed that an effort to resist being ejected by force would entail more danger of bodily injury than his getting off the train without collision with the conductor, and that the plaintiff jumped from the train to avoid being ejected by actual force. If these things be true, we must say that the declaration alleges that the force would have come. If so, was the plaintiff compelled to wait for it, when it would certainly increase his danger? It would seem useless to await the force, if come it will. Must he who is about to receive the deadly blow wait till it fall before exercising self-defense? Or, rather, if he flees to escape it, and in so doing, and because of his flight, receives an injury, would not the one wrongfully compelling the flight be answerable? Can he say his adversary should not have fled? In *Kline v. Central Pac. R. Co.*, 37 Cal. 400, 99 Am. Dec. 282, where a boy was ordered to get off a train while moving, the opinion said: "There may be moral as well as physical compulsion, and the former may prove as effectual as the latter. How, then, is one who resorts to the former less culpable than one who resorts to the latter? Or how can one who finds himself unable to resist the former be held more responsible for the consequences than when he yields, from necessity, to the latter? Can his obedience in the former case be considered the result of his own will, any more than his ejection in the latter? If, as the testimony tends to show, the conductor sharply ordered the plaintiff to get off the cars, at the same time putting his hand upon his shoulder as if to enforce obedience, and the boy jumped, without waiting for further actual force, or resisting until thrust off by the superior strength of the conductor, can we say judicially that his act was in any degree voluntary? The tone, manner, and whole bearing of the conductor may have satisfied the boy that force would be used. If so, was not such a demonstration on the part of the conductor equivalent to actual and superior force? We have no doubt, in such a case, a show or demonstration of force sufficient to impress a reasonable person with the belief that it will be employed must be held to be equivalent to actual force. The danger of sustaining personal injury is much greater where a person is ejected by the use of actual force than where he is ejected under circumstances which permit the exercise of some care on his part. It would be a rigid rule which would require a person to subject himself to such extra hazard, after it has become morally certain that actual force will be used, in order to free himself from all responsibility in respect to consequences, and fasten it upon his adversary." I think the

general principles stated in the California case correct. It is a difficult matter to define "force," or say in exact language what in such a case as this is the show of force, short of actual force, which would justify the party in jumping from the train into danger. It assimilates itself somewhat to the question of duress under the law of contracts. There the question is, Is this contract the act of the will of its maker, or his enforced act,—the creature, not of his will, but of coercion by the other party? Here the question is, Was the act of jumping from the train the willing but reckless act of the plaintiff, or his unwilling act, attributable to the wrongful act and coercion of the conductor? Mr. Bishop, in his work on Contracts (sec. 718), says: "It is immaterial whether the duress is actual or only, in a serious and effectual manner, threatened. This idea is expressed in the older books by dividing it, in the words of Blackstone, into two sorts,—duress of im-

prisonment, where a man actually loses his liberty, and duress *per minas*, where the hardship is only threatened and impending." In this case there is, if the declaration be true, much more than command. There is a threat, serious and violent, with ample capacity to execute it, and its execution certain to endanger the plaintiff more than if, without waiting for its execution, he jumped from the train, and this act was done only to avoid forcible ejection. Was there not a demonstration of force equivalent to actual force?

We think there is error in sustaining the demurrer, and we reverse the judgment, and remand the case for further proceedings, adding that we pass only on the face of the declaration, and indicate no opinion on the merits of the case, as it may appear on the evidence when tried.

Reversed and remanded.

IOWA SUPREME COURT.

C. W. ROBISON, *Appt.*,

v.

W. W. GRAY.

(.....Iowa.....)

Taking possession of mortgaged chattels and selling them at once is authorized by a chattel mortgage which provides that the mortgagee may take possession and sell whenever he "shall choose to do so," especially when the statute provides that the mortgagee is entitled to possession in the absence of stipulation to the contrary, notwithstanding the fact that the mortgage is given to secure notes which are payable at different times in the future.

(Given, J., *dissenta.*)

(January 26, 1894.)

APPPEAL by plaintiff from a judgment of the District Court for Webster County in

favor of defendant in an action brought to enforce payment of certain promissory notes.
Reversed.

Statement by **Rothrock, J.:**

This is an action upon four promissory notes executed by the defendant, and an account for interest on a balance alleged to be due the plaintiff. The defendant, by his answer, denied indebtedness upon the account, and alleged that the promissory notes were fully paid by the seizure of certain property rights and credits of defendant under a chattel mortgage given to secure the payment of said notes. In another count of the answer the defendant alleges that the plaintiff maliciously and wrongfully seized, and converted to his own use, the property described in the chattel mortgage, by reason of which wrongful acts the defendant was damaged in the sum of \$2,000 actual damages, and \$1,000 exemplary damages. The action was

NOTE.—Effect of "danger," "safety," or "insecurity" clause in a chattel mortgage.

A striking effect which is somewhat at variance with the general intention and understanding of the purpose of such clauses is that shown by the decision in *Hall v. Sampson*, 85 N.Y. 274, 91 Am. Dec. 55, where it was held that the insertion of a safety clause in the mortgage impliedly authorizes the mortgagee to retain possession of the property. That ruling was followed in *Hathaway v. Brayman*, 42 N.Y. 822, 1 Am. Rep. 524.

When the fact is considered that without such clause or some other giving the mortgagee the right to possession the mortgagee might take the property immediately, the effect is seen to be that while such clause is as is sometimes stated "for the benefit of the mortgagee" its absence might be more for his benefit.

The lower court in New York had previously held that a clause that if the mortgagee should at any time deem himself in danger of losing his debt by delaying the collection thereof until it became due, he might take possession of the property at any time does not by implication give the mortgagee

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the right to retain possession of the property until the happening of the contingency (*Rich v. Milk*, 20 Barb. 616), but that holding is expressly repudiated in the *Hall Case*, and the rule adopted by the court of appeals seems to have been followed in other states.

The insertion of a provision of this kind is inconsistent with the mortgagee's right to possession in the absence of the conditions specified. *Woods v. Gaar*, 98 Mich. 143.

So the mortgagee is entitled to possession until the mortgagee deems himself unsafe. *Sherman v. Clark*, 24 Minn. 37.

Right to interfere with third persons.

The effect of holding that such a clause gives the mortgagee the right to possession is to disable the mortgagee from bringing an action in the nature of trover against strangers who interfere with the property and limit him to his right to follow the property. So in New York it was held that if the mortgage contains a clause that in case the mortgagee shall deem himself unsafe it shall be lawful for him to take possession, the rights of the parties are the same as they would have been if the mort-

aided by an attachment, which was based upon the grounds that the defendant was about to dispose of his property with intent to defraud his creditors, and that the debt sued on was incurred for property obtained under false pretenses. The writ of attachment was levied upon certain real estate of the defendant. A levy was also made upon certain personal property. The defendant, by way of counterclaim, averred that the grounds upon which the attachment was procured were false, and that plaintiff had no reasonable grounds for believing them to be true, but knew the same to be false and untrue, and that the same were made willfully and maliciously, by reason of which the defendant was damaged in the sum of \$2,000 actual, and \$3,000 exemplary, damages, for which judgment was demanded. The counterclaim was denied by the plaintiff. The cause was tried to a jury, and a verdict was returned for the defendant for \$528.48. It was found specially by the jury that the attachment was wrongfully and maliciously sued out, and the seizure and sale of the property under the channel mortgage was wrongful, and an allowance was made in the sum of \$511 damages for the wrongful suing out of the attachment. Plaintiff appeals.

Messrs. Blake & Mitchell and Frank Farrell for appellant.

Messrs. Yeoman & Kenyon for appellee.

Rothrock, J., delivered the opinion of the court:

1. The matter of account involved in the controversy consisted of claimed balances due upon accounts of the plaintiff against the defendant. The court instructed the jury that there was no evidence authorizing a recovery of the interest claimed. It is insisted that this instruction was erroneous. An examination of the evidence satisfies us that the instruction of the court as to this item of the claim was correct.

2. It appears from the evidence that the plaintiff is a wholesale lumber dealer, and that the defendant was for several years a

retail dealer in that line at Lehigh, in Webster county, and that he made the principal part of his purchase of lumber from the plaintiff on credit. He did not make prompt payments for his purchases, and at times his indebtedness to the plaintiff amounted to considerable sums. On the 11th day of June, 1891, the defendant executed to the plaintiff the four promissory notes upon which this suit is founded. The aggregate amount of the notes was \$1,868. The first of said notes was made payable in thirty days, the next on the 9th day of September, the next on the 9th day of October, and the last on the 8th day of November, in the same year. The mortgage given to secure the payment of the notes was executed on the same day. The property mortgaged consisted of all of defendant's stock of lumber, and his books of account, and the accounts contained in said books, and all notes taken in settlement of said accounts. The mortgage was recorded on the 12th day of June, and on the next day it was placed in the hands of the sheriff of Webster county for foreclosure. The said sheriff took possession of the property, and sold the same at public sale, as provided in the mortgage. The sale under the mortgage was made on the 8d day of July, 1891, before any of the notes became due. It is claimed by counsel for appellee that there was no authority given in the mortgage to foreclose the same before it became due, and the court instructed the jury on this question as follows: "It is conceded on the trial that on the 11th day of June, 1891, defendant gave plaintiff his four promissory notes sued upon, which said notes were made payable at various dates in the future, from July 11 to November 8, 1891, and that, to secure the payment of said notes, defendant then and there made and delivered to plaintiff a chattel mortgage upon certain personal property, rights, and credits. It is also conceded that immediately or very soon after the giving of said mortgage, plaintiff proceeded to take possession of said property described therein, and to offer the same for sale, and did in fact make public sale of said property on the 8d day of July, 1891.

gaged had contained the express condition that the mortgagor was to continue in possession until default, or until the mortgagee should deem himself unsafe, and therefore the sale of the property by the mortgagor to a third person will not authorize an action for conversion, but the only remedy is to take possession of the property. *Hathaway v. Brayman*, 43 N. Y. 823, 1 Am. Rep. 524.

That decision apparently overrules a prior one by the lower court holding that trover will lie for the conversion of the mortgaged property before the debt is due, if the mortgage contains an insecurity clause. *Chadwick v. Lamb*, 20 Barb. 518.

Outside of New York, however, that doctrine is not recognized, but it is held that in case the mortgage authorizes the mortgagee to take possession and sell whenever he shall feel himself "unsafe or insecure," the mortgagee may maintain trover against the purchaser in case the property is sold to a third person. *Bailey v. Godfrey*, 54 Ill. 507, 5 Am. Rep. 157; *Sandager v. Northern Pac. Elevator Co.* 2 N. Dak. 3.

At least if the property is purchased with notice of his rights. *Jorgensen v. Tait*, 25 Minn. 387.

So the mortgagee may maintain an action against

one seizing the property, although his debt is not due. *Frisbee v. Langworthy*, 11 Wis. 376; *Welch v. Sackett*, 12 Wis. 242.

Of course decisions upon this question are influenced more or less by the positions which the various courts have taken upon the general question of the mortgagee's right to maintain trover, a question which will not be considered here.

Effect of taking possession.

When the right of taking possession is exercised the title vests in the mortgagee. *Durfee v. Grinnell*, 60 Ill. 371.

So that thereafter the possessory right of the mortgagor ceases and he has no remaining interest subject to levy and sale on execution. *Hall v. Sampson*, 36 N. Y. 274, 91 Am. Dec. 53, overruling 23 How. Pr. 54.

How far right is without control.

The courts have taken quite opposite views as to how far the right of the mortgagee is absolute for the exercise of which there is no power to call him to account regardless of how arbitrarily he acts.

Upon these admitted facts you are instructed that, under the terms of the mortgage given by the defendant, plaintiff had the right to take possession of the mortgaged property at any time he chose so to do, and no damages can be assessed against him in this action for such taking. He did not, however, have any legal right to sell said property before the debt secured thereby became due, and by such sale he became and is liable to account to defendant for the fair and reasonable value of the property so sold, without regard to the amount for which the sale was made." That part of the mortgage which provides for its foreclosure is as follows: "And I, the said W. W. Gray, do hereby covenant and agree with the said C. W. Robinson that in case of default made in payment of the above-mentioned promissory notes, or any part thereof, either principal or interest, and all taxes assessed against said property before any part thereof becomes delinquent, or in case of my attempting to dispose of, or remove from said county of Webster, the aforesaid goods and chattels, or any part thereof, or whenever the said mortgagee or his assigns shall choose so to do, then, and in that case, it shall be lawful for the said mortgagee or his assigns, by himself, or agent, or any officer, to take immediate possession of said goods and chattels wherever found, the possession of these presents being sufficient authority therefor, and to sell the same at public or private sale, or so much thereof as shall be sufficient to pay the amount

due or to become due, as the case may be, with all interest and taxes, costs, charges, expenses and attorney's fees pertaining to the taking, keeping, advertising, and selling said property and the collection of this debt." The instructions above quoted were evidently given in reliance upon the case of *Bank of Carroll v. Taylor*, 67 Iowa, 572. The language employed in the mortgage which was construed in that case was somewhat similar to the provisions of the mortgage in the case at bar. It was held in that case, because the mortgage provided "that in case of failure to pay the amount due hereon at maturity, or whenever the holder hereof may deem himself insecure, then he may take said property by virtue of this mortgage, and sell the same at public auction, . . . and the proceeds of said sale to be applied on said note," that "this provision, standing alone, would doubtless empower both the seizure and sale of the property before the maturity of the debt, if the holder considered himself insecure." But it was further held that said clause in the mortgage should be construed with another condition of the instrument, which was as follows: "That, if this note and mortgage shall be paid on or before the maturity thereof, then this mortgage to be void;" and the conclusion was reached that under the stipulations of the mortgage in that case the mortgagee had the right to take possession of the property before the debt became due, but that, if he considered himself insecure, he had not the right to sell the same to pay the

One class of decisions give him absolute discretion holding that—

Giving the mortgagee permission to take possession if he deems himself unsafe is equivalent to giving him the right to possession whenever he chooses to demand the property. *Gage v. Wayland*, 67 Wis. 506.

The mortgagee's discretion is absolute. *Huebner v. Koebke*, 42 Wis. 319; *Cline v. Libby*, 46 Wis. 123; *Hill v. Merriman*, 73 Wis. 483; *Allen v. Vose*, 34 Hun, 57. Although in the latter case the court found that there was reasonable ground for the mortgagee's considering himself unsafe.

Such provision authorizes the mortgagee to take possession when in his judgment he deems it best for the safety of his demand to do so, and no proof is required to show that he considered himself unsafe, as the legal presumption is that such is the fact when he takes possession before the debt is due. *Smith v. Post*, 1 Hun, 518.

For later New York decisions, however, see *infra*.

Permission of the mortgagor is not necessary to enable the mortgagee to take possession under a mortgage providing that for further security the mortgagee may take possession at any time he may think proper. *Braley v. Byrnes*, 21 Minn. 433.

If the mortgage authorizes the mortgagee to take possession when he deems himself insecure, he may do so even if no reasonable ground exists therefor. *Werner v. Bergman*, 28 Kan. 60, 42 Am. Rep. 152.

In that case *Furlong v. Cox*, 77 Ill. 283, is distinguished on the ground that in it the mortgagee did not claim that he had any apprehension that there was any danger, and *Davenport v. Ledger*, 80 Ill. 574, was distinguished on the ground that no evidence was introduced to show that the mortgagee felt himself unsafe or insecure, and that moreover there was evidence of express malice, and that possession was taken immediately after execution of the mortgage and at an unreasonable hour.

The mortgagee's right to take possession is not 23 L. R. A.

to be measured or determined by the fact that he deemed himself unsafe, but is absolute, at least in the absence of anything to show bad faith or an express purpose to oppress the mortgagor. *Richardson v. Coffman* (Iowa), Jan. 31, 1893.

If the mortgagee swears that he considered himself insecure, and he is uncontradicted, it is sufficient to entitle him to an instruction that he was entitled to possession. *Evans v. Graham*, 50 Wis. 450.

The majority of the courts refuse, however, to recognize a doctrine so extreme as those above, and limit the rights of the mortgagee more or less. Thus—

The question of the sufficiency of the reasons for the mortgagee deeming himself insecure cannot be submitted to the jury. The mortgage vests in the mortgagee a discretion which cannot be taken from him by the jury, so long as it is honestly exercised. The question of good faith is for the jury, and the right to take possession and at once proceed to sell the property is not a mere option to be arbitrarily exercised without reference to changed conditions or conduct of the mortgagor. *Woods v. Gaar*, 93 Mich. 143.

The mortgagee cannot act because he says he thinks himself unsafe, nor can he act from malice or caprice. His mind must be moved by facts, not by opinions or questions of law, and the facts must be those arising after the giving of the mortgage. The mortgagee may testify as to whether or not he deemed himself in danger of losing the debt, and then the grounds of such thought may be tested to ascertain whether or not he did deem himself in such danger. *Barrett v. Hart*, 42 Ohio St. 41, 51 Am. Rep. 801.

The mortgagee must show some ground for claiming that he deemed himself unsafe; and when evidence on that subject is offered, the question becomes one for the jury whether or not he did in reality feel unsafe, or whether it was a mere per-

debt before the debt became due. It will be seen, from an examination of that part of the mortgage in the case at bar, that the provisions thereof are not the same as those in the cited case. In this case it is provided that the mortgagee may take possession of the mortgaged property whenever he "shall choose so to do." It may be conceded that this right or option to take possession of the property is not materially different from the mortgage in the cited case, which was an option to the mortgagee to take possession when "he may deem himself insecure." In both cases there is an absolute right to take possession of the property under the stipulations named. But in the case at bar there is the further provision that, after seizing the property, the mortgagee may "sell the same at public or private sale, or so much thereof as shall be sufficient to pay the amount due or to become due, as the case may be." How could it be possible to make a sale of the property, and pay the amount to become due, unless the sale was made before the amount became due? The authority given to sell as plainly provides that a sale may be had before the amount becomes due as if it had been so stated in exact language. There is no room for construction, as in the case of *Bank of Carroll v. Taylor*, *supra*. In the case of *Wells v. Chapman*, 59 Iowa, 658, where the provisions of the mortgage as to the right to take possession of the property and sell the same were, in substance, like the mortgage in the case at bar, it was said that "under

this stipulation the mortgagee had the right, whenever he should 'choose so to do' to take possession of the property, and foreclose the mortgage, whether the debt was due or not." It may be conceded that in that case the mortgagee did not take possession of the property, and sell it, before the debt became due; but his right to do so was fairly involved in the question determined. In *Richardson v. Coffman*, 54 N. W. Rep. 356, this court followed the rule announced in the case of *Wells v. Chapman*. In the case of *Richardson v. Coffman*, it appears that the mortgagee took possession of the property, and sold it, before the debt secured by the mortgage became due. Whatever may be thought now of the correctness of the rule in the case of *Bank of Carroll v. Taylor*, it appears to us very plain that it ought not to be applied in construing a mortgage which plainly provided, not only for possession, but for a sale, of the property, before the maturity of the debt. The consequences of holding that there may be possession, but no sale, are apparent. If the mortgage in such case be upon livestock, and the debt has a long time to run before maturity, such a procedure would be ruinous to the security, and a loss to both parties.

8. We discover no other error in the case. For the error above pointed out, *the judgment of the District Court is reversed.*

Given, J., dissenting:

I do not concur in the conclusion that ap-

tense for the purpose of enforcing the payment before maturity. *Hawver v. Bell*, 46 N. Y. S. R. 447.

In *Newlean v. Olson*, 22 Neb. 717, in deciding that there must be cause for the seizure, the court says: "If this were not so a mortgagee might induce the mortgagor amply to secure the debt upon the implied promise that credit for a certain length of time would be given, and the instant after receiving the mortgage declare that he felt unsafe and insecure and proceed at once to a foreclosure and sale." Such a rule would place the mortgagor entirely at the mercy of the mortgagee, and in many, if not most, cases, deprive the mortgagor of the very means by which he could pay the debt.

Such clause does not authorize the seizure and sale of the property, unless the mortgagor is about to do or has done some act which tends to impair the security. *J. I. Case Plow Works v. Marr*, 33 Neb. 215; *Hull v. Godfrey*, 31 Neb. 204; *Reesor Wilhelmy Co. v. Nissen*, 35 Neb. 716.

Such clause authorizes the mortgagee to deem himself unsafe and to take possession only when the mortgagor has done, or is about to do, some of the acts specified in the mortgage, as grounds upon which the mortgagee may proceed to take possession. *Humphreys v. D. M. Osborne & Co.* (S. Dak.) Oct. 20, 1891.

In *Lichtenberger v. Johnson*, 32 Neb. 185, it was found by the jury that at the time the property was seized the mortgagee was better secured than at any former period, and the court said his distrust of the mortgagor was a mistaken want of confidence for which he is to be held responsible. His suspicion lacks that faith and reliance due to the value of material things presented to the senses.

Under the statutes in Minnesota the mortgagee has no right arbitrarily to take possession, but can only take it for just cause based upon the actual existence of facts constituting a reasonable ground for believing himself insecure. *Deal v. D. M. Osborne & Co.* 42 Minn. 102.

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Although the mortgage provides that the mortgagee may take possession, if at any time he shall "feel himself unsafe or insecure," he cannot take such possession unless there is reasonable ground or probable cause for such action. *Roy v. Goings*, 96 Ill. 361, 36 Am. Rep. 151.

In that case the principle of *Furlong v. Cox*, 77 Ill. 203, was followed, in which the right to take possession was given in case the property was in danger of being sold, etc., which principle was afterwards approved in *Davenport v. Ledger*, 80 Ill. 574.

Under a clause permitting possession to be taken in case of diminution in value of the property, a substantial and not mere nominal diminution is intended. *Solomon v. Friend*, 42 Ill. App. 407.

The effect of malice.

Acting from malicious motives or without any reasonable belief that the debt is unsafe or insecure will render the mortgagee liable for damages. *Davenport v. Ledger*, 80 Ill. 574.

If the mortgagee acts from malice and a pressing need for money, he is not protected by the power given him by the mortgage. *Hyer v. Sutton*, 59 Hun. 40. In that case the court says, in the absence of proof it will be assumed that the taking was by virtue of the authority conferred in the instrument, and no bad faith will be presumed, but if the bad faith is admitted by demurrer or proof, the mortgagee is given no protection.

Facts which justify taking possession.

In some of the cases the courts have expressed opinions upon the sufficiency of given states of fact to warrant the mortgagee in taking possession.

Reason to believe himself to have been overreached as to the value of the property is sufficient to entitle a mortgagee to regard himself as insecure. *Botsford v. Murphy*, 47 Mich. 232.

When the mortgagee is given power to seize the

pellant had a right to sell the mortgaged property before the condition upon which it was conveyed was broken. The conveyance is upon the express condition that if appellant paid each of the four promissory notes on or before maturity, and taxes before delinquent, the conveyance should be void. By the notes, time was given, extending over several months, for the payment of the debt, and, by the mortgage, appellee conveyed his property as security upon the condition named. To permit appellant to sell the property, and apply the proceeds to the payment of the debt before due, is to deny to appellee the time given him in which to pay the debt, and the privilege reserved to him in the contract,—to redeem his property from the pledge by paying the debt at maturity. The conclusion of the majority is based upon that clause in the mortgage providing that, whenever the mortgagee "shall choose so to do," he might take possession of the mortgaged property, and sell the same, "or so much thereof as shall be sufficient to pay the amount due or to become due." The conclusion is that this authorized appellant to take possession of and to sell the property before default was made in paying the debt or taxes. The right to take possession is not questioned. That right is clear, under section 1927 of the Code, which provides that, in the absence of stipulation to the contrary, the

mortgagee is entitled to possession. To take possession did not deprive appellee of the time given for payment, nor of the right to redeem by payment at maturity. The fact that possession, and not sale, is provided for, emphasizes the distinction which I think exists. To me it seems clear that this clause, taken alone, does not authorize a sale before default in payment, and that such a right should not be inferred from the power to sell sufficient to pay the amount due or to become due. There were four notes falling due at different times, a failure to pay any of which at maturity would be a breach of the condition, and in that case the holder of the mortgage had the right to sell sufficient to pay that which was to become due, as well as that which was already due, because of the breach. If it may be said that, taken alone, this clause does authorize a sale before condition broken, still it seems to me that, when considered in connection with the other provisions of the mortgage, it should not be so construed. We may not ignore any part of the instrument in giving a construction to it, but, taking the whole together, arrive at the intention of the parties. Construing the language conferring power to sell in connection with the time given to appellee in which to pay the debt, and the right to redeem his property by payment at maturity, I am convinced that it was not mutually understood

property whenever he shall choose to do so, he may seize it when it is levied on under an execution in favor of a third person. *Wells v. Chapman*, 49 Iowa, 653.

The levying of an execution on the property and advertising it for sale under a judgment in favor of a third person is sufficient to warrant the mortgagee in exercising his right to take possession when he feels himself unsafe or insecure. *Lewis v. D'Arcy*, 71 Ill. 648.

In *Farrell v. Hildreth*, 38 Barb. 178, the court held that from the state of facts presented, the jury would have been warranted in finding that the mortgagee felt himself unsafe and insecure, but the question of the necessity of such finding is not considered.

Selling.

Notice is not necessary before sale. *Harris v. Lynn*, 25 Kan. 281, 37 Am. Rep. 253; *Chamberlain v. Martin*, 43 Barb. 607.

Nor is demand upon the mortgagor. *Huggans v. Fryer*, 1 Lans. 276.

When the mortgage provides that if the debt shall be paid on or before the maturity thereof the mortgage shall be void, but gives the mortgagee power to take possession and sell at any time he deems himself insecure, he may take possession before maturity of the debt, but cannot sell until the debt matures. *Bank of Carroll v. Taylor*, 67 Iowa, 572.

A clause that for further security the mortgagee may take the property into his possession whenever he deems himself insecure does not authorize him to sell prior to the maturity of the debt. *Harder v. Hoep*, 69 Wis. 283.

The application of proceeds to a note not due is not justified, where the mortgage authorizes the seizure of the property in case the mortgagee deems himself insecure, and the sale of the same at public auction, or as much thereof as shall be sufficient to pay the amount due. *Loeb v. Milner*, 31 Neb. 303.

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Construction, of different provisions and circumstances.

A clause that the mortgagee may take possession whenever he considers his claim in jeopardy is equivalent to the usual provision as to taking possession when the mortgagee considers himself insecure. *McGraw v. Bishop*, 35 Mich. 72.

A mortgage providing that the mortgagor shall retain possession until default, but containing the provision that such possession shall always be "at the will of the mortgagee" does not entitle the mortgagee to take possession before default. *Anderson v. Holmes*, 14 S. C. 162.

Giving of further time for payment upon the execution of a new note with security, upon condition that certain suits shall be suspended and the mortgaged property used in a certain way, will not take away the right to take possession under the danger clause. *Fox v. Kitton*, 19 Ill. 519.

The mere taking possession under such clause two days after the execution of the mortgage, although the mortgage states that the property is to remain in the possession of the mortgagor, is not of itself sufficient to show fraud in the execution of the mortgage in favor of a third person. *Hoey v. Plerson*, 67 Wis. 233.

Other rights conferred.

In *Matthews v. Cooper*, 49 N. Y. S. R. 728, a receiver who had been appointed over the property was directed to give up possession to the mortgagee, claiming under a danger clause.

The mortgagee's right cannot be impaired by subsequent legislation. *Boice v. Boice*, 27 Minn. 371.

The election to take possession of the property before the maturity of the debt confers the right on the mortgagor to pay the amount due and retain his property. *Rice v. Kahn*, 70 Wis. 233.

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or intended that appellant might, at his own option, and without cause, sell the property before default in payment, and thereby deprive appellee of the time allowed in the contract for payment and redemption. It may be that, had appellee attempted to dispose of or remove the property from the county, appellant, having seized it, might sell it before the debt was due. But no such cause for the sale is alleged or proven; hence that question is not in the case. If causes arose requiring a sale of the property before default in payment, whether or not such causes were named in the mortgage, a court of equity would authorize a sale. If, by reason of the perishable nature of the property, or other cause, the security would be impaired by delaying a sale thereof until the maturity of the debt, appellant's remedy was ample in a court of equity. It may be said that it is a hardship to hold him to that remedy; but surely not so great a hardship as to deny to appellee, without cause, the time accorded him by the contract in which to pay his debt and redeem his property. Appellant could not sue upon these notes before maturity without other cause than his arbitrary will, nor could he have a decree foreclosing this mortgage; yet it is held that he may, at his own option, do for himself what the courts would not do for him,—that he may not only compel payment of the notes before any of them are due, but may forever put it beyond the power of appellee to redeem his property according to the contract. I see no distinction in principle between this case and *Bank of Carroll v. Taylor*. A like discretion is given to the mortgagee in both cases, and the law announced in that case is supported by reason and the current of authorities. Cases will be found, from states not having a statute like our section 1927, wherein the right to take possession before default is considered, and, in connection therewith, the right to sell; but in none of them, so far as I have been able to discover, is it held that a mortgagee may sell the property without cause, at his own option, before condition broken. *Wells v. Chapman* does

not seem to me to be in conflict with *Bank of Carroll v. Taylor*. The question certified was whether the mortgagor, he being in possession, had any interest in the mortgaged property subject to execution. This court held that, as the mortgagee had the right to take possession whenever he chose, "and foreclose the mortgage, whether the debt was due or not," there was no interest left in the mortgagor subject to execution. This decision is grounded on the right of the mortgagee to take possession and sell, but not upon the right to sell before default. The right to sell after default extinguished all interest in the mortgagor, subject to execution, as effectively as would the right to sell before. *Richardson v. Coffman*, follows *Bank of Carroll v. Taylor*, but does not, as I view it, decide the question under consideration. After remarking upon the disagreement in the adjudicated cases as to the right to take possession, *Wells v. Chapman* is referred to as "the only case we have been able to find where the provision in the mortgage for taking possession is like that in the case at bar. It was held that the mortgagee might seize the property whenever he elected so to do, whether the debt was due or not. That case is decisive of this question." An examination of the further statements in the opinion well show that the right to take possession and to sell for good cause was the subject under consideration, rather than the right to sell without cause, at the option of the mortgagee. To me, this case furnishes an apt illustration of what I believe to be the error in the conclusion of the majority. By that conclusion the mortgagee is sustained in seizing the mortgaged property on the second day after the mortgage was given, and proceeding at once to sell the same, without cause or excuse, in payment of a debt for which he had extended credit running over several months. I cannot think that the sanction of the law should be given to such arbitrary and unconscionable acts.

Rehearing denied.

NEW YORK COURT OF APPEALS.

PEOPLE of the State of New York, *ex rel.*
NEW YORK HOTEL & RESTAURANT
CO., *Appt.*,

v.

Edward P. BARKER *et al.*, *Respts.*

(140 N. Y. 487.)

A domestic corporation may be "prevented by absence or illness" from making complaint of a tax or assessment, under the New York Consolidation Act of 1882, chap. 410, § 822, when all its officers and agents

who have charge of the matter are prevented by absence or illness from making the complaint.

(December 19, 1893.)

APPEAL by relators from an order of the General Term of the Supreme Court, First Department, affirming an order of the Special Term for New York County denying relator's application for a writ of mandamus to compel respondents, as commissioners of taxes of the City and County of New York, to hear relator's claim to a reduction of its assessment. *Reversed.*

NOTE.—The great growth of corporations is resulting in a constant increase of questions concerning them. That they are usually regarded as "persons," see note to *Dollman v. Moore* (Misc.) 19

L. R. A. 222; and the present case strengthens the rule by reason of provision as to absence or illness.

The facts sufficiently appear in the opinion. **Messrs. Charles E. Coddington and Alfred B. Cruikshank**, for appellant:

The strict language of the statute does not exclude domestic corporations from its benefits.

The word "person" in the statute includes corporations.

Field v. New York Cent. R. Co. 29 Barb. 176; *Johnson v. McIntosh*, 81 Barb. 267; *Cary v. Marston*, 56 Barb. 27; *Wallace v. New York*, 2 Hilt. 440; *United States Teleg. Co. v. Western U. Teleg. Co.* 56 Barb. 46; *Pharmaceutical Soc. v. London & Provincial Supply Asso.* L. R. 5 App. Cas. 857; *People v. Rector of Trinity Church*, 22 N. Y. 44; *Olcott v. Tioga R. Co.* 20 N. Y. 210, 75 Am. Dec. 393; *Hoyle v. Plattsburgh & M. R. Co.* 54 N. Y. 314, 18 Am. Rep. 595; *Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 181, 31 L. ed. 650; *Republic of Honduras v. Soto*, 2 L. R. A. 642, 112 N. Y. 810.

Under the tax and assessment laws the word "person" has always been held to include corporations.

La Farge v. Exchange F. Ins. Co. 22 N. Y. 352; *People v. New York Tax Commrs.* 23 N. Y. 242; *British Commercial L. Ins. Co. v. New York Tax Assessment Commrs.* 1 Keyes, 808; *People v. McLean*, 80 N. Y. 254.

It is elementary that statutes are to be construed with a view to the mischief and the remedy designed.

Tonelle v. Hall, 4 N. Y. 140; *James v. Pat-ten*, 6 N. Y. 9; *Murray v. New York Cent. R. Co.* 8 Abb. App. Dec. 339; *Tracy v. Troy & B. R. Co.* 88 N. Y. 483; *Smith v. People*, 47 N. Y. 303; *Re Folsom*, 56 N. Y. 60; *Drake v. Gilmore*, 52 N. Y. 809; *Re Union College Trustees*, 129 N. Y. 808.

The statute is highly remedial, and should be liberally construed.

People v. Home Ins. Co. 93 N. Y. 847.

Messrs. David J. Dean and James M. Ward, with **Mr. William H. Clark**, for respondents.

Earl, J., delivered the opinion of the court:

The relator the hotel and restaurant company is a domestic corporation having its principal place of business in the city of New York, and its personal property was assessed, for the purposes of taxation for the year 1892, at the sum of \$200,000. It is provided in the consolidation act relating to the city of New York (Laws 1882, chap. 410, §§ 817-820), that the assessment books shall be kept open by the commissioners of taxes and assessment for examination and correction from the second Monday in January until the first day of May in each year, and that during that time "application may be made by any person considering himself aggrieved by the assessment of his personal or real estate to have the same corrected." Section 822 provides as follows: "Sec. 822. The commissioners of taxes and assessments are hereby invested with power to remit or reduce a tax imposed upon real or personal estate. It shall require a majority of the commissioners to correct or reduce the assessed valuation of the personal property of

any person, and no tax on personal property shall be remitted, canceled or reduced unless the applicant or party aggrieved shall satisfy the commissioners that he has been prevented by absence from the city or by illness from making his complaint or application to them within the time allowed by law for the correction of taxes. Any remission or reduction of taxes upon real estate must be made within six months after the delivery of the books to the receiver of taxes for the collection of such tax. The board of aldermen shall have no power to remit or reduce any tax." Within the six months specified in this section the relators applied to the commissioners upon affidavits to have the assessment canceled and removed from the assessment books, upon the ground that the corporation had no personal property liable to assessment; and the commissioners, after hearing the relators and reading the affidavits, determined that their application should be dismissed, and they refused to pass upon the merits of the same, upon the sole ground "that the said commissioners had no power to entertain or grant the same, for the reason, and claiming, that a domestic corporation having its place of business in the city of New York could not be prevented by absence or illness from making complaint, within the meaning of the consolidation act." The relators then applied to the special term for the writ of mandamus directed to the commissioners, commanding them to entertain and consider their application for the cancellation of the assessment. Their application was denied upon the same ground taken by the commissioners, and the order denying the writ was affirmed by the general term upon the same ground.

We think the construction of section 822 by the commissioners and the courts below is too narrow, and that the section is applicable as well to domestic corporations as to individuals. It is a remedial provision of law, which should be fairly and comprehensively construed, with the view of giving all parties aggrieved the benefit of the remedy therein provided. The purpose of the provision is to prevent unjust and unequal taxation, and no reason can be perceived for denying the application to domestic corporations. Literally speaking, a domestic corporation cannot be "sick" or "absent from the state;" but corporations must act through their officers and agents, and if they are all absent from the state, or are prevented by sickness from making the application within the time limited by the prior sections, we know of no reason why they should not have the benefit of section 822. The terms "he," "his," and "person," used in the statute, may comprehend a corporation. Various decisions and authorities upon this subject are found in the brief for the appellants, and are referred to without repeating them here. There is no reason why the party aggrieved in such a case may not act by an agent who has sufficient knowledge of the facts to present the proofs; and if the party should be absent from the state, or confined by illness to his house for several months, it would be a very narrow construction of the statute to hold that he could not appear and make the

application under that section by an agent or attorney who had sufficient knowledge of the matter. We have held that on what is called "grievance day" the person assessed may appear by agent to procure a reduction or correction of an assessment made against him. *Re Corwin*, 185 N. Y. 245. So, too, we think it is a fair construction of this section that if the owner of property, residing in the city of New York, places his entire business in the hands of an agent, who has full knowledge in respect thereto, such agent may appear for the owner and make the requisite proof upon an application for the correction of an assessment; and if that agent be prevented by absence from the state, or illness during the proper time, from making the application, it may be made afterwards under this section. In such case the party assessed has been prevented by "absence from the state" or by "illness," to wit, by the absence or illness of his agent, from making

the application. So, when a domestic corporation, by the absence or illness of all its officers and agents who had charge of the matter, is prevented during the proper time from making the application, such corporation may afterwards make the application under section 822. It is undoubtedly true that this section may be construed as it has been by the commissioners and the courts below; but we think the intention of the legislature and the beneficent purpose of the provision will be best subserved by the construction we give.

Our conclusion, therefore, is that *the orders of the General and Special Term should be reversed*, and the case remitted to the special term for its action upon the application for the peremptory writ; and that the appellants recover their costs in all the courts of the respondents.

Ordered accordingly.

All concur.

COLORADO SUPREME COURT.

PEOPLE of the State of Colorado, *ex rel.*
Charles CONNOR,
v.

William STAPLETON *et al.*

(.....Colo.....)

1. Ratification by the publishers of an article constituting contempt of court put into a newspaper by a reporter will render them liable therefor.
2. It is a contempt of court for a newspaper to charge that persons stigmatized as boodlers and corruptionists have influence enough with the court to prevent the handing down of a decision in a case in which they had been convicted of crime, to charge the court with shielding them from punishment, and to state that it would be interesting to know what mysterious but powerful influence has retarded the machinery of justice so strikingly.
3. A statutory enumeration of acts which shall constitute contempts of court does not deprive the court of jurisdiction over other contempts.
4. Courts have not unlimited power to determine what shall be regarded as contempts, but in the absence of valid statutory specifications they must be governed by the common law.

(May 15, 1898.)

ON rule to show cause why respondents should not be punished for contempt of court for the publication of certain articles in their newspaper, the facts in regard to which were brought to the attention of the court by an affidavit filed by relator. *Respondents discharged on payment of costs.*

Statement by Elliott, J.:

The facts necessary to an understanding of the opinion are as follows:

A little more than three years ago, James Connor, Charles Connor, and James W. Marshall, having been convicted in the district court of Arapahoe county for conspiracy, and sentenced to a term of imprisonment in the county jail, brought the record of such conviction to this court for review. Upon examination of the record, it appearing probable that error prejudicial to the legal and substantial rights of the accused had been committed on the trial, a supersedeas was granted, and the cause was regularly docketed. The record was very voluminous. It was four months before the abstract and brief were filed in behalf of the accused. No brief in behalf of the people was filed until more than a year and a half after the cause was docketed. Neither party ever filed any petition, or made any motion asking to have the cause advanced. The cause was regularly reached for final hearing, and was placed upon the calendar for oral argument with other causes, in March last. Counsel for the accused then appeared and argued the cause. No one appeared in behalf of the people. The legislature was then in session, and frequently requested opinions from this court. Many important causes were then under advisement, so the cause could not be immediately taken up and disposed of. Not long after the oral argument the municipal election occurred in the city of Denver, April 4, 1898. While the Connor case was still under consideration by the court, Charles Connor, by a sworn petition presented to this court by his counsel, Mr. Carpenter, set forth, among other things, the following:

NOTE.—The above case presents in a very admirable way the limits of journalistic criticism of judicial action. The doctrine taught is one that needs some emphasis in view of the recklessness of some able journals in attacking the good faith of

the judges when an unwelcome decision is made. See also *Cooper v. People* (Colo.) 6 L. R. A. 430.

As to the power of a court to restrict publication of its proceedings, see *Re Shortridge* (Cal.) 21 L. R. A. 755.

That on April 14 and 15, 1898, the Denver Republican was a newspaper published in Denver, and having a general circulation throughout the state, and that the respondents, William Stapleton and Kemp G. Cooper, were, respectively, the editor and manager of said paper. That on April 14, 1898, there was published a lengthy article in the local columns of said newspaper, in which it was asserted, among other things, that one of the recently elected aldermen had been bribed to betray his party, and that James Connor and Charles Connor, "notorious political thugs, who walk the streets of Denver as living examples of the law's delay, engineered the plot." It was further stated that from \$1,000 to \$5,000 had been made use of for such corrupt purpose. The article also contained the following:

"It is a disgrace to the courts that the Connors should be allowed to remain at large to prey upon the political cancers and failings of humanity. Jim Connor is under conviction for train robbery, and he is also under sentence of penal servitude for having stolen a ballot box. His brother, Charles Connor, participated in the train robbery.

"Their Train Robbery Record.

"The first crime was committed four years ago. Jim Connor was then a lieutenant of police, and his brother was also in the service. With Jim Marshall of Kansas, a bird of the same feather, and a messenger, they conspired to rob the Denver & Rio Grande Express. A package, the most valuable in the train, was to be thrown out at an appointed spot, and Connor was to be in readiness to receive it. Some of the conspirators wilted at the last moment, and the express company was informed. The plot was foiled, but the evidence against the principals was overwhelming, and they were convicted. The Connors appealed to the supreme court nearly three years ago, but the court has taken no action, and the culprits are abroad, buying aldermen, and helping Tammany to retain control of the city government. It is humiliating to the whole state that a man like Jim Connor could have influence enough to prevent the highest tribunal from handing down a decision in his case. There must be influence of some kind at work somewhere."

In the same issue of said newspaper there was published a lengthy editorial charging the Connors with inducing said alderman elect, by despicable and dishonest means, to vote against his party in the organization of the aldermanic board. This editorial also contained the following: "In this connection it is pertinent to call the attention of the supreme court of the state to the fact that for more than three years the appeal taken by Jim Connor and Charley Connor from the decision of the court which sentenced them to prison for attempted train robbery has remained undecided on the calendar of that tribunal. It would be interesting to know what mysterious, but evidently powerful, influence has retarded the machinery of justice so strikingly in this case. It would also be interesting to know how soon the supreme court can make up its mind to render a decision upon that appeal." On the next day,

23 L. R. A.

April 15th, there was published another lengthy local article denouncing the Connors with the corruption of the alderman elect, and again stating the money used to be from the sum of \$1,000 to \$5,000. This article, among other things, contained the following:

"It Seems So.

"Some people claim that there is no use in indicting or convicting men like Jim Connor, as they are never punished. The history of Connor's crimes would lend some semblance of truth to this argument, but the people of Denver have had enough of Connor, and others of his kind. The citizens will not tolerate longer the methods of screening blackguards who may have some political influence because of their past crimes against the ballot. The city of Denver is not big enough for Jim Connor and Charley Connor, and other jail birds who are a menace to society every day they are allowed to be at large. The time has arrived when these corruptionists and political thugs, who have been found guilty of various crimes, shall receive their deserts. It is an opportune moment to clear the atmosphere. The present grand jury can do a great deal in that respect. Every day the supreme court allows to pass without its taking action on the appeal of the Connor brothers is an encouragement to commit crime. The city should have been rid of these men long ago. There can be no earthly excuse for the supreme court in any manner shielding them from the punishment they so richly deserve."

The petition of relator further alleged, in effect, that the articles so published were false, defamatory, and malicious, and were designed to prejudice his cause so pending before this court; that said publications were calculated to convey the idea that the judges of this court had been improperly and corruptly influenced in his cause; and that such charges against the honesty and integrity of the court were meant to intimidate, influence, and coerce the judges, and to embarrass them in the administration of justice. Petitioner prayed that respondents might be proceeded against for contempt. Upon the presentation of said petition this court entered a rule against respondents, requiring them, and each of them, to "appear and answer, in writing, showing cause, if any they have, why they have published, or caused to be published, so much of said newspaper articles as charge this court with dishonesty or want of integrity, or with being improperly influenced in and about said cause of *James Connor et al. v. The People*," etc. The rule was "expressly limited to so much of said newspaper articles as contains charges and imputations against the honesty and integrity of the members of this court in and about said Connor case." The rule was based upon the ground "that said charges are designed and intended to interfere with, intimidate, and embarrass this court in the due and impartial administration of justice, and that said charges, if allowed to pass unnoticed, may injure the standing and usefulness of this court, by impairing public confidence

in the honesty and integrity of its members." The answer of respondents is sufficiently set forth in the opinion. The sufficiency of the answer was challenged by demurrer filed by the attorney-general in behalf of the people.

Messrs. Eugene Engley, Atty. Gen., and S. L. Carpenter for petitioner.

Mr. L. B. France, for respondents:

If this is to be treated as a case of contempt, it can only be constructive, and not direct.

Stuart v. People, 4 Ill. 405; *People v. Wilson*, 64 Ill. 208, 16 Am. Rep. 528; *Dunham v. State*, 6 Iowa, 245; *Ex parte Hickey*, 4 Smedes & M. 751; *Storey v. People*, 79 Ill. 50, 22 Am. Rep. 158.

The question of intent is material to be considered in this case.

Thomas v. People, 9 L. R. A. 569, 14 Colo. 257; *People v. Wilson*, 64 Ill. 232, 16 Am. Rep. 528; *Ex parte Biggs*, 64 N. C. 202; *Re Woolley*, 11 Bush, 95.

Lack of knowledge prior to the publication enters into the question of intent.

People v. Rucker, 5 Colo. 455; *Tripp v. Overacker*, 7 Colo. 72; *People v. Goddard*, 8 Colo. 483.

Elliott, J., delivered the opinion of the court:

This is the first proceeding of the kind, originating in this court. A few cases have been brought here for review, involving contempts against other courts of record, and in such cases the law relating to contempts of the kind now presented has been carefully considered, and conservatively declared. In thus declaring the law this court has always kept in view the rights of the people, as well as the maintenance of lawful judicial authority for the protection of litigants, and the welfare of society. No attempt has been made to abridge the freedom of speech, nor the liberty of the press, though in some instances persons have been held responsible for the "abuse of that liberty," as our constitution provides they may be. The liberty of the press is a great blessing. It is entitled to full protection. But the "abuse of that liberty" is a great evil, against which the people are entitled to be protected; and for their better protection, when necessary in the interest of litigants, resort may be had to summary proceedings. Colo. Const. art. 2, § 10; *Hughes v. People*, 5 Colo. 436; *Cooper v. People*, 13 Colo. 856-873, 6 L. R. A. 430, and cases there cited.

2. This court has never lost sight of that cardinal principle of free government that judicial tribunals are created and maintained, not for the benefit of those occupying judicial positions, but for the benefit of society, and the protection of the people in the enjoyment of their rights. To this end it is essential to uphold the courts in the lawful exercise of their authority and jurisdiction. The law-abiding people of the state are primarily interested in the due administration of justice, since it is only by such means that they can be made secure in their persons and property. It is a matter of congratulation that proceedings of this kind have been of rare occurrence in this state. It shows

that the publishers of newspapers, for the most part, have been loyal to the courts as tribunals of justice, and have sought to uphold, rather than impair, their usefulness.

3. This proceeding was not instituted or instigated by this court of its own motion. A party whose cause was pending in this court presented his sworn petition, complaining of the articles published by respondents, and praying protection from such assaults pending the consideration and determination of his cause. We were thus bound to take cognizance of his petition, or give some reason for refusing to do so. If we refused, what reason could we give? Could we say to the petitioner, "You are a convicted criminal, and therefore you have no rights which this court is bound to respect?" The true spirit of our institutions, and the fixed policy of our government, require that courts of justice shall be no respecter of persons. The courts are bound to hear and determine causes according to settled rules of law, without regard to the bias or prejudice of interested parties, or the force of popular clamor. The law must be declared fairly and impartially, no matter who may be parties to the record. In this way, and in this way alone, can courts of justice fulfill their mission as conservators and protectors of public and private rights under a free government, which guarantees to all persons "the equal protection of the laws." These principles are as applicable to appellate tribunals as to courts of original jurisdiction. Parties must be allowed to appeal their causes to this court with the assurance that they will be heard and determined as they appear upon the record, and that without fear or favor from any one, either of high or low degree. We cannot assent to the demand that the settled rules of law relating to substantial rights shall be disregarded in order to convict unpopular persons, or persons of mean reputation. Such persons, as well as the more fortunate classes, are entitled to have the law fairly and impartially adhered to, when they are put upon trial. It is true this court could have disposed of the petition in this case by quietly declining to take cognizance of it. Only petitioner, his counsel, and a few of their confidential friends, perhaps, would have known of our refusal. But we should always have been conscious that we had been wanting in courage to meet a disagreeable issue, and that we had declined to hear a suitor because he was under the ban of a public newspaper's displeasure. The only just and honorable way, therefore, was to take jurisdiction of the proceeding, and require respondents to show cause, if any they had, why they had thus deliberately and repeatedly assailed the honesty and integrity of this court in and about petitioner's cause.

4. By joining in their answer, respondents place themselves upon the same level in respect to the publications. Their counsel in his argument suggests that respondent Cooper was not aware of any of the articles until after they were published. No such fact, however, is pleaded, and the well-known skill and customary diligence of the learned counsel in matters of pleading forbid that we should

regard this as an oversight. If it had been requested, leave would have been given for said respondent to amend his answer. Where an unlawful publication is shown to have been made without the previous knowledge of the proprietor of a newspaper, such fact may be shown in mitigation, though not in justification, of the publication; and it would seem that the mitigation would be slight, unless accompanied by a retraction. In this case, however, respondents do not deny previous knowledge as to the editorial article, nor do they express regret for any of these articles. On the contrary, they seek to defend them all upon various grounds.

5. The answer of respondents alleges that the first local article "was published without the direction, instigation, or knowledge of said respondents, and that they, nor neither of them, were cognizant of said article until after the publication of the same." As to the local article published next day a similar allegation is made. These allegations may be literally true; that is, the local articles may not have been expressly directed or instigated by either respondent Stapleton or respondent Cooper, and the articles may not have been seen or communicated directly to either of respondents until after they appeared in print. Nevertheless, considering the subject-matter of the first local article, and the subject-matter of the editorial published on the same day, it is impossible to believe that the editor and reporter did not have a perfect understanding as to the position which the paper should take in reference to this court, as well as the other matters discussed by them in their respective articles. The views of the editor supplement and indorse, in substance, the language of the reporter, and the very next day the columns of the paper are again made use of by the reporter to repeat the attack thus made upon this court. When the act of an employé is either directed or afterwards ratified by his employer, it becomes the act of the employer, and the maxim respondeat superior applies.

6. Respondents further allege that the "reference to said cause and to this honorable court was for the purpose, rather, of calling attention to the dilatory conduct of those having charge and management of said cause in said court, and not for the purpose of casting any reflection whatever in the premises upon the court itself, or upon any judge thereof." The sufficiency of this defense cannot be accepted. Let any intelligent person read the articles, and then say, if he can, that they were written for no other purpose than "calling attention to the dilatory conduct of those having charge of the management" of the Connor case. By a simple inquiry at the clerk's office, respondents would have learned that the Connor case was brought here and docketed the same as hundreds and thousands of other cases; that the cause had been given its regular place upon the docket; that neither party had ever asked to have the cause advanced for final hearing; that the cause had already been argued orally in open court; and that the judges then had the cause, as well as many other causes, under consideration. Every lawyer and every intelligent

citizen understands that it is not the province of this court either to prosecute or defend causes brought here for review. It would be quite out of place for this court of its own motion to advance or dispose of any cause out of its order. It is the well known practice of this court to advance a criminal cause, and hear and determine the same as speedily as practicable, when asked to do so by either party. But, if a cause were advanced without any such request, such action might well be taken to indicate undue zeal, or some ulterior motive, on the part of the court. The supreme court is not charged by law with the management or prosecution of criminal causes, and we are confident that respondents well understood this much of the law and practice. Why, then, did they not arraign those whose duty it was to prosecute the Connor case, instead of directing their attack solely against this court? Not one word is said against those whose duty it was to prosecute causes in this court. The claim that respondents only intended "calling attention to the dilatory conduct of those having charge and management of said cause" is evidently an afterthought,—an excuse without foundation, put forth at this time to enable them to escape the consequences of their conduct.

7. Again, respondents allege that a fair construction of the articles published by them "will not warrant the inference or implication against the good faith or integrity of this honorable court, or that they were or had been improperly influenced in and about the cause of the said relator" (the Connor cause), and that the articles were published, "not for the purpose of casting any reflection whatever, in the premises, upon the court itself, or upon any judge thereof." Respondents are certainly entitled to have the articles published by them fairly interpreted. The articles require very little construction. It is safe to say that every intelligent and impartial person who may have read said articles at once inferred that such articles were designed to convey the impression that this court had in some way been improperly and dishonorably influenced in the matter of the Connor litigation. Bear in mind that the first local article charged the Connors with handling money, by thousands of dollars, for corrupt purposes, in the organization of the municipal government. In view of this, what other meaning or construction could be put upon such language as the following in the first local article: "It is humiliating to the whole state that a man like Jim Connor could have influence enough to prevent the highest tribunal from handing down a decision in his case. There must be influence of some kind at work somewhere?" What other interpretation or construction could be put upon the second local article, wherein it is said: "There can be no earthly excuse for the supreme court in any manner shielding them [referring to the Connors] from the punishment they so richly deserve?" How can it be claimed that respondents did not intend by said article to impute anything dishonorable to this court, when in their paper they charge that a convicted criminal,

whom they have stigmatized as the worst of characters,—a boodler and a corruptionist,—has influence enough to prevent this court from handing down a decision in a case wherein he had been convicted of crime? The next article charges that this court is shielding convicted criminals from the punishment they so richly deserve, and yet respondents say that such charges imply nothing dishonorable on the part of this court! Can it be that respondents are insensible to the significance of such language? The editorial article is scarcely more guarded. It is more crafty, but not less poisonous and suggestive. The editorial is a severe arraignment of a certain political organization and certain individuals, including the Connors, charging them with dishonesty, fraud, and corruption in and about their efforts to defeat the will of the people, and obtain control of the municipal government of the city of Denver. With the editorial as a discussion of municipal politics, this court, as a court, has no concern. But let any intelligent and impartial person read the editorial from beginning to end, and then explain, if he can, why it was pertinent, in connection with the other matters discussed in that editorial, to call the attention of the supreme court to the Connor case, and thereupon to remark: "It would be interesting to know what mysterious, but evidently powerful, influence has retarded the machinery of justice so strikingly in this case?" Why was such language used, unless it was intended thereby to indicate that the supreme court was in league or in sympathy with the Connors, and was so acting as to shield them while they and their associates were corrupting, and seeking to subvert and destroy, good government in this city? Every right-minded judge may well be sensitive to any charge made by a responsible party affecting his judicial integrity. In any light in which the articles published by respondents can be viewed, the attack upon this court was as cruel and malignant as if the judges had been severally stabbed in the back with a dagger, without provocation, and without warning. If the attack did not wound so deeply, it was not for want of the means employed by respondents, but because the people did not believe the aspersions cast upon the integrity of their judges. Since the issuance of the citation in this proceeding the case of *James Connor et al. v. The People* has been decided. Referring to this circumstance, it was intimated in argument that this court cannot properly say, and cannot afford to say, that it was intimidated, coerced, or influenced in its decision of that cause by the conduct of respondents; that respondents, therefore, committed no contempt, and should be discharged. As well might a person, after making a violent assault upon another, insist that he had committed no offense because he had not succeeded in overcoming his victim. It is true the members of this court did not suffer themselves to be intimidated nor coerced, nor are we conscious of having been influenced in the determination of the Connor case, by anything respondents have published. Nevertheless, the conduct of respondents in

making charges and imputations against the integrity of this court in and about the Connor case was well calculated to embarrass, was undoubtedly intended to embarrass, and to some extent did embarrass the court in rendering its decision in that case, and thus a most serious offense against the administration of justice was committed. Contempts, as was said by *Mr. Justice Breese* in *Stewart v. People*, 4 Ill. 405, necessarily include "all acts calculated to impede, embarrass, or obstruct the court in the administration of justice." This language was approved and applied thirty years afterwards in the case of *People v. Wilson*, 64 Ill. 211, 16 Am. Rep. 528. As was said by *Mr. Justice McAllister* in the latter case, "the tendency of the article is to degrade and scandalize the court, to overawe its deliberations, and extort a decision against the accused." Judges are human. They are possessed of human feelings, and when accusations are publicly made, as by a newspaper article, charging them, directly or indirectly, with dishonorable conduct in a cause pending before them, and about to be determined, it is idle to say that they need not be embarrassed in their consideration and determination of such cause. They will inevitably suffer more or less embarrassment in the discharge of their duties, according to the nature of the charges, and the source from which such charges emanate. When a judge tries and determines a cause, in connection with which public charges against his judicial integrity have been published, the public, as well as parties interested, are frequently led by the publication of the charges to distrust the honesty and impartiality of the decision, and thus confidence in the administration of justice is impaired. It is not only important that the trial of causes shall be impartial, and that the decision of the court shall be just, but it is important that causes shall be tried, and judgments rendered, without bias, prejudice, or improper influence of any kind. It is not merely a private wrong against the rights of litigants, and against the judges. It is a public wrong, a crime against the state, to undertake, by libel or slander, to impair confidence in the administration of justice. That a party does not succeed in such undertaking lessens his offense only in degree.

8. The answer of respondents denies the jurisdiction of the court to proceed against them in this proceeding. It is unnecessary to enter into a lengthy discussion of the law relating to newspaper interference with the administration of justice. In the case of *Cooper v. People*, 18 Colo. 337, 378, 6 L. R. A. 480, the law upon that subject was very fully considered, and explicitly declared. The case of *Hughes v. People*, 5 Colo. 436, is also a valuable decision upon a similar subject. In the argument of this case, nothing essentially new has been presented. In fact, upon the oral argument, the law, as declared by the former decisions of this court, was not seriously controverted, except upon a single point, which will be briefly noticed. The learned counsel for plaintiffs in error in the case of *Cooper v. People* appeared also for

respondents in this case, and in argument claims that his position in the former case was misunderstood. He says that he did not mean to be understood as contending in the former case "that the publishers of newspapers have a constitutional right to assail the integrity and impugn the motives of a judge in relation to his judicial action, even in cases pending and undisposed of, without being amenable to contempt proceedings therefor;" and that he does not now contend for such doctrine. He says he intended to concede then, as he concedes now, that the jurisdiction to punish for contempt is inherent in superior courts of record; that such power is essential to their existence and to the maintenance of their authority; that such power existed at common law, and is not essentially abridged by the constitution of this state; but that, while he concedes the existence of such power, he nevertheless insists that such power is subject to legislative control, and that such power has been limited to such causes of contempt as are specified in the code of civil procedure. We are glad to note this explicit statement of the learned counsel's position. Though he may have been misunderstood by the writer of the separate opinion in the former case, his views in respect to the effect of the code were not misunderstood, nor overlooked. In the leading opinion, delivered by *Mr. Justice Hayt*, and concurred in by the whole court, the effect of the code provisions was considered and passed upon. Reference was made to the opinion of *Hughes v. People*, 5 Colo. 436-446, where it was held, as early as 1880, that "the right of self-protection is inherent in the courts. The power to punish for contempt is an incident to all courts, independent of statutory provisions." In the *Hughes Case*, also, this court, speaking by *Mr. Justice Stone* (*Chief Justice Elbert* concurring, *Mr. Justice Beck* not sitting), said: "Such a statutory enumeration of causes as is found in our code, when applied to the ever-varying facts and circumstances out of which questions of contempt arise, cannot be taken as the arbitrary measure and limit of the inherent power of a court for its own preservation, and for that proper dignity of authority which is essential to the effective administration of law." The *Hughes Case* was based upon the Code of 1877, which was repealed in 1887. Chapter 80 of the present Code is, however, a substantial re-enactment of the former provisions relating to contempt proceedings. These provisions were re-enacted more than six years after the announcement of the decision in the *Hughes Case*. Thus, by a well-known rule of statutory construction, it must be presumed that the legislature had knowledge of, and were satisfied with, the construction given to such provisions, and so re-enacted them without change. *Harvey v. Travelers Ins. Co.* 18 Colo. 354. Moreover, neither in the Code of 1877 nor in the present code are there any negative or other qualifying words limiting contempts to such causes as are therein specified.

9. Upon the oral argument the learned counsel for respondents inveighed strongly against what he termed the claim of un-

limited power on the part of the courts in the matter of contempts. So far as we are advised, no court in this country has ever claimed any such power. This court certainly has not. It is idle to speak of the power of the courts as being unlimited in contempt proceedings, or in any other proceedings, for that matter. No department of the government possesses unlimited power, under a constitution like ours. This subject has recently received the consideration of this court. See *Greenwood Cemetery Land Co. v. Routt*, 17 Colo. 163, 15 L. R. A. 869, wherein it is said: "Thus it appears that the different departments, though separate, distinct, and independent to a certain extent, are by no means absolute. The distribution of governmental powers to different departments was obviously intended as a check upon the exercise of arbitrary power by any department. Thus a government of balanced powers was established, with checks and counter checks, for the better protection of society, and the better security of private rights and individual interests."

10. The courts of this country, so far as we are advised, have never claimed the arbitrary right to declare what should or what should not be deemed contempts, nor have they claimed unlimited power or discretion to affix the penalty in such cases. In the absence of valid written law specifying what shall and what shall not be deemed contempt, the common law must govern. The constitutional provision (art. 2, § 20), "that excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted," is binding upon all departments of the government, and is a special restraint upon the courts. By the common law the punishment for contempt extended only to fine and imprisonment, and certainly no court in this country has ever claimed that such punishment can be inflicted except within reasonable limits, proportionate to the offense. Speaking upon this subject, *Mr. Justice Hayt*, in *Cooper v. People*, after quoting from *Blackstone* and *Cooley*, said: "It must not for this reason be understood that we claim the power of the courts to punish as for contempt is now as indefinitely broad as stated by *Blackstone*. However, upon principle and authority, we must hold that at common law superior courts of record have the inherent power summarily to convict and punish as for a contempt of court those responsible for articles published in reference to a cause pending, when such articles are calculated to interfere with the due administration of justice." *Chief Justice Helm*, in the same case, also said: "We recognize in this case, as we have heretofore done, the inestimable value of a fearless and independent press, but we would be grossly neglectful of our official duty were we, while carefully guarding the independence of the press, to forget that independence of the judiciary which is absolutely essential to constitutional government and liberty." In *Wyatt v. People*, 17 Colo. 261, it was said: "Though the legislature cannot take away from courts created by the constitution the power to punish contempts, reasonable regulations by that body touching

the exercise of this power will be regarded as binding." While the courts do not possess unlimited power to declare what shall be deemed contempts, and what shall be the measure of punishment therefor, neither do the publishers of newspapers possess unlimited license to punish whatsoever they please. The liberty of the press is one thing. The "abuse of that liberty" is quite another. The former is guaranteed by the constitution. The latter is as clearly interdicted. If the liberty of the press is abused, the offender may be held responsible therefor. Such is the common law; such is our constitutional provision; and such offenders may be dealt with summarily for contempt when their publications are calculated to impede, obstruct, or embarrass the administration of justice. It has not been deemed expedient by our people that any class of persons should be privileged to attack the courts, with the view to interfere with the rights of litigants, or to embarrass the administration of justice. Hence they have never adopted any constitutional provision granting such dangerous license. Nor do we believe that publishers of newspapers generally would approve of such license being granted. If they should, we are confident that the intelligent people of Colorado cannot be deceived or led into a course of action that would jeopardize their rights and interests as litigants, and imperil the safety of our free institutions. If courts of justice may be publicly assailed by libel and slander, or otherwise threatened and traduced in respect to causes, civil or criminal, pending before them for hearing or trial, then, indeed, no one's rights are any longer safe, and life, liberty, and property are held by a feeble tenure in this commonwealth. Do the good people of the state of Colorado desire that the judges whom they have chosen shall be threatened, maligned, intimidated, or dictated to, in respect to the trial or decision of causes? Is it desired that courts of justice shall sit in this state to register the behests of a public newspaper? Is it desirable that the law should be so framed that the publisher of a newspaper may interfere with the orderly administration of justice in the courts? If a publisher shall thus undertake to interfere, is it desirable that the courts shall be powerless to hold him responsible therefor in such time and manner as that the mischief he seeks to accomplish may be avoided, or summarily punished? In short, is it desirable that causes shall be tried and determined by the courts, or by the publisher of some newspaper? With all due respect for the profession of journalism, and with no desire to restrict or interfere with its sphere of usefulness, we must declare that the courts possess advantages superior to the journalist in the matter of hearing, trying, and determining causes affecting public and private rights. The law, as administered by the courts, gives each party an opportunity to present his cause by pleading and proof, each party having had previous notice of what the other claims. The court decides only after each party has had opportunity to be heard. The enterprising journalist acts promptly in gathering news. His in-

formation is frequently *ex parte*, and his comments and conclusions thereon are hurriedly announced. The demands of the public require this course of action at the hands of the journalist. But it is not demanded that he shall assume the duties of the judiciary. Imperfect as may be the conclusions of the courts on some cases, it would be a great mistake to substitute in their place the local comments, or even the editorial opinions, of the press. The injuries to public and private rights occasioned by the present methods of administering justice are as nothing to what would result if causes were determined without fair opportunity for hearing and trial. As was said by the wise man of old, "He that answereth a matter before he heareth it, it is folly and shame unto him." Thoughtful citizens know very well that there is far more danger to our institutions, and far more danger to the rights of the people, and especially to the rights of litigants, to be apprehended from the power of the press over the courts than from the power of the courts over the press. It would be a strange anomaly in a free government, where judges are elected for comparatively short terms, and where the right of suffrage is practically universal, if the judges elected by the people were to become arbitrary oppressors of the people, or of any class of the people. Thoughtful citizens understand that the danger now threatening our institutions is that courts are not independent enough, instead of being too arbitrary; and that there is too great laxity instead of too great severity in the administration of justice, for public as well as for private good. The courts of this state have not been oppressors of the people. The power of punishing for contempt has been seldom resorted to. Since Colorado became a member of the federal Union, nearly seventeen years ago, only one case has reached this court where the publishers of a newspaper have been adjudged guilty of contempt for attempting to interfere with judicial proceedings. Other instances, perhaps, may have occurred where newspapers have gone beyond their legitimate limits, of which the courts, with their customary forbearance, have not thought proper to take notice. It is a matter of common observation, that the courts of this country are reluctant to exercise the extraordinary power vested in them in regard to such matters.

11. As a conclusion to their answer, respondents insist that it was their duty, as editor and manager of a newspaper, to examine, criticize, comment upon, or condemn publicly, in said paper, the proceedings and conduct of the persons mentioned in the said articles, and that said articles, and all of them, were published with just, legal, and proper motives, and without any intention whatever to reflect upon this honorable court. It would be a very pleasant way to dispose of this proceeding for us to accept these oft-repeated assurances that respondents did not intend or design, by their publications, to convey the impression that this court had been actuated by unworthy motives, or controlled by dishonorable influences, in the Connor case. But it would be an affectation

of credulity on our part to profess to believe such assurances. It is the province of the court to interpret and construe written language. In a case of this kind, if there were any doubt as to the meaning of respondents' published articles, we should certainly be glad to give them the benefit of the doubt. *Re Woolley*, 11 Bush, 95; *People v. Freer*, 1 Cal. 435. It is an elementary rule of construction that a writing consisting of common words shall be interpreted and construed according to the ordinary meaning of the words employed. The articles complained of contain only common words, and it would be a perversion of their ordinary meaning to hold that the words as used were not designed to charge and impute unworthy motives, dishonorable conduct, and a want of integrity, to this court, as has already been shown in a former part of this opinion. We should stultify ourselves, as judges, to accept the construction which respondents now seek to give their language. We do not believe, nor can we, for the purpose of escaping an unpleasant responsibility, affect to believe, that persons capable of writing such articles did not intend to convey the meaning which their own words import. The rule is elementary that a person is presumed to intend the natural and probable consequences of his own voluntary act, and such rule is certainly applicable to words deliberately written or printed.

12. The learned counsel for respondents complains that the law relating to contempts by newspaper publications, like the law of libel, is very uncertain, and that there is a want of uniformity in the precedents and adjudicated cases. It is true the adjudicated cases are widely variant, but this is no fault of the law. It results rather from the fact that the forms of words, and other methods by which the motives and integrity of courts and individuals may be assailed and maligned, are so numerous that it is impossible that the law should be more specific. It would be idle to declare that particular words, or a particular method of defamation, should be unlawful, so long as other words and other methods, equally defamatory, may be resorted to. But we need not prolong this opinion. We are confident that respondents have for a long while understood the law relating to this subject, and that they have deliberately disregarded it in this instance. They had no reason for imputing dishonorable conduct, or a want of integrity, to this court, in respect to the Connor case, and they knew they had no reason for so doing. Nevertheless, they made such imputations, and suffered the same to be repeated in their newspaper. Where a wrongful act is willfully done the law presumes the wrongdoer to have been actuated by motives of malice. Knowing the customary forbearance of the courts in such matters, respondents doubtless thought this court would not undertake to protect itself from their assaults. Notwithstanding their attitude, we have no desire to exercise great severity in the present case. We see no necessity for exhausting the power of the court in the present instance. But it must be understood that this court will not,

from any personal consideration, shrink from the responsibility, however onerous, of protecting the administration of justice from embarrassment by assaults of the kind under consideration. Attacks upon the judicial integrity of this court, calculated to prejudice the rights of litigants in particular cases, or to impede, obstruct, or embarrass the administration of justice, cannot always be suffered to pass unnoticed. If we were to forbear too much in matters of this kind the confidence of the people might well be impaired in the firmness and stability, if not in the integrity, of the judiciary. As was said by Chief Justice Lawrence in deciding the case of *People v. Wilson*, 64 Ill. 217, 16 Am. Rep. 528: "We have personally felt great reluctance to taking notice of the publication, but our consciousness of the mischief that may be done in embarrassing the administration of justice, and impairing the moral authority of the judiciary throughout the state, if this article is to stand as an unpunished precedent, has compelled us to issue the rule, and now compels us to order an attachment." The facts and circumstances set forth in respondents' answer will not be disregarded so far as the same are entitled to any weight as matters of mitigation; but the answer is not, in the opinion of the court, sufficient, in law, as a defense or as a justification of the matters complained of against respondents. It is therefore ordered by the court that a writ of attachment issue, in due form, for the arrest of respondents, and each of them, and that they, and each of them, be brought forthwith before the court, that it may be inquired of them if anything further they have to say why they should not be found and adjudged guilty as charged, and punished accordingly.

Hayt, Ch. J., and Goddard, J., concur in the foregoing opinion.

The foregoing opinion having been announced, the writ of attachment was issued, and respondent Stapleton was brought before the court in obedience thereto. In behalf of respondent Cooper, it was said by his counsel that he was temporarily absent from the state and leave and time were asked in behalf of respondents to present something further in writing in their behalf. A brief time was granted, and thereupon respondent Stapleton presented the following:

"Comes now William Stapleton, respondent above named, and for further answer and explanation touching the offense whereof, by the opinion of this honorable court, he has been adjudged guilty, respectfully submits the following: That he has read the opinion heretofore in this cause filed, and is now convinced that the objectionable language referred to therein was fairly and reasonably open to the construction put upon it by this honorable court though no such construction was intended or thought of when the same was written and published. That he does not believe, and never did believe, that this court, or any member thereof, was in any manner improperly influenced in the Connors case, or in any other case. That the articles referred to in the opinion were written hast-

fly, incident to the hurry of the publication of a morning paper, and at a time when there was intense feeling occasioned by the action of a member of the city council of Denver in the organization of the board of aldermen. That the purpose of these articles was solely to call public attention to the conduct of parties occupying no official position whatever in connection with this court, and to prevent further improper influence upon the organization of said board of aldermen. That there was no intention to reflect in any manner upon this court, or upon any member thereof. That he very much regrets having permitted the publication of language seemingly, though unintentionally, calculated to question the motive or independence of this court, or the honorable justices composing the same. That there was no desire whatever to interfere in the slightest degree with the due and proper administration of justice. That respondent realizes the great importance of having a pure, unimpeded, and dignified administration of justice by this and all other courts. That neither respondent, nor any one else connected with the ownership, publication, or management of said paper, has ever intentionally or knowingly consented to the insertion therein of matter in any way tending to annoy or embarrass this court in the performance of its judicial duties, and that, in connection with the subject-matter of the articles in question, there was never any justification for adverse criticism of this court, or for reflection upon the conduct of either of its members. Upon the foregoing statement, and the other matters herein appearing of record, respondent respectfully submits to the finding and judgment of the court.

WILLIAM STAPLETON.

"State of Colorado, County of Arapahoe, — ss.: Subscribed and sworn to by the said William Stapleton, respondent in the above-entitled cause, before me, a notary public in and for said county and state, this 18th day of May, 1893. [Seal.] CYRUS E. COOPER, Notary Public."

Per Curiam:

In view of the acknowledgment, retraction, and regrets now expressed by Mr. Stapleton in writing, and under his oath, accompanied by the assurance that the matters

thus expressed will be published by him as widely and as conspicuously as the articles complained of, it is the opinion of the court that in the present instance further proceedings against him are unnecessary, and that severity of punishment is not required. It is therefore ordered by the court, all the justices concurring, that this proceeding be dismissed, as to Mr. Stapleton, and that he be discharged upon payment by him of his share of the costs herein, and, further, that the proceeding stand continued, as to respondent Cooper, until such time as he can be brought before the court.

Subsequently, respondent Cooper, by leave of the court, presented his further answer under oath, which, omitting the formal parts, was as follows: "That this respondent did not cause or procure the publication of any of the objectionable articles mentioned in this proceeding, and that he had no knowledge whatever of any or either of them until after the same had been published in the Republican; that he did not nor has he ever approved of said articles, or either of them, so far as the same have any reference whatever to this honorable court; that he very much regrets the publication of language seemingly, though unintentionally, calculated to question the motive or independence of this court, or the honorable justices composing the same; that this respondent has no desire whatever to interfere in the slightest degree with the due and proper administration of justice, and that he realizes the importance of having a pure, unimpeded, and dignified administration of justice by this and all other courts; that this respondent has never intentionally or knowingly consented to the insertion in said paper of matter in any way tending to annoy or embarrass this court in the performance of its judicial duties; and that, in connection with the subject-matter of the articles in question, there never was, as respondent believes, any justification for adverse criticism of this court, or for reflection upon the conduct of either of its members."

And thereupon it was ordered that, upon the payment of the residue of the costs herein, Mr. Cooper be discharged, and this proceeding dismissed.

NEBRASKA SUPREME COURT.

Otto LOBECK, Admr., etc., of C. A. Fried,
Deceased, *App't*,

LEE-CLARKE-ANDRESEN HARD-
WARE CO. *et al.*

(.....Neb.....)

*1. Upon the dissolution of a partner-

*Headnotes by RYAN, C.

ship firm by the death of one of its members the surviving partners may carry on the same line of business at the same place as was transacted the firm business, without liability to account to the legal representative of the deceased partner for the good-will of said firm, in the absence of their own agreement to the contrary.

2. Where the legal representative of a deceased member of a partnership firm, as such, without words of limitation, joins in the sale of all the stock and

NOTE.—In connection with the above case as to good-will of a partnership dissolved by death of a partner, see the note to *Vonderbank v. Schmitt* 23 L. R. A.

(La.) 15 L. R. A. 462, in respect to the business name of a firm as part of the good-will.

fixtures of such firm to the surviving members thereof, such legal representative cannot maintain an action against such survivors for the good-will of said firm, or for any portion thereof.

(June 6, 1893.)

APPEAL by plaintiff from a judgment of the District Court for Douglas County in favor of defendants in an action brought to compel defendants to account for decedent's share of the good-will of a business, which has been carried on by a firm of which decedent was a partner during his lifetime, and to continue which the defendant corporation was organized. *Affirmed.*

The facts are stated in the commissioner's opinion.

Messrs. Cowin & McHugh and Gregory, Day & Day, for appellants:

The contract by its term precludes the construction that the good-will was to be included in the price affixed to the stock, for it provides that the stock should be inventoried with freight added; for under that well-known rule of interpretation, that when the method of doing a thing is specified it carries with it the preclusion of any other method as fully as if specifically stated.

The contract taken in itself designates the good-will as property, as a thing of value, to be by and of itself inventoried at its market value as distinctly and definitely as that of the stock and fixtures named therein.

Good-will is a proper subject of sale or bequest, and passing to the owner or assignee in bankruptcy.

Greenhood, Pub. Pol. p. 729; *Sheppard v. Boggs*, 9 Neb. 258; *Wallingford v. Burr*, 15 Neb. 204, 17 Neb. 187; *Austen v. Boys*, 4 Jur. N. S. 719.

The good-will does not survive, but is partnership property; if not disposed of by consent it must be sold like other partnership effects.

Dougherty v. Van Nostrand, Hoffm. Ch. 68, 6 L. ed. 1066; *Lindley*, Partn. p. 448; *Hall v. Barrows*, 4 De G. J. & S. 150.

This contract must be interpreted also in the light that the administrator of the estate of C. A. Fried became a tenant in common with the surviving partners in the copartnership estate.

And such a contract made by him with the surviving partners in the absence of fraud or mistake would be binding upon all the parties and upon all persons claiming through them.

Sage v. Woodin, 66 N. Y. 578; *Lindley*, Partn. p. 614; *Smith v. Everett*, 27 Beav. 446.

There could have been no misunderstanding, but these defendants regarded themselves as liable to the plaintiff for one fourth the value of the good-will of Lee, Fried & Co.

Singer Mfg. Co. v. Doggett, 16 Neb. 609; *Dodge County School Dist. No. 8 v. Estes*, 13 Neb. 52.

Mr. John L. Webster, for appellees:

The contract of December 30, 1887, recites that the "corporation agrees to buy the stock, . . . as per inventory, taken between December 26 and December 31, 1887." This is a recital that the inventory had been taken. It appears that in the setting down of the items to be valued, that the good-will was not so set

down as a separate item for separate valuation. From all that appears in the petition Lobeck knew that fact when he signed the contract, and he was satisfied with the prices put down in the inventory.

There is no averment of fraud or mutual mistake, Lobeck by diligence or care could have ascertained the mistake if one existed. Lobeck had a statement showing a stated account of his interest in the firm assets.

2 Bates, Partn. § 958; *Stettheimer v. Killip*, 75 N. Y. 286.

Lobeck recognized and ratified the transfer of the property by the surviving members of the firm, to defendant corporation, on the basis of that inventory.

Cobb v. Hatfield, 44 N. Y. 533; *Van Trott v. Wiess*, 86 Wis. 439.

Without some allegation of actual fraud or collusion, or mistake, to justify such an opening up of the inventory, the action cannot be maintained.

Stettheimer v. Killip, *supra*; 3 Pom. Eq. Jur. § 1376; *Story*, Eq. § 151.

Good-will is not a subject-matter of separate inventory.

Parsons, Partn. p. 274; *Baxter v. Connolly*, 1 Jac. & W. 580; *Thackray's App.* 75 Pa. 132; 2 Bates, Partn. § 661; *Rammelsberg v. Mitchell*, 29 Ohio St. 22; *Chicago L. Ins. Co. v. Auditor of Public Accounts*, 101 Ill. 82; *Spring Valley Water Works v. Schottler*, 62 Cal. 69, 118; *Chicago v. Garrity*, 7 Ill. App. 474; *Mitchell v. Read*, 84 N. Y. 556; *Chisum v. Deves*, 5 Russ. 29; *Dougherty v. Van Nostrand*, Hoffm. Ch. 68, 6 L. ed. 1066; *Elliot's App.* 60 Pa. 161; *Wedderburn v. Wedderburn*, 22 Beav. 84.

In the cases where the courts have held the good-will to be a valuable interest, and ordered the same to be sold for the benefit of the firm, it has been by a sale of the business itself, and not by a separate appraisal and sale of the good-will as an individual item of property.

Williams v. Wilson, 4 Sandf. Ch. 379, 7 L. ed. 1141; *Holden v. M. Makin*, 1 Pars. Sel. Eq. Cas. 270; *Collyer*, Partn. 80; *McFarland v. Stewart*, 2 Watts, 111, 26 Am. Dec. 109; *Turner v. Major*, 3 Giff. 442; *Levy v. Walker*, L. R. 10 Ch. Div. 436; *Musselman's App.* 62 Pa. 81, 1 Am. Rep. 882.

The good-will of the firm passed to the survivors of the firm on the death of Fried. The plaintiff had no interest therein.

3 Kent, Com. p. 64, citing *Hammond v. Douglas*, 5 Ves. Jr. 539; *Farr v. Pearce*, 3 Madd. 74; *Lewis v. Langdon*, 7 Sim. 421; *Parsons*, Partn. p. 274; *Robertson v. Quiddington*, 28 Beav. 529.

The surviving members of the firm had the legal right to dispose of the good-will, together with the property, upon such terms as they should think proper, and Lobeck would be bound by the disposition, unless the defendants were guilty of fraud.

Anderson v. Ackerman, 88 Ind. 485; *Miller v. Jones*, 39 Ill. 60; *Barry v. Briggs*, 22 Mich. 205.

Under the contract, surviving members of the firm were to determine the value of the good-will, if any, likewise the manner in which the same was to be inventoried.

The title to the whole property, including

the good-will, went to the defendant corporation, under the bill of sale of January 16, 1888, and such sale is binding upon the plaintiff.

Lobeck must stand by that contract of sale, or offer to rescind, and return the \$5,000 received by him.

Van Trott v. Wiess, 86 Wis. 489; *Masson v. Bonet*, 1 Denio, 69, 43 Am. Dec. 651; *Cobb v. Hatfield*, 46 N. Y. 538; *Voorhees v. Earl*, 2 Hill, 288, 89 Am. Dec. 588; *Hogan v. Weyer*, 5 Hill, 389; *Hammond v. Pennock*, 61 N. Y. 158; *Latham v. Hickey*, 21 La. Ann. 425; *Wilbur v. Flood*, 16 Mich. 40; *Woodbury v. Woodbury*, 47 N. H. 11, 90 Am. Dec. 555; *Downer v. Smith*, 32 Vt. 1, 76 Am. Dec. 148; *Evans v. Gale*, 17 N. H. 578, 48 Am. Dec. 614.

The rescission must be *in toto*, and property received under the rescinded contract must be returned, and the adverse party put as far as possible *in statu quo*, whatever may be the ground of rescission.

Conner v. Henderson, 15 Mass. 819, 8 Am. Dec. 103; *Carneal v. May*, 2 A. K. Marsh. 587, 12 Am. Dec. 453; *Durrett v. Simpson*, 3 T. B. Mon. 517, 16 Am. Dec. 115; *Southern L. Ins. & T. Co. v. Lanier*, 5 Fla. 110, 58 Am. Dec. 448; *Perley v. Bulch*, 28 Pick. 283, 84 Am. Dec. 56; *Kimball v. Cunningham*, 4 Mass. 502, 3 Am. Dec. 280; *Fay v. Oliver*, 20 Vt. 118, 49 Am. Dec. 764; *Jennings v. Gage*, 13 Ill. 610, 56 Am. Dec. 476; *Emerson v. McNamara*, 41 Me. 565; *Katabrook v. Sweet*, 116 Mass. 808; *Cook v. Gilman*, 34 N. H. 556.

It is too late to put the party *in statu quo* at the time of trial.

Herman v. Haffenegger, 54 Cal. 161.

The failure to offer to return the consideration received will be treated as an affirmation of the contract.

Sanborn v. Osgood, 16 N. H. 112; *Ayers v. Hewett*, 19 Me. 281; *Rowley v. Bigelow*, 12 Pick. 307, 23 Am. Dec. 607; *Bigelow*, Fr. p. 410.

Ryan, C., filed the following opinion:

In the month of March, 1881, Henry J. Lee, C. A. Fried, E. M. Andreesen, and H. T. Clarke entered into a written agreement whereby they associated themselves as partners under the firm name of Lee, Fried & Co., for the purpose of dealing at wholesale in nails, hardware, and tinners' stock. This partnership business was to commence in March, 1881, and to expire January 1, 1888, probably upon the same terms as provided in said contract, though we find in the record no direct evidence of any agreement as to such continuance. The business was carried on by the firm of Lee, Fried & Co. until the death of C. A. Fried, which occurred August 16, 1887. Indeed, even then matters continued as before, except that Otto Lobeck, having qualified as executor of the estate of C. A. Fried, acted in place of said decedent. On the 30th day of December, 1887, Henry J. Lee, Henry T. Clarke, Edward M. Andreesen, and one John T. Clarke entered into a written contract to which said executor, as such, was a party, of which contract the following is a copy: "This contract, made on the 29th day of December, A. D. 1887, by and between the surviving partners of the firm known as Lee, Fried & Co., to wit,

Henry J. Lee, Henry T. Clarke, Edward M. Andreesen, and Otto Lobeck, executor of the estate of C. A. Fried, deceased, parties of the first part, and Henry J. Lee, Henry T. Clarke, Edward M. Andreesen, and John T. Clarke, parties of the second part, witnesseth: That for and in consideration of the covenants hereinafter contained, to be kept and performed by the respective parties to this contract, the parties of the second part agree to form a corporation prior to January 2d, A. D. 1888, to be known as Lee-Clarke-Andreesen Hardware Company, for the purpose of conducting a general hardware business. The said parties of the first part agree to sell to such corporation, when formed, and said parties of the second part, as such corporation, agree to buy, the stock, fixtures, and good-will of the business owned and conducted by the former firm of Lee, Fried & Company at the market value thereof, as per inventory taken between December 26th and December 31st, A. D. 1887; said stock to be inventoried with freight added. The said parties of the second part, as such corporation, agree to pay and the said parties of the first part agree to accept therefor stock in said corporation at par value or part cash at the option of said corporation; said transfer to take place January 1 or 2, A. D. 1888. The said parties of the first part agree to pay all outstanding indebtedness of said firm. The said parties of the second part, as such corporation, agree to make collection of all outstanding accounts of said old firm without costs to said parties of the first part, unless for extraordinary expenses, such as attorneys' fees, court costs, etc.; said collections, when made, to be turned over to said parties of the first part, or an authorized representative, and to be used in paying the liabilities of the old firm of Lee, Fried & Co. And the parties of the first part agree among themselves that the stock in said corporation received in payment for the stock, fixtures, and good-will of said partnership shall be apportioned and partitioned among the surviving member of said firm and the executor of C. A. Fried deceased, according to their interest in the partnership, as the same may appear from the books of account of said partnership: provided, however, that if the said Otto Lobeck, executor of the estate of C. A. Fried, deceased, shall elect to receive money in lieu of said stock for the interest of his decedent in said partnership, then the other members of said partnership, to wit, Henry J. Lee, Henry T. Clarke, and Edward M. Andreesen, shall purchase from said Lobeck the amount of stock in said corporation to which his decedent would be entitled as a member of said partnership, at its par value, each an equal one third of said stock, to be paid for therefor in money. Witness our hands this 30th day of December, A. D. 1887. Lee, Fried & Company, Henry J. Lee, Lee, Fried & Co., Henry T. Clarke, Edward M. Andreesen, Otto Lobeck, administrator with will attached, parties of the first part. Henry J. Lee, Henry T. Clarke, Edward M. Andreesen, John T. Clarke, parties of the second part."

Consistently with the terms of the above

contract, the said Henry J. Lee, Henry T. Clarke, Edward M. Andreesen, and John T. Clarke organized a corporation under the name of Lee-Clarke-Andreesen Hardware Company, which took possession of the entire property invoiced as described in the aforesaid written agreement and the bill of sale, executed January 16, 1888, of which the following is a copy: "Know all men by these presents, that for a valuable consideration we, Henry J. Lee, Henry T. Clarke, and Edward M. Andreesen, surviving partners of the late firm of Lee, Fried & Company, have bargained and sold, and by these presents do bargain and sell, unto the Lee-Clarke-Andreesen Hardware Company the stock of hardware, warehouse, and fixtures of said late firm according to the inventory taken between December 26th and December 31st, 1887, amounting to \$198,436.75, together with the good-will of the business of said late firm; to have and to hold the said property and good-will unto the said Lee-Clarke-Andreesen Hardware Company, its successors and assigns, forever. This bill of sale being made in execution of said contract dated December 29th, 1887, for the sale of said property. Witness our hands this 16th day of January, 1888. Lee, Fried & Co. Edward M. Andreesen. H. T. Clarke. H. J. Lee."

It does not satisfactorily appear why the above bill of sale was not signed by Otto Lobeck, as the representative of C. A. Fried, for, while it purports to be made to carry into execution the written contract of date December 29, 1887, in which said Lobeck, in his representative capacity, appeared as one of the parties of the first part, he seems by common consent to have been omitted from even mention in the bill of sale. It might be inferable from the draft of date December 31, 1887, made by Otto Lobeck as administrator of C. A. Fried's estate, upon the firm of Fried & Co. in favor of C. O. Lobeck, for \$5,000, that the said administrator had elected to, and had thereby in part consummated his said election to, withdraw from said firm. If this satisfactorily appeared, the determination of this appeal would be much simplified. As the evidence does not explain the nonjoinder of Lobeck as administrator in the bill of sale, and as it does not point to sufficient certainty of intent to warrant placing great stress upon it, the bill of sale will be assumed to have been made in execution of the contract entered into on December 29, 1887, and upon that assumption the rights of the parties will be considered, without reference to said draft.

This action was brought in the district court of Douglas county by Otto Lobeck, as the representative of C. A. Fried, against the Lee-Clarke-Andreesen Hardware Company, Henry J. Lee, Henry T. Clarke, and Edward M. Andreesen. The prayer of the petition was that said defendants be required to make a just and fair inventory and valuation of the good-will acquired as above described, and be required to account for the same, either by the issuance of stock or in money, as to the court should seem equitable and proper, and for such other and further relief as to the court might seem meet. The

answer, in addition to other denials, which need not be detailed, denied that the good-will was of any value, but alleged that it passed incidentally with the stock of goods purchased; that the invoice covered such good-will; and that, by said executor having accepted payment on account of the interest of the estate of his decedent under the terms of said written agreement, he was estopped to make claim for the value of the good-will of the firm of Lee, Fried & Co. There was a reply, which was in substance a denial of the various affirmative matters pleaded in the answer. On the 11th day of February, 1891, a trial was had to the court, upon which the court found for the defendants, and adjudged that the cause be dismissed for want of equity, and that said defendants recover their costs. During the trial of the case plaintiff offered to show the value of the good-will of the firm of Lee, Fried & Co. as a fact independent of and in addition to the price paid for the merchandise of said firm purchased by the defendants. This offer of evidence was refused, and in various ways the questions which shall now be considered were properly presented for adjudication. These involve the construction of the contract between plaintiff and the other parties to the above contract, and the respective rights and remedies of such parties, with reference to the good-will of the firm of Lee, Fried & Co. Only one member of the firm of Lee, Fried & Co. had died at the date of the above contract, and his executor, with the other members of said firm, constituted the parties of the first part. The parties of the second part were the surviving members of the firm of Lee, Fried & Co. and John T. Clarke. The subject-matter of this contract was "the stock, fixtures, and good-will of the business owned and conducted by the former firm of Lee, Fried & Co." The price to be paid was the market value of the subject-matter of the contract, to be determined as per inventory therein described; said stock to be inventoried with freight added. This contract, however, did not contemplate the purchase by the parties of the second part, as individuals, of the subject-matter thereof, but that such purchase should be made by them as a corporation to be formed thereafter, under the name of the Lee-Clarke-Andreesen Hardware Company. Another peculiarity of this contract was in the media of payment. The consideration recited was the keeping and performing of certain conditions, which were, payment either wholly or partly in stock of the corporation contemplated at its par value, and the balance in cash, at the option of said corporation, and the payment of all outstanding debts and the collection of all outstanding accounts of the firm of Lee, Fried & Co. After providing for payments and collections as above, the parties of the first part—Henry J. Lee, Henry T. Clarke, Edward M. Andreesen, and Otto Lobeck, executor of the estate of C. A. Fried—agreed among themselves that such stock as should be issued by the proposed corporation in payment for the stock, fixtures, and good-will of said partnership should be apportioned and partitioned among

the surviving members of said firm of Lee, Fried & Co. and the executor of C. A. Fried deceased, according to the interest of each in the partnership as such interest appeared by the books thereof, provided, that if said executor elected to receive money in lieu of stock for the interest of C. A. Fried, then that Henry J. Lee, H. T. Clarke, and Edward M. Andreesen should purchase from said executor the share of stock to which, as such executor, he would be entitled at its par value.

From this synopsis it is evident (aside from paying the indebtedness of the firm of Lee, Fried & Co., and making collections of its outstanding accounts for that purpose) that each of the said first parties to said contract agreed to accept payment for the property inventoried in the stock of the proposed corporation, or partly in stock and the balance in money, at said proposed corporations' option. Among themselves, the parties of the first part further agreed that, in event payment should be made in the stock of said proposed corporation, it should be divided in a certain manner, with the proviso, however, that, if the executor of C. A. Fried should elect to receive money, rather than stock, each of the other parties of the first part would pay him in cash one third of the par value of said stock. This action was brought against the Lee-Clarke-Andreesen Hardware Company, Henry J. Lee, Henry T. Clarke, and Edward M. Andreesen. There is no averment in the petition of any demand for the delivery to plaintiff of stock by the Lee-Clarke-Andreesen Hardware Company, nor of a refusal by that corporation to issue stock alone, or make payment partly in its stock and partly in money, as provided in said agreement. The complaint of violations of the above contract is made solely as against Henry J. Lee, Henry T. Clarke, and Edward M. Andreesen; the said hardware company being only incidentally mentioned as having ratified said contract, and assumed all the rights to and secured all the benefits thereof by taking possession of all the property, assets, and estate of the former firm of Lee, Fried & Co., by, through, and under said contract, and appropriating the stock, fixtures, good-will, and certain leasehold interests and estates of said firm of Lee, Fried & Co. for the purpose of specially protecting and securing the full benefits of the good-will of the last-mentioned firm, and as having appropriated the same to their own use and behoof exclusively. As the antecedent portion of the last paragraph had reference solely to the above corporation, it is probable that the closing sentence was intended to be limited in like manner, though it is spoken of in the plural number. However that may be, it is clear that the petition predicated plaintiff's rights upon the primary liability of the surviving members of the firm of Lee, Fried & Co., and as whatever liability may be found to exist as against the Lee-Clarke-Andreesen Hardware Company must in any event, under the averments of the petition, be secondary and only collateral to that of H. J. Lee, H. T. Clarke, and Edward M. Andreesen, the alleged lia-

bility of these three last-named parties to the estate of C. A. Fried must necessarily be the test of plaintiff's right of recovery. As the judgment prayed was for the value of the "good-will" of the firm of Lee, Fried & Co., it may not be without profit to define that term. In *Dougherty v. Van Nostrand*, Hoffm. Ch. 69, 6 L. ed. 1066, it was said: "The good-will of a trade is called by Lord Eldon the probability that the old customers will resort to the old place. *Cruttwell v. Lye*, 17 Ves. Jr. 846." In *Parsons on Partnership*, on marginal page 263, the term "good-will" is thus discussed: "It is a hope or expectation which may be reasonable and strong, and may rest upon a state of things that has grown up through a long period, and been promoted by large expenditures of money. And it may be worth all the money it has cost, and a great deal more; but it is, after all, nothing more than a hope grounded upon a possibility." These definitions have reference to but one, though the generally employed, use of the term "good-will." In *Lawson's Rights, Remedies & Practice* (sec. 685), the same form of good-will is defined, in conjunction with which, however, is found another meaning, which must be taken into account as the sense of the term as treated of in one class of adjudicated cases, of which *Smith v. Walker*, 57 Mich. 456, is an example. This language (italicized to challenge attention to the superadded meaning) is employed in the section above referred to: "The good-will of a business is defined as the benefit which arises from its having been carried on for some time in a particular house, or by a particular person or firm, or from the use of a particular trade-mark or trade-name. Its value consists in the probability that the old customers will continue to be customers, notwithstanding a change in the firm name or place of business. It is a species of personal property." Still another meaning is sometimes included in the definition of the term "good-will," as illustrated by the following language, quoted from *Collyer on Partnership*, as embodied in section 161: "The term 'good-will' is used in two distinct senses. It is applied either to an advantage arising from the fact of sole ownership simply, without reference to other persons, or as an advantage arising from the fact of sole ownership, to the exclusion of other persons. The latter species of good-will is founded on special contract, and is a commodity upon which a valuation may be fixed. Therefore the interest of an outgoing partner in such good-will may be valued and assigned, with the rest of the effects, to the remaining partner. A good-will of this kind, being a valuable addition to a trade, and arising, as it does, in contract, must be created by some appropriate words. It cannot be implied from the general words 'stock, effects,' etc. Therefore, where one partner had agreed to sell to his copartner 'his inheritance in their nursery for £10,000,' and the other partner, in answer to the proposal, wrote as follows: 'I agree to give you £10,000, as you mention, for your moiety of all your partnership premises, stock, business, and concern,'—

Lord Eldon held that the purchaser had no right, according to his contract, to claim any good-will in the trade, in addition to the partnership property which was the subject of it, except what was the necessary effect of his acquiring the sole ownership in the property; certainly not such as to preclude the seller from carrying on the same trade where and when and with whom he pleased." In section 99, *Story, Partn.*, the generally employed definition of this term is given, after which occurs the following language: "But the term 'good-will' is sometimes applied to another case, where a retiring partner contracts not to carry on the same trade or business at all within a given distance. This is an interest which may be valued between the parties, and may therefore be assigned, with the premises and the rest of the effects, to the remaining partner, as an accompaniment of the ordinary good-will of the establishment. Good-will, in the former sense, is, therefore, an advantage arising from the mere fact of sole ownership of the premises, stock, or establishment, without reference to other persons as rivals; and, in the latter sense, as an advantage arising from the fact of excluding the retiring partner from the same trade or business as a rival."

In the discussion of adjudicated cases, there has not always been kept in view, much less stated, what particular form of good-will was under consideration. For instance, where it is the right to use the trademark adopted and made valuable by a firm or an individual, it is readily seen that it has something of the nature of tangible personal property, and, as such, independently might properly be subject to sale. This form of property is frequently protected by injunction, and in various ways is treated as one form of good-will, having no analogy to that form under consideration in the case at bar. Again, the term is sometimes applied to the contract obligation to refrain from competition by a retiring partner as against the other members of the firm, either as measured by the extent of territory or duration of time. Such an advantage as this affords may be of great value, and, having its origin in contract, and being founded upon sufficient consideration, the courts recognize, protect, and enforce it. Of these forms of good-will which imply a monopoly such as the courts will protect, it has been said that good-will may, independently, be transferred. This distinction as to the use of the term "good-will" is recognized in the above text, quoted from *Story* and from *Collyer on Partnership*. Speaking generally, it is believed it will be found, that whatever confusion has arisen as to the right to transfer good will specifically and independently is referable simply to a failure to distinguish these different forms of good-will. As to that form which must alone be considered in determining this case there is no confusion of interpretation nor conflict of authorities. Treating of it is the following language, quoted from *Collyer on Partnership* (sec. 162): "The former species of good-will is clearly not founded in special

contract, but in a combination of accidental circumstances, as the existence and celebrity of the house, the skill and affluence of the trader, or the prejudices or necessities of the customers. This, therefore, is not a tangible interest. It is not a commodity on which a specific value can be placed, or for which a definite allowance can be made. Therefore, upon the death of one partner, it is not stock of which the executor of a deceased partner can compel a division, unless he can also compel a sale of the whole premises and stock, as in the case of a partnership at will. Under these latter circumstances, however, the good-will would accompany the rest of the stock, and might create some additional speculative value in the mind of a purchaser. Accordingly, a court of equity, in this and similar cases, would so treat it that its value should be felt and appreciated by all parties interested in the concern; and therefore, in decreeing a sale of the entire partnership, would order the sale to be so adjusted as to give full effect to the value of the good-will."

In the case of *Austen v. Boys*, 4 Jur. N. S. 719, where plaintiff sought to recover the value of his alleged good-will in the firm of solicitors, the following language was used by *Lord Chancellor Chelmsford*: "Where a trade is established in a particular place, the good-will of that trade means nothing more than the sum of money which any person would be willing to give for the chance of being able to keep the trade connected with the place where it has been carried on. It was truly said in argument that 'good-will' is something distinct from the profits of the business, although in determining its value the profits are necessarily taken into account, and it is usually estimated at so many years purchased upon the amount of those profits. But the term 'good-will' seems wholly inapplicable to the business of a solicitor, which has no local existence, but is entirely personal, dependent upon the trust and confidence which persons may rest in his integrity and ability to conduct their legal affairs."

But this term, however, as used in the agreement of 1846, appears to me to be capable of a definite meaning, and, if confined within the limits of the agreement, as between the parties themselves, it becomes perfectly intelligible. It seems to have been intended to describe that interest which the retiring partner would have had if he had remained in the partnership, and which, by his retirement before its termination, he was willing to relinquish to the continuing partner.

But it is said that the stipulation as to not practicing within one hundred miles of the postoffice, being indefinite, and therefore extending to the whole period of the life of the retiring partner, is inconsistent with the notion of the term 'good-will' having such a narrow and contracted meaning as would thus be assigned to it. But this argument is founded upon the entire disregard of the different offices of the two stipulations. The one is intended to provide for the sale of the interest in the partnership whenever either partner chooses to retire; the other is a general engagement, the con-

consideration for which is not merely the benefit obtained on retirement, but the whole of the partnership agreement. . . . I am satisfied that the term 'good-will,' associated as it is with the words 'shares and interest,' and being a matter of valuation between the partners themselves, must be confined within the limits of the partnership, and that Mr. Austen is not entitled to any supposed value for his shares beyond it."

In *Musselman's App.*, 63 Pa. 81, 1 Am. Rep. 382, was considered the term "good-will" as applicable under the following condition of facts: A banking firm had dissolved, and appointed a partner to liquidate, who, immediately following the dissolution, commenced banking in the firm house on his own account, under the firm name, at the same time settling the firm business there. Thompson, *Ch. J.*, for the court, said that there was no doubt that if, under these circumstances, this partner had sold the "good-will," he would have been obliged to have accounted for the value received. This opinion discussed the liability of this partner in the following language: "Nor, at law, was there any obligation on him to pay for the good-will. He did not agree to pay for it, and he did not sell it as such. Nor can I comprehend how it existed independently of the property. There was no relinquishment of business by the partners. Their business expired by its own limitation. They had no exclusive right in the business that existed for a moment after the firm dissolved, or any sole ownership of it as against any others; and these are the criteria of property in good-will, according to the English rule. *Kennedy v. Lee*, 8 Meriv. 441; *Collyer*, Partn. 156; *Story*, Partn. 369. But, supposing the rule to be more extensive by usage with us (and I think it is), how can there be a good-will in favor of the members of a firm where the firm has ceased by its own limitation, and no exclusive right to follow the business in that place belongs to them? In that case, as a distinct property, it is good. It then attaches to and enhances the realty, and the value of it is realized in selling or renting that."

On marginal page 262 of *Parsons on Partnership* occurs the following language: "The executor of a deceased partner can realize the share of the deceased in the good-will only when he can compel a sale of the stock and premises, and then the good-will goes with them; for, as a general rule, by the conveyance of a shop or store, the good-will of the business carried on in it passes, although nothing is said about the good-will. And if an executor cannot compel a sale of the premises, or, as it seems, if the premises are not in fact sold, the executor gets no advantage from the good-will, for that remains entirely with the surviving partners who

carry on the same business in the same place."

To a proper understanding of the language used by *Sir John Romilly, M. R.*, in *Robertson v. Quiddington*, 28 Beav. 529, a brief statement of the facts of the case may not be unprofitable. John Morgan and N. A. Quiddington, in 1886, commenced carrying on a business as tailors, under the firm name of Morgan & Co. In this business Morgan had a two-thirds interest, and at his death, which occurred on the 8th day of January, 1860, John Robertson, by the terms of Morgan's will, became entitled to two thirds of the interest held by the testator in the good-will of the above-mentioned business. On the 23d day of June, 1860, Robertson filed a bill praying that said good-will might be sold, and that plaintiff might be declared entitled to four ninth parts of the proceeds of such sale, and for an accounting by Quiddington of all profits made or received by him from the good-will of the business of Morgan & Co. since the decease of Morgan. A demurrer to the bill was sustained on the ground of want of equity. In the consideration of this demurrer the following language was employed: "I fully concur in the observations on both sides, not only that the good-will is a valuable and tangible thing in many cases, but it is never a tangible thing unless it is connected with the business itself, from which it cannot be separated, and I never knew a case in which it has been so treated. I am of opinion that, even if the executors have assented to this bequest (which I must assume on demurrer, because it is so stated upon the bill), it is not competent for a legatee of two thirds of a good-will of a deceased partner to file a bill against the legatee of the remaining one third and the surviving partner, who is entitled to all the rest of the good-will, to have that bequest specifically made good."

From the above consideration of principles and citations from approved text-writers, as well as adjudicated cases, it seems inevitably to result that the surviving partners of the firm of Lee, Fried & Co., in the absence of a restrictive agreement on their part, were entitled to carry on the same line of business as had been transacted by said firm, and at the same place, without accounting for the value of such of the good-will of said firm as thereby accrued to them. It also seems equally clear that, by the purchase of the stock and fixtures of the firm of Lee, Fried & Co., the defendants, in the absence of an express reservation to the contrary, became entitled to whatever good-will attached to the former business of said firm.

It results, therefore, that the judgment of the District Court is affirmed.

The other Commissioners concur.

ARKANSAS SUPREME COURT.

S. C. WILSON, *Appt.*,

v.

H. Clay KING.

(.....Ark.....)

1. One convicted of a capital offense and sentenced to death in one state is not thereby prevented from maintaining a civil action in another state.
2. One becoming surety on a supersedeas bond which is substituted for a prior similar bond assumes, under the Arkansas statutes, liability for all damages accruing during the pendency of the appeal, and not for those only which accrue after his bond is filed.

(April 7, 1894.)

A PPEAL by defendant from a judgment of the Circuit Court for St. Francis County in favor of plaintiff in an action brought upon a supersedeas bond. *Affirmed.*

The facts are stated in the opinion.

Mr. George Sibley, for appellant:

The plea in abatement was good.

Mansf. Dig. 586; 1 Bl. Com. 132; 2 Bl. Com. 121; 4 Bl. Com. 380.

Const. 1874, art. 2, § 17, relieves against corruption of blood or forfeiture of estate only.

If the conditions upon which the defendant signed the paper that was to become bond before it should be his bond, were certain and well known and communicated to the officer whose duty it was to accept it had not been complied with, it was not his bond. The bond became valid and binding only upon the conditions stipulated; the clerk with whom it was to be filed having notice of the conditions.

Seymour v. Van Slyck, 8 Wend. 414, cited in 2 Am. & Eng. Encyclop. Law, note 4, p. 458; *State v. Churchill*, 48 Ark. 426.

Mr. W. G. Weatherford, for appellee:

Upon the execution and delivery of the bond being shown the maker's liability is *prima facie* established, the onus of avoidance is then upon the defendant.

State v. Churchill, 48 Ark. 446.

Wilson is really liable for the whole. His right, if any he has, is in equity to enforce contribution by his predecessor in a similar obligation.

Dugger v. Wright, 51 Ark. 232.

Any act of the principal which estops him from setting up a defense personal to himself, operates equally upon his surety.

2 Jarman, Estoppel, § 992.

The act of Mrs. Pillow in filing and obtaining the benefit of the supersedeas bond, estopped her, and her act estopped her surety Wilson.

The recitals in this bond bound both principal

and surety, and they are estopped from denying their truth, nor will they be allowed to deny the jurisdiction under which the supersedeas was issued.

Norton v. Miller, 25 Ark. 108; *State v. Hill*, 50 Ark. 458; *State v. Churchill*, 48 Ark. 426; *Searcy v. Yarnell*, 47 Ark. 269; *Disimukes v. Halpern*, 47 Ark. 317; *State v. Turner*, 49 Ark. 317; *Harmon v. Klins*, 52 Ark. 251.

Battle, J., delivered the opinion of the court:

In *Pillow v. King*, lately pending in this court, John Farmer executed a bond to stay proceedings on the decree appealed from in that case. He was afterwards released, on his application, from further liability, and S. C. Wilson executed another bond, in the sum of \$3,500, for the same purpose, which was filed with, and approved by, the clerk of this court. The condition and effect of the bond were as provided by section 1295 of Mansfield's Digest.

The decree which was appealed from in *Pillow v. King* was affirmed by this court (55 Ark. 633), and King brought this action on the bond of Wilson, to recover the damages he suffered during the pendency of the appeal by reason of being deprived of the use of the lands and other property, to the possession of which he was entitled under the decree affirmed, which he alleges exceeded the amount of the bond sued on. The defendant answered, and alleged as follows:

First. That King was incompetent to sue, "because he was civilly dead, having been found guilty . . . of murder in the first degree, and been sentenced to death, in Shelby county, Tenn."

Second. That, at the time he signed the bond, it was agreed with Mrs. Pillow (the appellant in *Pillow v. King*), that certain notes should be delivered to him (the defendant), for indemnity, before the bond was filed, of which he informed the clerk of this court, and that the notes had never been delivered.

Third. That, if liable at all, he was only liable for such damages or rents as accrued subsequently to the 6th of April, 1891,—the day on which his bond was filed,—Farmer being liable for the damages and rents which accrued while his bond was in force.

The uncontroverted allegations of the pleadings and the evidence adduced at the trial of this action tended to prove that the rents which accrued during the pendency of the appeal in *Pillow v. King* exceeded \$3,500. There is no contention that King ever received them from any source. No evidence was adduced or offered to show that the clerk of this court ever received notice of the agreement mentioned in the second ground of defense before the filing and approval of the bond sued on.

The jury returned a verdict in favor of the plaintiff for \$3,500, and judgment was rendered accordingly.

1. The conviction and sentence of King in the state of Tennessee did and does not affect his right to sue and recover in this state. *Story, Conf. L. 8th ed. §§ 619-625.*

2. The second defense was wholly unsu-

NOTE.—The above decision as to the extraterritorial effect of a sentence to death although made without discussion and in accordance with the doctrine of text-writers seems to be so far as actual decisions go a novel one.

As to civil death in the United States in general, see *Davis v. Laning* (Tex.) 18 L. R. A. 22, and *note*, 23 L. R. A.

tained by the evidence; there being no evidence that the clerk of this court had notice, before the bond was filed, of the agreement of Wilson and Mrs. Pillow as to the conditions upon which it was to take effect. The bond showed the purposes for which it was executed, and impliedly authorized the filing of the same. For the purpose of securing its approval and acceptance by the clerk, there was indorsed upon or appended to it an affidavit of Wilson to the effect that he was worth, over and above all his liabilities and exemptions from executions, the sum of \$3,500,—the amount of the bond.

8. In order to stay the proceedings on a judgment or decree during an appeal therefrom to this court, the statute requires the appellant to file a bond, executed by one or more sufficient sureties, to the effect, among other things, that the appellant shall pay "all rents or damages to property during the pendency of the appeal, of which the appellee is kept out of possession by reason of the appeal." The effect of the bond is to secure the payment of the value of the use of the property for the time the appellee was deprived of the possession, and the damages to it during the same

time, in the event the judgment or decree is affirmed. The object is to protect the appellee. The statute provides that if a supersedeas bond is filed, and the court "shall consider the sureties insufficient, or the bond substantially defective, in securing the rights of the appellee, the court or judge," on motion and notice, "shall issue an order discharging the supersedeas, unless a good bond, with sufficient sureties, be forthwith executed." The object of this proceeding is to supply the deficiency of the bond on file, and, to do so, the new bond is required to bind the sureties thereon for the payment of "all rents or damages to property during the pendency of the appeal." When filed, it relates back, and covers all rents and damages which accrued before and after it was filed, and during the pendency of the appeal. *Dugger v. Wright*, 51 Ark. 232; *Bentley v. Harris*, 2 Gratt. 357.

The defendant was liable for all the rents of, and damages to, the property recovered by the plaintiff in *Pillow v. King*, which accrued during the entire time of the pendency of the appeal therein.

Judgment affirmed.

LOUISIANA SUPREME COURT.

SUCCESSION OF Harriet R. HOOKE, Deceased Wife of Joseph Ashbey.

(46 La. Ann. —.)

*Where a matrimonial community of acquets and gains exists, and the wife dies, and her succession is opened by the qualification of the father as natural tutor of his minor children, issue of his marriage with the decedent, a creditor who has obtained a judgment on a community debt cannot compel an administration of the wife's succession. His remedy is to proceed against the surviving husband and the community property.

(January 15, 1894.)

APPEAL by opponents from a judgment of the Civil District Court for the Parish of Orleans granting the petition of James H. Ashbey for the appointment of an administrator for the estate of Harriet R. Hooke, deceased. *Reversed.*

The facts are stated in the opinion.

Mr. J. Zach. Spearing, for appellants:

The holder of a judgment or claim against the husband cannot claim the amount of the same from, and is not by virtue thereof a creditor of, the succession of the deceased wife.

Rev. Civ. Code, 2398; *Clark's Succession*, 27 La. Ann. 269; *Reihl v. Martin*, 29 La. Ann. 16; *Bofenschen's Succession*, 29 La. Ann. 714.

A person who is not a creditor of a succession and has no interest therein, cannot cause the appointment of an administrator to the same.

*Headnote by PARLANGE, J.

NOTE.—As to liability of community for debts, see note to *Oregon Imp. Co. v. Sagmelster* (Wash.) 19 L. R. A. 288.
23 L. R. A.

Poret's Succession, 26 La. Ann. 158; *Story's Succession*, 3 La. Ann. 502; *Walker's Succession*, 32 La. Ann. 331; *Hebert's Succession*, 33 La. Ann. 1099; *Sarrazin's Succession*, 34 La. Ann. 1168; *Soye v. Pries*, 30 La. Ann. 98.

The beneficiary heir, present and of age, is preferred in the appointment as administrator, where one is necessary; on his default, the natural tutor of the minor heir will be preferred.

Rev. Civ. Code, 1042, 1044, 1046, 1121; *Romero's Succession*, 42 La. Ann. 896; *Stoane's Succession*, 12 La. Ann. 610; *Sutton's Succession*, 20 La. Ann. 150; *Daigle's Succession*, 27 La. Ann. 524.

Messrs. Ernest T. Florence and J. S. Whitaker, for appellees:

Where the succession of a wife owns community property and has been accepted under benefit of inventory but no administrator has been appointed thereto, a creditor of said community can compel the appointment of an administrator.

Civ. Code, art. 1041.

The succession of a wife owns her share of the community property, incumbered with the community debts.

Dickson v. Dickson, 36 La. Ann. 454; *Tugwell v. Tugwell*, 32 La. Ann. 852.

A judgment rendered on a community debt against the surviving husband interrupts prescription against the heir of the deceased wife.

Regan's Succession, 12 La. Ann. 116; Civ. Code, art. 3552.

The husband and the community are different legal entities and are solidarily liable for community debts.

Childers v. Johnson, 6 La. Ann. 641.

Petition for rehearing.

Are we to seize all the property of the succession on the chances of its being community?

Are we to disregard all claims between the community and the separate estate; are we to bear the expense of contesting claims of privilege; are we to compel the former tutor to account for the revenues of the community, all by a writ of *fiert facias*?

We suggest to the court that it is a legal impossibility to get at these questions, to say settle them by means of a *fi. fa.*

In not one case has this court held that a succession creditor must proceed by *fi. fa.* against whatever the beneficiary heirs choose to have recognized as community property, and if the judgment be not satisfied be helpless as to the balance because he cannot compel them to account for their disposition of other community property.

This suggestion was accepted "under benefit of inventory."

Civ. Code, art. 1401.

As soon as the inventories are finished the judge shall name an administrator to manage the property.

Code Pr. art. 976.

During the time, etc., the judge shall appoint an administrator to retain the property, if any of the creditors require it, of course, this being a succession where the heirs were minors, they have until their majority to accept—some of them are still minors.

We are admittedly creditors, we require that an administrator be appointed—the codes say that in such case the judge shall appoint him.

In *Self v. Morris*, 7 Rob. (La.) 27, this court said: "From all these provisions it clearly appears, that whenever a succession is accepted with benefit of inventory (and minors cannot accept otherwise) it is to be administered as a vacant estate, under the authority of the court of probates; and that persons holding claims against such an estate must provoke the appointment of an administrator."

See also *Dees v. Tildon*, 2 La. Ann. 414; *State v. Leckie*, 14 La. Ann. 646; *Clark's Succession*, 80 La. Ann. 807.

Parlange, J., delivered the opinion of the court:

Harriet R. Hooke, wife of Joseph H. Ashbey, died in 1894. A matrimonial community of acquets and gains had existed between her and her husband, who is still surviving. Shortly after her death, her husband, alleging that his wife had died intestate, leaving both separate and community property, obtained from the civil district court for the parish of Orleans an order for the taking of an inventory of the property left by the decedent. He was appointed, and he qualified, as the natural tutor of his three minor children, issue of his marriage with the decedent. An under-tutor was also appointed and qualified. The inventory amounted to \$12,456.15½, the interest of the decedent in the community property being valued at \$1,869.87½, and her separate property at \$10,586.78. In 1885, Mary Y. Ashbey, as natural tutrix of her minor children,

obtained a judgment in said civil district court against Joseph H. Ashbey, on a balance of account for \$5,437.92 and interest, which account Joseph H. Ashbey had rendered Mary Y. Ashbey prior to the death of the wife of Joseph H. Ashbey, and which account constituted a community debt. In 1893, James H. Ashbey filed a petition in the succession of Harriet R. Hooke, wife of Joseph H. Ashbey, alleging that Joseph H. Ashbey, since his appointment as natural tutor of his children, and since the taking of the inventory, has taken no action whatever in said succession; that the same remains unsettled; that Joseph H. Ashbey refuses to either settle or acknowledge claims against said succession; that he refuses to represent the same; that the petitioner is a creditor of the same, and prays to be appointed administrator. The application is opposed by Mary Ashbey, one of the heirs, now of age, of the deceased wife of Joseph H. Ashbey, and by the latter as natural tutor of one of his children, for the reasons that the application is not properly made or filed according to law; that James H. Ashbey is not a creditor of the succession, and has no right, and is not a proper person, to be appointed administrator; and that the succession owes no debts, and the appointment of an administrator is unnecessary. The opponent Joseph H. Ashbey prayed in the alternative to be appointed administrator in case petitioner's application should not be rejected. On the trial of the matter James H. Ashbey offered in evidence the judgment rendered against Joseph H. Ashbey in 1885, and also the account upon which that judgment was based. James H. Ashbey also offered a judgment of said civil district court, rendered in 1893 in the succession of one James H. Ashbey, recognizing and putting in possession his sole heirs, among whom is James H. Ashbey, the party to the instant case. We understand that the claim of the latter to be a creditor of the present succession is founded on the fact that the judgment against Joseph H. Ashbey belonged to the succession of one James H. Ashbey, of whom the James H. Ashbey, party to the instant case, is one of the heirs. The lower judge rendered judgment ordering an administration, and he appointed Joseph H. Ashbey the administrator. The opponents have appealed. In our opinion, the judge *a quo* erred. Under the circumstances of this case he should not have ordered an administration. It is settled that, notwithstanding the actual dissolution of a matrimonial community of acquets and gains by the demise of one of the spouses, it has a fictitious existence subsequently for the purposes of liquidation and payment of community debts. *Dumestre's Succession*, 42 La. Ann. 411; *Factors & Traders Ins. Co. v. Levi*, 42 La. Ann. 484; *Landreaux v. Louque*, 43 La. Ann. 234, and cases therein cited; *Cason's Succession*, 83 La. Ann. 792. The judgment being a conceded community debt, we see nothing to prevent its owner or owners from proceeding against Joseph H. Ashbey, who was the head of the community, and against the community property, for the satisfaction of the judgment.

It is therefore ordered that the judgment appealed from be annulled, reversed, and set aside,

and that the application of James H. Ashbey for an administration of the succession of Harriet R. Hooke, deceased wife of Joseph H. Ashbey, be, and the same is hereby, rejected

and dismissed, at the cost of James H. Ashbey in both courts.

Rehearing denied March 12, 1894.

TENNESSEE SUPREME COURT.

W. H. HOPSON and Wife, *Appts.*,
v.

H. L. FOWLKES *et al.*

(22 Tenn. 697.)

Possession under an execution sale against the husband of land formerly held by entireties by a couple who were divorced prior to the sale is sufficient if properly maintained to bar all rights of the wife thereto, even before the husband's death.

(June 19, 1893.)

APPPEAL by complainants from a decree of the Chancery Court for Dyer County in favor of defendants in an action brought to recover possession of certain real estate. *Affirmed.*

The facts are stated in the opinion.

Messrs. J. T. Woodson and Draper & Parks for appellants.

Messrs. Richardson & Coover for appellees.

Mc Alister, J., delivered the opinion of the court:

This is an ejectment bill. Complainants seek to recover a tract of land consisting of 800 acres, situated in Dyer county. Complainant Mary E. Hopson was formerly the wife of one James Wilson, to whom she was married in 1854, and during said marriage, to wit, on September 8, 1856, one William M. Shipp, the father of Mary E., conveyed to her and her then husband, James Wilson, jointly, the tract of land in controversy. The said James Wilson died in November, 1886, and complainants claim that the legal title to said land is vested in the said Mary E. by right of survivorship, the land having been owned by her and her then husband, James Wilson, by entireties. It should be stated in this connection that said Mary E. was divorced from the said James Wilson on the 30th of October, 1860, and on the 18th of March, 1861, she intermarried with W. H. Hopson, her present husband. It further appears that on January 4, 1860, the land in controversy was attached by creditors of the said James Wilson, and, under proper decrees of the chancery court of Dyer county, it was sold to the defendants, Fowlkes and Ledsinger. The defendants therefore claim title to said land as purchasers at that judicial sale, under the decrees of the chancery court vesting title in them, and by continuous adverse possession. Respondents say they are, and all the time have been, since

the date of the confirmation of sale, the owners in fee of said tract of land, holding and claiming the same openly against all persons. Respondents plead the statute of limitations of seven years, and they rely on said adverse claim of title and possession of more than seven years, as a complete defense to said action. The chancellor pronounced a decree in favor of defendants, and complainants have appealed.

It appears from the record that the defendant H. L. Fowlkes and P. O. Ledsinger, the ancestor of defendant Gilbert Ledsinger, purchased this land at the sale in the case of Ingram and Allen Walker against James Wilson, and that on the 24th of January, 1861, a decree was rendered confirming the sale, divesting title, and vesting the same in the purchasers.

It further appears that said purchasers went into immediate possession of the land, inclosed it with fences, erected improvements thereon, and have remained in continuous and adverse possession of the same up to the institution of the present suit, which was commenced on the 12th of November, 1888,—about twenty-six years after the defendants purchased and took possession of said land. Under the operation of the first section of the Act of 1819, chap. 28 (Mill. & V. Code, § 8459), an adverse possession of seven years under a deed, grant, or other title purporting to convey the fee, not only bars the remedy of the party out of possession, but vests the purchaser with a good and indefeasible title in fee to the land described in his assurance of title. Under the second clause of the first section of said Act (Mill. & V. Code, § 8460) it is provided, viz.: "And, on the other hand, any person, and those claiming under him, neglecting for the said term of seven years to avail themselves of the benefit of any title, legal or equitable, by action at law or in equity effectually prosecuted against the person in possession, as in the foregoing section, are forever barred." The second section of said Act of 1819 (Mill. & V. Code, § 8461) provides, viz.: "No person, or any one claiming under him, shall have any action, either at law or in equity, for any lands, tenements, or hereditaments, but within seven years after the right of action has accrued."

Under the proof in this case the defendants are protected by each and all of the provisions of the statute, unless it appears that the complainant was laboring under some disability that exempted her from its operation.

It is insisted on behalf of complainant Mary E. that the defendants, by virtue of their purchase, only acquired such interest as her former husband, James Wilson, had

NOTE.—As to adverse possession against remaindermen and owners of future estates, see note to *Gindrat v. Western Ry. of Alabama (Ala.)* 19 L. R. A. 839.

in this land, and that, the said James Wilson having died on the 8th of November, 1886, the said Mary E. then became entitled to the whole estate by right of survivorship. It has already been mentioned that the said Mary E. was divorced from her former husband, the said James Wilson, on the 30th of October, 1860, but her counsel insist that this divorce did not change the nature of her estate in this land, which she still continued to hold by the entirety with the said James Wilson, with the contingent right to the whole estate in the event she survived him. It is insisted that her right of possession and the devolution of the title did not accrue until the death of the said James Wilson, and that she is not affected by the lapse of time, and the statute of limitations. It will be remembered that the decree of divorce was pronounced on the 30th of October, 1860, which was prior to the purchase by the defendants at the chancery sale, which occurred on the 24th of January, 1861. What, then, was the effect of the divorce upon the tenure of complainants' title to this land. In the case of *Harrer v. Wallner*, 80 Ill. 197, the supreme court of Illinois had occasion to consider the question now before us. Judge Walker, in delivering the opinion of the court, said: "Now this estate by the entireties is peculiar. The possession of one is the possession of both. The estate is joint for life, and descends to or vests in the survivor absolutely and in fee, and, by the destruction of the estate of one, it inures to the other. Neither can have partition, nor can either sell the estate so as to affect the rights of the other; and, when their rights to the property are invaded, a suit for a recovery for the injury, or for the property, must be joint, because the property and the right to its enjoyment are joint during coverture. Then appellee could not sue for and recover any interest in the land without joining her husband in the action until the coverture ceased. It is unlike tenants in common, where either may sue and recover for an injury to the property, and may use the names of his cotenants. What effect, then, did the granting of the divorce have on this estate, or the rights of the parties therein? The relation of husband and wife was thereby terminated, and with it all marital duties. Their interest and duties from thenceforth, as related to each other, were as though they never existed. The estate by the entireties is essentially a joint estate, although it differs in one or two particulars therefrom. The power to hold jointly arose from the fact that they were married when the conveyance was made. Had the marriage not existed, the parties would have taken as tenants in common. It was that circumstance, and that alone, which gave to them the joint life estate and the right to joint possession. When the very thing which by operation of law gave them a joint estate was destroyed by operation of the same law, the joint estate ceased, and they then became vested with an estate *per my* as tenants in common. They by that act, and operation of law flowing from it, are not jointly entitled to possession, but, the unity of title and the unity of

estate no longer existing with the incidental right of joint possession, it inevitably follows that they then become tenants in common. The termination of the marriage relation having wrought a change in the rights of the parties in the estate, the court should rather hold that the change is broad enough to convert it into an estate in common, than to hold that whatever change was made it left the right of survivorship. But, on principle, we are satisfied the decree of divorce had the effect to make them tenants in common, and that appellees thereby became entitled to partition." See also, *Bishop, Mar. & Div. § 716*; *Freeman, Coten. § 76*. We are not without authority on the question in this state. In the case of *Ames v. Norman*, 4 Sneed, 683, 70 Am. Dec. 269, it appeared that Ames and wife were seised of an estate in the land by entireties. Said land was sold at execution sale in satisfaction of judgment against the husband, and the defendant Norman, as a creditor of Mrs. Ames, afterwards redeemed the land from the purchaser at said sale. After Norman's rights had become vested, the wife of Ames, the original judgment debtor, procured a divorce, and the question was whether the interest or title of the purchaser at execution sale was subject to be divested or in any way affected by a subsequent divorce *a vinculo matrimonii* to the wife. It was held that the subsequent divorce had no effect whatever upon the rights of such purchaser. It was held that the defendant, by his purchase, became invested with the right of the husband as it existed at the time of the sale; that is, a right to occupy and enjoy the profits of the land as owner during the joint lives of the husband and wife, subject to the contingency that if the complainant survives her former husband his estate will then terminate, but if the husband survives he will become absolute owner of the whole estate.

The case at bar is to be differentiated from the case of *Ames v. Norman* in this important particular: that in the present case it appears that the wife was divorced prior to the date of defendant's purchase and possession. At that date the wife's status was that of *feme sole* and her estate in this land had, by operation of law, been changed from one by the entirety to a tenant in common. That Judge McKinney, who delivered the opinion of the court in *Ames v. Norman*, recognized this distinction is apparent from the following language. We quote from his opinion, viz.: "As one of the necessary results of the unity of person in husband and wife, it has always been held that where an estate is conveyed or devised to them jointly they do not take in joint tenancy. Constituting one legal person, they cannot be vested with separate or separable interests. They are said, therefore, to take by entireties that is, each of them is seised of the whole estate, and neither of a part. If the rights of husband and wife in relation to an estate held by entireties are not altered by the decree declaring the divorce, what becomes of the joint estate? What are their respective rights in the future in regard to it? They are no longer one legal person; the law itself has made them twain

They are no longer capable of holding by entireties. The relation upon which that tenancy depends has been destroyed. The one legal person has been resolved by judgment of law into two distinct individual persons, having in the future no relation to each other; and with this change of their relation must necessarily follow a corresponding change of the tenancy dependent upon the previous relation. As they cannot longer hold by a joint seisure, they must hold by moieties. The law, in destroying the unity of person between them, has, by necessary consequence, destroyed the unity of seisin in respect to their joint estate, for, independent of the matrimonial union, this tenancy cannot exist."

We think these principles are conclusive of this case. The decree of divorce, while it severed the unity of person of James and Mary E. Wilson, also severed their unity of

estate in this land, making them tenants in common. That decree also removed the disability of Mary E. as a married woman, and left her free to institute proceedings for a partition of this land, or otherwise to assert her rights therein. She neglected to take any steps, and the bar of the statute was complete when the present suit was instituted. It may be remarked, in conclusion, that the whole groundwork of complainants' bill is based upon the assumption that complainant Mary E. was not a party to the original attachment suit, and had no notice of those proceedings. This assumption is earnestly controverted by the defendants. We do not, however, decide that question, as it is wholly immaterial.

The title of Mrs. Hopson having been extinguished, and her remedy barred by operation of the statute, *the decree of the Chancellor is affirmed.*

ILLINOIS SUPREME COURT.

City of MT. VERNON, *Appt.*,

v.

PEOPLE of the State of Illinois.

(147 Ill. 339.)

Land owned by the state and used by a court for judicial purposes, though not

exempt from special assessment, under Const., art. 9, § 8, providing that the property of the state may be exempted from taxation by general law, and the General Revenue Law, § 2, exempting from taxation all property of every kind belonging to the state cannot be assessed for such improvements, since Const., art. 4, § 28, provides that the state shall never be made defendant in any court of law or equity, and the

NOTE.—Municipal assessment of state property.

This note is confined exclusively to cases of municipal assessment of state property.

General doctrine.

Taxation is in its essence an exercise of sovereign power over the inferior; an exaction, payment of which by the inferior is compelled by the superior. Trustees of Pub. Schools v. Taylor, 30 N. J. Eq. 618. State property is by implication excluded from the operation of laws imposing taxation, unless there is a clearly expressed intention to include it. Trustees for Support of Pub. Schools v. Trenton, 30 N. J. Eq. 667.

The immunity of property of the state and of its local divisions from taxation, does not result from a want of power in the legislature to subject such property to taxation, the state having power to render its property and that of its municipal divisions liable to taxation. *Ibid.*

Yet property cannot be taxed until authority therefor be conferred by the legislature, and the manner of imposing taxes prescribed by law must be followed; no other way of taxation can be lawfully pursued. Chicago, R. I. & P. R. Co. v. Davenport, 51 Iowa, 451.

All property within the state is held subject to the power of constitutional taxation by the legislature, for general purposes, and all property within the several local divisions of the state is held subject to such taxation for local purposes as may be lawfully imposed upon the local property by the local authorities. Cheaney v. Hooser, 9 R. Mon. 330, 339.

But it has been stated that it is impossible for the legislature to clothe the municipality with the power of taxing state property. Trustees of Pub. Schools v. Taylor, *supra*.

The municipality, a mere creature, cannot be vested with any compulsory powers over its creator. *Ibid.*

28 L. R. A.

If the state permits any part of its property to be taken for municipal purposes, such permission is a voluntary appropriation made by the state, and not taxation by the municipality. *Ibid.*

In Higgins v. Chicago, 18 Ill. 278, it was stated that the assessment of public improvements upon the public property of the state, county, or municipal corporations was a mere question of policy, and that the power existed to make it bear its share of the one or the other, that it might be exempted from the one and subjected to the other.

It has been held that it is only property which the state owns that is exempt from taxation, not that in the avails of which she may or may not ultimately be entitled to share. Ryan v. Gallatin County, 14 Ill. 78.

A distinction has been drawn between property held by corporations, such as school districts and devoted to a public use, and property which is devoted to a governmental use, the former being subject to special assessments made for the purposes of improvement. Polk County Sav. Bank v. Iowa, 69 Iowa, 24.

In People v. Western Seaman's Friend Soc. 87 Ill. 246, where it was sought to recover a judgment for taxes upon the property of the defendant, which, it was contended, was an institution of purely public charity, under the clause of the revenue laws, it was stated that it might be well doubted whether that clause was intended by the legislature to embrace more than institutions of public charity, such as have been founded and are maintained solely by the state, as contradistinguished from institutions founded by private enterprise, for the dispensation of private charity.

Distinction between assessment and taxation.

A manifold distinction exists between taxes and assessments which is distinctly recognized in the decisions. An assessment is not a tax. Hassan v. Rochester, 67 N. Y. 523; Roosevelt Hospital v. New York, 84 N. Y. 113.

calling of the state into court to defend a proceeding against its property is making it a defendant within the constitutional prohibition, and any judgment would be merely advisory without power to enforce it.

(October 27, 1893.)

APPEAL by complainant from a judgment of the Jefferson County Court in favor of defendant in a proceeding brought to confirm a special tax for street improvements against property owned by the state. *Affirmed.*

The facts are stated in the opinion.

Messrs. Robert M. Farthing and C. H. Patton, for appellants:

The state, within the true sense of the provision of the constitution, is not a party defendant, because this is a proceeding *in rem*, an application to confirm a special tax directly upon or against real estate.

People v. Draystran, 100 Ill. 286.

The inhibition has no application here, but applies to personal actions wherein the state in its own name alone and in its corporate personality might but for the above constitutional provision be made a party "defendant" and a personal judgment rendered.

Both the constitution and statutes expressly

permit the city to institute this very proceeding.

The property of the state, counties, and properly used for school and religious purposes may be exempted from taxation; but such exemptions shall only be by general law.

Const. art. 9, § 3.

And article 9, section 9, reads thus:

"The general assembly may vest the corporate authorities of cities, towns, and villages with power to make local improvements by special assessments, or by special taxation of contiguous property, or otherwise. For all other corporate purposes all municipal corporations may be vested with authority to assess and collect taxes; but such taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same."

The legislature has vested its unlimited power in the cities of the state in the matters aforesaid.

1 Starr & C. Stat. 261, § 116, art. 9, § 1.

The legislature has never enacted any statute having for its object the unjust policy of compelling those in the immediate vicinity of its property to pay for its improvement, by which all the people of the state are equally benefited.

Taxes are regarded as burdens or charges imposed upon persons or property to raise money for public purposes, and assessments are regarded not as burdens, but as an equivalent or compensation for the enhanced value which the property of the person assessed has derived from the improvements. *Sharpe v. Speir*, 4 Hill, 76; *Re New York*, 11 Johns. 77; *Bleecker v. Ballou*, 8 Wend. 263.

Assessments for city improvements contemplate a local benefit and increase of value and are made under the power to tax and in exercise of that power. *Harris County v. Boyd*, 70 Tex. 237.

Exemption from taxation does not exempt from special assessments. *McLean County v. Bloomington*, 106 Ill. 209; *Illinois Cent. R. Co. v. Decatur*, 1 L. R. A. 618, 126 Ill. 92; *Adams County v. Quincy*, 6 L. R. A. 155, 130 Ill. 566.

Assessments for city purposes do not come within the meaning of the term "taxation" as usually employed in the constitution and statutes. *Harris County v. Boyd*, *supra*.

In *McLean County v. Bloomington*, *supra*, the distinction between taxation and special assessment was said to be clearly made in the constitution, and while providing that the general assembly might exempt the property of the state, counties, and other municipal corporations from the former, it made no such provision with regard to the latter, section 9 authorizing the general assembly to vest such corporate authorities with power to make local improvements by special assessment, without any restriction as to the property to be assessed. *Adams County v. Quincy*, *supra*.

The general limitations contained in article 8 of the Texas Constitution are held not to apply to the exaction by city authorities under their charter giving power to construct and repair sidewalks, etc., as against abutting owners. *Harris County v. Boyd*, *supra*.

Liability to assessment.

In *People v. Austin*, 47 Cal. 353, land was taken and dedicated for a public street under an Act of 1871 and 1872, which provide that the value of the land taken and the damages to the improvements thereon, or adjacent thereto, injured thereby, and 23 L. R. A.

all other expenses, should be held and considered to be the costs of opening the street, and be assessed on the lands mentioned in the act which described the district, and provided that all lands belonging to the United States or to the state of California should be exempt from assessment. The act was assailed on the grounds of its unconstitutionality, and it was held that the power of assessment was but a portion of the power of taxation, and that if the sovereign could not tax its own property for general revenue purposes, it could not be doubted that it might exempt it from assessment or taxation in any form.

In *Richmond County Academy Trustees v. Augusta*, 20 L. R. A. 151, 90 Ga. 684, where lands were held in trust under the Virginia Act of July 31, 1783, and later acts vesting in trustee's funds arising from the sale and lease of certain state lands for the erection and maintenance of a public academy in the county of Richmond, the lands were held exempt from municipal taxation, even though separate from the tract on which the academy was situated, and used only as the means of income for the institution, the court considering the same as public property of the state and exempt under article 7, section 2, paragraph 2, of the Constitution.

The municipality has no power to levy a tax upon state bonds, even though within the corporate limits. *Augusta v. Dunbar*, 50 Ga. 337.

Section 5 of article 2 of the Illinois Constitution of 1848 provides that the corporate authorities of counties, townships, school districts, cities, towns, and villages may be vested with power to assess and collect taxes for corporate purposes, such taxes to be uniform in respect to persons and property within the jurisdiction of the party imposing the same.

Under this section it was held that a tax for the opening and improvement of a public street, or other local improvement, might be said to be a tax for corporate purposes, and that while the clause authorized the legislature to invest municipal corporate authorities with power to assess and collect taxes for corporate purposes, yet the power was limited and restricted to uniformity in respect to persons and property. *Adams County v. Quincy*, 6 L. R. A. 155, 130 Ill. 566. See this case *infra*, "Government property."

The only exemption from taxation of state property is given by the 5th clause of section 2 of the Revenue Law (3 Starr & C. Stat. 2027, section 2), which is: "All property described in this section to the extent herein limited shall be exempt from taxation, that is to say: . . . Fifth, All property of every kind belonging to the state of Illinois."

This does not mean nor include "special taxes," nor "special assessments," for local improvements.

McLean County v. Bloomington, 106 Ill. 218; *Illinois & M. Canal Trustees v. Chicago*, 12 Ill. 403; *Higgins v. Chicago*, 18 Ill. 276; *Chicago v. Colby*, 20 Ill. 614; *Peoria v. Kidder*, 26 Ill. 352; *Wright v. Chicago*, 46 Ill. 44; *Miz v. Ross*, 57 Ill. 121.

"Special taxation of contiguous property" is equally with "special assessment" not included within the meaning of the word "taxation," and therefore that exemption from taxation does not exempt public property from "special taxes."

Illinois Cent. R. Co. v. Decatur, 1 L. R. A. 613, 126 Ill. 95; *Adams County v. Quincy*, 6 L. R. A. 155, 180 Ill. 577.

So firmly does this court hold to the requirement of such uniformity in "special assessment" cases that it actually held a statute of the state to be unconstitutional because it vio-

lated this principle of uniformity in *University of Chicago v. People*, 118 Ill. 565; *Chicago v. Baptist Theological Union*, 115 Ill. 245; *Scammon v. Chicago*, 42 Ill. 196; *Chicago v. Larned*, 34 Ill. 280.

If the state, owning the supreme court-house square, abutting upon said improvement, must escape its just proportion of the assessments it throws the entire cost upon the owners of the opposite side of the street. This very sort of injustice was severely condemned in *Scammon v. Chicago*, *supra*.

See also *Higgins v. Chicago*, 18 Ill. 281; *Hassan v. Rochester*, 67 N. Y. 528.

It would be absurd to presume that the state would repudiate the moral obligation of this just and meritorious claim, and it is necessary to have the assessment confirmed, since it should be judicially ascertained how much is due before the state could be asked to make its appropriation to pay it.

People v. Managers of Buffalo State Asylum for Insane, 28 N. Y. S. R. 886.

Mr. George Hunt, Atty-Gen., for the People.

Magruder, J., delivered the opinion of the court:

This is a proceeding by the city of Mt. Vernon, in the county court of Jefferson

Section 9 of article 9 of the Illinois Constitution of 1870 provides that the general assembly may vest the corporate authorities of cities, towns, and villages with power to make local improvements by special assessments, or by special taxation of contiguous property or otherwise, for all corporate purposes; all municipal corporations may be vested with authority to assess and collect taxes, but such taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same.

Under this section it was held that taxation for general corporate purposes must be uniform, while for local improvements it might be by special tax, or by way of assessment upon the contiguous property, special assessments being clearly recognized as a mode of municipal taxation. *Chicago v. Larned*, 34 Ill. 280.

The power of cities and villages to make local improvements by special assessments, referring such power to the exercise of the right of eminent domain, was sustained in *Chicago v. Larned*, *supra*.

In *McLean County v. Bloomington*, 106 Ill. 209, the court construed the sections of the constitution as giving the power to make special assessments or local improvements, without any restriction as to the property to be assessed.

The corporation of a city or county may, if not specially exempted, justly pay a part of the assessments proportionate to the benefits conferred by improvements. *Scammon v. Chicago*, 42 Ill. 192.

The same conclusion was reached by the court in the prior case of *Higgins v. Chicago*, 18 Ill. 276.

In *Chicago, R. I. & P. R. Co. v. Davenport*, 51 Iowa, 451, it was sought to restrain the collection of a tax upon the company's interest in the government bridge crossing the Mississippi river, of which the company had paid half the costs of construction and had the use. It was held not subject to taxation, the bridge being built and owned by the United States.

The property of the United States of the city and county of Baltimore is all exempt from taxation, and yet it has never been held or contended that 28 L. R. A.

it was not liable for the paving done in front of such property. *Baltimore v. Green Mount Cemetery Proprs.* 7 Md. 517.

Upon a petition for a writ of certiorari to quash the proceedings in allowing an assessment under the Massachusetts Statutes of 1867, chap. 106, upon the property of the inhabitants of the county of Worcester, for the purpose of defraying the expenses of constructing sewers, it was held that such property, although held by the county, was so held for the purposes and uses of the commonwealth as essential to the administration of the executive and judicial duties of the government, and not subject to taxation in any form, unless the intention of the legislature to render them so clearly appeared. *Worcester County v. Worcester*, 118 Mass. 193, 17 Am. Rep. 159.

In the case of a mortgage given to secure state funds, set apart for the support of public schools, it was held in *Trustees for Support of Public Schools v. Trenton*, 30 N. J. Eq. 667, that the city had no power to tax such mortgages, although mortgages were embraced in the classification of property subject to taxation.

Where the state goes into the market for the investment of money, it makes its securities subject to the vested rights of property of private individuals, and therefore a mortgage given to the state or to its representatives for public money invested is subject to all prior estates in the mortgaged premises. *Ibid.*

Where a mortgage was executed to trustees for the support of free schools, to secure a loan with interest of moneys belonging to the state school fund, another mortgage being executed upon the same premises to the chancellor of the state, upon which the city claimed an assessment of taxes under the provisions of the city charter and a sale of the premises for a payment of the same, it was held that a lien upon municipal taxes did not exist upon such mortgaged premises, even though the city charter made the taxes paramount to all other liens and incumbrances. *Trustees of Public Schools v. Taylor*, 30 N. J. Eq. 618.

In *Hassan v. Rochester*, 67 N. Y. 528, an injunc-

county, to confirm a special tax assessed—for the purpose of paving certain streets of the city—against the lots and blocks contiguous to or abutting upon the improvement. Among the blocks so abutting upon the improvement is the block, owned by the state, upon which the supreme court building is located. This property was assessed a proportionate share of the cost of the improvement. The question presented by the objections to the confirmation of the assessment is whether land owned by the state, and used by its supreme court for judicial purposes, is subject to special taxation for a local improvement by one of the cities of the state. The county court sustained the objection that it had no jurisdiction, so far as the property of the state was concerned, holding that said property was exempt from special taxation for the local improvement in question, and refusing to confirm the assessment as to said property, or to enter judgment against the same. From such judgment of the county court the present appeal is prosecuted.

tion was sought to restrain the collection of an assessment imposed upon the plaintiff's land for city improvements, upon the ground that lands belonging to the state were not included in such assessment, and the court held that while it was conceded that property belonging to the state was not the subject of taxation in the absence of an exception by statute, it by no means followed that it was not liable to assessments for local improvements; that the exemption in the fourth section of the Revised Statutes of New York, chap. 13, part 1, of "all lands belonging to the state or the United States" related to general county and state taxes, and had no reference to assessments for improvements, made under special laws, and of a local character.

In *Piper v. Singer*, 4 Serg. & R. 354, where a suit was brought to recover taxes assessed on the public buildings belonging to the county, situated within the borough and assessed under the Act of February 9, 1790, for the improvement and keeping in order of the streets and alleys, removing nuisances or obstructions therefrom, it was held that the property of counties was not taxable for city or borough purposes.

In the above case it appeared that the inhabitants of the borough required a number of streets and alleys for their own particular accommodation, in which the inhabitants of the county in general had no concern, and therefore ought not to be taxed for keeping them in repair. *Piper v. Singer*, *supra*.

In *Nashville v. Bank of Tennessee*, 1 Swan, 202, suit was brought to recover city taxes from the bank, and it was held exempt, even though its charter contained no expressed exemption, it being public property and as such exempt without any positive law.

Article 2, section 9, of the Texas Constitution relates to all taxation both general and special in its exemption of county, city, and town property used for public purposes, as public buildings. *Harris County v. Boyd*, 70 Tex. 237.

In *Black v. Sherwood*, 34 Va. 906, it was sought to tax county property as a landing place for a ferry, but the same was held exempt under chapter 61 of the Acts of 1881, 1882, page 383, which exempted all real estate belonging to any county, city, or town.

The rule that public property cannot be seized for debts due from the public corporation, applies as forcibly to seizures for street improvements as to seizures under any other legal process. So held in *Lowe v. Howard County Comrs.* 34 Ind. 553, 23 L. R. A.

Section 3 of article 9 of the Constitution provides, that "the property of the state, counties, and other municipal corporations, both real and personal, . . . may be exempted from taxation; but such exemption shall be only by general law." In pursuance of this constitutional enactment, the legislature has provided, in section 2 of the General Revenue Law, that "all property described in this section, to the extent herein limited shall be exempt from taxation, that is to say . . . Fifth. All property of every kind belonging to the state of Illinois." 2 Starr & C. Ann. Stat. p. 2027. We have held that exemption from taxation does not exempt from special assessment or special taxation of contiguous property. *McLean County v. Bloomington*, 106 Ill. 209; *Illinois Cent. R. Co. v. Decatur*, 126 Ill. 92, 1 L. R. A. 613; *Adams County v. Quincy*, 180 Ill. 566, 6 L. R. A. 155.

It is therefore argued that, inasmuch as the general assembly, under the authority conferred upon it by section 9 of article 9 of the

where it was sought to sell a public square of a county for the payment of an assessment for street improvements.

Government property.

In *Fagan v. Chicago*, 34 Ill. 227, where property belonging to the United States was omitted from an assessment for benefits of a public nature, whereby such property was benefited, it was held that such omission was right, the states having no power to tax the organs of the general government. The assessment imposed in the above case was for street paving, and was levied by the city upon government property.

In *Adams County v. Quincy*, 6 L. R. A. 155, 130 Ill. 566, the city applied for an order confirming the report of commissioners appointed to levy a special tax upon lots contiguous to, and touching upon the line of certain streets proposed to be paved, in accordance with the city ordinance. A block owned by the county and used as a court-house, being a portion of such property and assessed for its proportion of the costs, it was contended that such property being used solely for public purposes was exempt from taxation. The court held that although all public buildings belonging to any company were exempt from taxation under section 2 of chapter 120 of the Revised Statutes of Illinois, yet that special assessments for local improvements were not taxes in the strict sense of that term, and that property held for a public use is not exempt from such assessment, although exempt from taxation for general purposes.

In *Polk County Sav. Bank v. Iowa*, 69 Iowa, 24, the question arose whether the city council had the power to make assessments against the property of the state under chapter 162 of Laws of 1873 for the purposes of the sewer tax, and it was held that such act did not confer the right upon cities to assess state property used for government purposes.

In the above case it was stated that the ruling of the court in *Hassan v. Rochester*, 67 N. Y. 523, did not apply, as there was no statute in Iowa expressly or impliedly subjecting the property of the state to assessment. *Polk County Sav. Bank v. Iowa*, *supra*.

Where lands are held for public use as a court-house, the increased value supposed to follow street improvements could not apply as compensation for the levy, as in property held by individuals. *Harris County v. Boyd*, 7 Tex. 237. R. W.

Constitution, has, in article 9 of the City and Village Act, vested the corporate authorities of cities and villages with power to make local improvements by special assessment or special taxation of contiguous property, the property of the state may be assessed for paving a street under a city ordinance which directs that the cost of such paving be paid by special taxation of contiguous property according to frontage. What force there might be in this argument, if there were no other constitutional provision applicable to this subject than those above referred to, it is needless to discuss. But there is another provision of the constitution, which, as it seems to us, is conclusive of the matter. Section 26 of article 4 of that instrument is as follows: "The state of Illinois shall never be made defendant in any court of law or equity." It is claimed by the appellant that the state is not a party defendant, within the true meaning of section 26 upon the alleged ground that this is a proceeding *in rem*,—an application to confirm a special tax directly upon or against real estate. It cannot be denied that county courts are included in the expression, "any court of law or equity." The statute requires that notice of the assessment shall be sent by mail to the owner of the property, and that notices shall be posted and published. Proof must be made of the mailing, posting, and publication of such notices. The owner has a right to appear in response to the notice, and file objections to the report of the commissioners. A hearing is had, and evidence is introduced. Rev. Stat. chapter 24, art. 9, §§ 18-51. Although no judgment *in personam* is rendered against the owner, yet it cannot be said that he is not a defendant, in view of the provisions made for his notification, appearance, and contest against the confirmation of the assessment. We think that, when the state is thus called into the county court to defend a proceeding against its property, it is made a defendant, in the sense contemplated by the constitutional prohibition.

In support of the contention that the property of the state can be thus specially assessed, reference is made to cases where it has been held that real estate owned by a city or county may be subjected to its proper share of the burden of constructing public improvements. *Scammon v. Chicago*, 42 Ill. 192; *McLean County v. Bloomington*, and *Adams County v. Quincy*, *supra*.

But it is to be observed, in regard to cities, villages, and counties, that they are mere agencies of the state, through which local government is conveniently administered, and that the general assembly may authorize property held by one of its agencies to be burdened with a charge for the benefit of another of its agencies, to the extent of benefits received, "in regard to a matter in

which the citizens and property owners within the territorial limits of such last-named agency have no exclusive interest, but only an interest in common with the entire public." *McLean County v. Bloomington*, *supra*. Although the property of the city or county cannot be sold so as to pass the title thereto to private parties, yet mandamus will lie to compel the payment of the amount assessed out of the city or county treasury. *Taylor v. People*, 66 Ill. 322; *Olney v. Harvey*, 50 Ill. 453, 99 Am. Dec. 530; *People v. Clark County Suprs.* 50 Ill. 213; *McLean County v. Bloomington*, *supra*.

Here, however, it is conceded that the amount assessed can neither be recovered by a sale of the property of the state, nor by mandamus. The judgment in the assessment proceeding, if there was jurisdiction to render it, would be merely advisory. The tribunal pronouncing it would have no power to enforce it. Courts are not organized, under our judicial system, for the purpose of determining the moral obligations of the parties, but for the purpose of making such determinations as they have the authority to carry into execution. "The state is a sovereign, and cannot be sued by her citizens in her own courts without her permission." *State v. Jewel*, 30 La. Ann. 861. "It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission." *Hane v. Louisiana*, 134 U. S. 17, 33 L. ed. 848. "The obligations of a state rest for their performance upon its honor and good faith, and cannot be made the subjects of judicial cognizance, unless the state consents to be sued, or comes itself into court." *Pennoyer v. McConnaughy*, 140 U. S. 1, 35 L. ed. 363. In *Moore v. School Trustees of Town Three*, 19 Ill. 83, we said: "The state could not be made a party defendant, nor compelled to sue. Her sovereignty would protect her from being coerced to prosecute or defend." *Osborn v. Bank of the United States*, 22 U. S. 9 Wheat. 738, 6 L. ed. 204; *Webster v. French*, 11 Ill. 254." In *Fagan v. Chicago*, 84 Ill. 227, it was held that the city of Chicago had no power to levy a special assessment for paving a street upon the block of ground owned by the United States government, and used, with the building thereon, for the purpose of a post-office, custom-house, courts, etc. In that case we said: "A municipal corporation has no power to assess or exact from the state or the general government any sum for benefits conferred."

In view of the consideration here presented, we think that the county court properly refused to confirm the assessment as to the property in question. Accordingly, *the judgment of that court is affirmed.*

COLORADO SUPREME COURT.

Fred. M. WADSWORTH, *Plff. in Err.*,
v.
UNION PACIFIC R. CO.

(18 Colo. 800.)

- *1. Where the court announced that a new trial should be allowed, and plaintiff then declared that he elected to stand by his case as made, and thereupon the court dismissed the action.—*Held*, that the circumstances showed that all parties intended to treat the case as though the court had dismissed the action or granted a nonsuit on the ground that plaintiff had failed to "prove a sufficient case for the jury."
2. The Code of Civil Procedure contemplates that the substance, and not the mere form, of judicial proceedings shall be regarded in determining the rights of parties.
3. Where the evidence is conflicting, or of such a character that different conclusions may be reasonably drawn therefrom, the case presents a question of fact for the jury under proper instructions.
4. Though the dismissal of an action may not be warranted, on the ground stated in the judgment order, yet, if the record discloses other grounds which, as a matter of law, show the plaintiff was not entitled in any event to recover in the action, a judgment of dismissal may be upheld.
5. Under the stock-killing act, as amended in 1885, before a person could claim that a railway company owed him any duty in respect to fencing its railway, it was necessary for him to allege that he was the owner or holder of land adjacent to such railway; that he had requested the railway company to fence its line, put in cattle-guards and gateways; and, moreover, according to said act, the railway company could not, by complying with such request, exempt itself from the unconditional liability otherwise imposed, except as against the party making the request.
6. It is not every remark in a judicial opinion that amounts to a judicial decision. General expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.
7. A legislative act, within the sphere of legislative power, and not an encroachment upon the province of some other department of the government, will be upheld, unless clearly in conflict with some provision of the constitution of the state or nation, or in violation of some private right thereby secured.
8. By the stock-killing statute of 1885 (secs. 13, 14) a railway company might be denied

*Headnotes by ELLIOTT, J.

"the equal protection of the laws," and deprived of its property "without due process of law." Such a statute is unconstitutional.

9. Where the sections of a statute must be construed together as dependent, and not as independent, provisions, the invalidity of one part invalidates other parts.

(May 22, 1893.)

ERROR to the District Court for Park County to review a judgment in favor of defendant in an action brought to recover damages for the killing of a horse. *Affirmed*.

Statement by ELLIOTT, J.:

This action is founded upon chapter 93, Gen. Stat. 1883, as amended by the Act of 1885. Section 13 and amended sections 14 and 15 are as follows:

"Sec. 13. That every railroad or railway corporation or company operating any line of railroad or railway or any branch thereof within the limits of this state, which shall damage or kill any horse, mare, gelding, filly, jack, jenny, or mule, or any cow, heifer, bull, ox, steer, or calf, or any other domestic animal, by running any engine or engines, car or cars, over or against any such animal, shall be liable to the owner of such animal for the damages sustained by such owner by reason thereof.

"Sec. 14. If the owner of any animal or animals so killed, or his or her authorized agent, shall make affidavit before some officer authorized to administer oaths that he or she was the owner or authorized agent of the owner, of the recorded brand found upon the animal or animals so killed or damaged at the time of such killing or damaging, and such person shall, within six months after such killing or damaging, deliver such affidavit to the agent or any officer of such company or corporation, together with a certificate of his or her mark or brand, under official seal of any officer authorized by law to record such mark or brands, or shall make affidavit that the animal killed or damaged, as aforesaid, had no recorded mark or brand, and that he or she is the owner of such animal, describing it, the corporation or company shall pay to such person delivering such affidavit and certificate, or such affidavit last aforesaid, as follows: Schedule. For American sheep, each, two dollars and fifty cents (\$2.50); for Mexican sheep and goats, one dollar and fifty cents (\$1.50); for Texas cattle, yearlings, twelve dollars (\$12.00); for Texas cattle, two years old, seventeen dollars (\$17.00); for Texas cattle, three years old, steers and cows, twenty dollars (\$20.00); for Texas cattle, four years old steers or over, twenty-five dollars (\$25.00); for American yearlings, fifteen dollars (\$15.00); for Ameri-

NOTE.—To the effect that a railroad company may by statute be made constitutionally liable absolutely without regard to negligence for all damages resulting from fires set by its engines or originating on its right of way, see *Union Pac. R. Co. v. De Busk* (Colo.) 3 L. R. A. 350; *McCandless v. Richmond & D. R. Co.* (S. C.) 18 L. R. A. 440.
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While as to the unconstitutionality of a statute attempting to create such liability for stock killed by its trains, see *Bielenberg v. Montana Union R. Co.* (Mont.) 3 L. R. A. 313; *Jensen v. Union Pac. R. Co.* (Utah) 4 L. R. A. 134.

can, two years old, twenty dollars (\$20.00); for American, three years old, steers and cows of all ages, twenty-eight dollars (\$28); for American, four years old steers and over, thirty-four dollars (\$34); for calves, ten dollars (\$10). The above price, when paid, shall be payment in full. All Texas and Mexican cattle shall be considered as Texas cattle, and half-bloods shall be classed as American cattle. Thoroughbred cattle, milch cows, high-grade American cattle and grade bulls shall be paid for at their cash value. Thoroughbred sheep shall be paid for at their cash value; horses, mules, and asses shall be paid for at their cash value; provided, that no railroad company shall at any time be required to pay more than the market value of any animal killed or damaged, except as hereinafter provided. In all cases where such railroad company or corporation shall kill any of the stock mentioned in this act, and for which no price or sum is fixed, the owner or agent of such stock shall, after the filing, as aforesaid, of an affidavit and certificate of brand or affidavit of ownership, which affidavit shall contain a statement of class, grade, and value of such animal or animals, select some disinterested freeholder of the county where such killing took place, and shall notify such company or corporation of said selection, and such company or corporation shall, within three days thereafter, select some suitable person to act with person so selected, and the two so selected shall select a third, and the three so selected shall, without delay, proceed to appraise the value of the stock so killed or damaged, a majority of which three appraisers shall be sufficient to determine the same; and shall certify, under oath, such appraisement to an agent or superintendent of such company or corporation. In case such railroad or corporation shall refuse or neglect to appoint such appraiser, it shall be the duty of the justice of the peace nearest to the place where such stock was so killed or damaged to select three disinterested persons as appraisers, and administer to them an oath to honestly appraise the value of such stock, which appraisers shall, without delay, appraise and forward to such justice the result of such appraisement, which justice shall, within ten days thereafter, forward to an agent or superintendent of such railroad or corporation, a certificate of the result of such appraisement and the costs thereof; and such railroad or corporation shall, within thirty days after the receipt of such certificate, pay to the owner of the stock so killed or damaged, or to his or her authorized agent, the amount of such appraisement, together with all the costs, as aforesaid; and in all cases where the value of such stock is established by this act such company or corporation shall pay for such stock within thirty days after the delivery of the affidavit and certificate of ownership of brand, or affidavits of ownership of said stock, and, if any such company shall so fail to pay for such stock within thirty days after the delivery of such affidavit and certificate, such company shall be liable for double the value the appraised or schedule value of any such animal or animals, together with reasonable attorneys' fees, to be

allowed by the court; and all persons selected or appointed under this section shall receive the sum of one dollar, to be paid by said railroad company or corporation, as hereinbefore provided; provided, that any railroad company having fenced its line of road, or any part thereof, or who may hereafter fence its road, or any part thereof, with a good and lawful fence, and put in good and sufficient cattle-guards, and have put in gateways upon and across their said railroad, at the request of persons holding or owning land adjacent to said railroad, for the private use and accommodation of said adjacent owners or holders of land, said railroad company shall not be held liable for the killing or injury of any stock getting through said gateways, belonging to said party at whose request and for whose accommodation said gateway was made, unless such killing or injury was occasioned by the fault or negligence of said railroad company or its employes.

"Sec. 15. Every railroad company shall keep a book at the county seat of each county through which their road runs; provided, that said road runs or passes through the county seat. If such railroad does not pass through the county seat, then such book shall be kept at the principal town in the county through which it passes; and it is hereby made the duty of the said company to cause to be entered in said book, within fifteen days after the killing of any animal, a description, as nearly as may be, of such animal, its color, age, marks, and brands, and shall keep said book subject to the inspection of persons claiming to have had animals killed. Should any company fail to keep said book, or to file such notice, in the manner herein provided, or to enter therein such description of any animal killed, for a period of fifteen days thereafter, such company shall be liable to the owner of such animal to an amount twice the full value thereof." Gen. Stat. 1888, p. 814; Sess. Laws 1885, pp. 804, 888.

Wadsworth was plaintiff below. The Union Pacific Railway Company was defendant. At the October term, 1887, the cause was tried by a jury, and verdict rendered in plaintiff's favor. A motion for a new trial was interposed by defendant, and at a subsequent term the following proceedings were had and entered of record: "And afterwards, and on the 25th day of April, 1888, the same being one of the regular juridical days of the April, 1888, term of the said court, the motion for new trial aforesaid having been continued for further hearing to said last-named term, and having been argued in chambers meanwhile in vacation, and now coming on for final hearing and determination, and the court, being of the opinion that said motion should be allowed, but plaintiff electing to stand by his case as made, doth order and adjudge that, there being no evidence that defendant's engine or cars ran over or against the horse of plaintiff herein in question, said animal, upon the contrary, appearing to have run into or against the moving train of defendant's cars, this action of plaintiff, under the statutes counted upon therein, does not lie, and the same, the evidence, and the verdict herein notwithstanding, is dismissed at

the costs of the plaintiff." The plaintiff seeks a reversal of this judgment by writ of error.

Messrs. Bailey & Wilkin, for plaintiff in error:

The so-called stock-killing statute under which plaintiff brought his action below, since its enactment in 1872, has been before this court in the cases following:

Atchison, T. & S. F. R. Co. v. Lujan, 6 Colo. 338; *Denver & R. G. R. Co. v. Henderson*, 10 Colo. 1; *Denver & R. G. R. Co. v. Zastrow*, 10 Colo. 4; *Atchison, T. & S. F. R. Co. v. Betts*, 10 Colo. 481.

And in each case, expressly or by implication, has been pronounced valid and constitutional as against the objection that it imposes on the railroad company an absolute liability to the owner of stock killed or injured for his damage thus sustained entirely independent of the question of negligence.

The statute twin to this, imposing a like absolute and unconditional liability upon railroad companies for damages from fires set out by them, was recently before this court in *Union Pac. R. Co. v. De Busk*, 3 L. R. A. 850, 12 Colo. 291; *Union Pac. R. Co. v. Moffatt*, 12 Col. 310, and upon the like objection made was pronounced valid and constitutional.

Every act which has received the sanction of the general assembly is to be considered constitutional unless the contrary appears beyond a reasonable doubt.

People v. Lake County Comrs. 12 Colo. 89.

The terms of the act state no exception to the absolute and unconditional liability of that railroad company which shall damage or kill any such domestic animal as this of plaintiff's by running any engine or engines, car or cars, over or against the same, save when it does this non-negligently at fence protected points upon its line.

It seems to be the policy of the act to devolve the burden of casualties of this sort upon that one of the two parties to it (both claiming non-imputability) which, declining to exempt itself under the fence provision, chooses to engage for its own profit in a business in which the dangerous agency which causes the injury is necessarily to be employed.

Hart v. Western R. Corp. 13 Met. 99; *Union Pac. R. Co. v. De Busk*, 18 L. R. A. 850, 12 Colo. 294.

The statute (Gen. Stat. 1883, § 2804, originally promulgated Sess. Laws 1872, p. 185) is constitutional in declaring a railroad company's liability for single damages for stock killed or injured without reference to company's non-negligence and without reference to fencing proviso which was added by more recent legislation.

Union Pac. R. Co. v. De Busk, and *Union Pac. R. Co. v. Moffatt*, *supra*; *Union Pac. R. Co. v. Arthur*, 2 Colo. App. 159; *Denver, T. & G. R. Co. v. De Graff*, Id. 42; *Union Pac. R. Co. v. Sternberg*, 18 Colo. 141; *Denver & R. G. R. Co. v. Chandler*, 8 Colo. 371; *Denver & R. G. R. Co. v. Stewart*, 1 Colo. App. 227; *Atchison, T. & S. F. R. Co. v. Lujan*, 6 Colo. 338; *Denver & R. G. R. Co. v. Henderson*, 10 Colo. 1; *Denver & R. G. R. Co. v. Zastrow*, Id. 4; *Atchison T. & S. F. R. Co. v. Betts*, Id. 481.

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This statute is constitutional as establishing, at the least, a presumptive but disputable presumption of liability, reserving to the railway company the right to defend by showing contributory negligence or other affirmative defensive matter to exempt it from its presumptive statutory liability imported by the fact of killing or injuring stock in operating its trains.

1 Thomp. Neg. § 15, p. 512, and cases cited; *Savannah, F. & W. R. Co. v. Geiger*, 21 Fla. 669, 58 Am. Rep. 703, notes, and cases cited; *Bradley v. People*, 8 Colo. 599; *Little Rock & Ft. S. R. Co. v. Payne*, 33 Ark. 816, 34 Am. Rep. 55.

The fencing proviso of the Statute of 1885, counted on in the complaint, relieves the statute of the constitutional question. It exempts from liability for non-negligent injury in cases of this sort at properly fence-protected points; this being equivalent to requiring the fencing and declaring a liability for damages in the absence of fencing.

Wilder v. Maine Cent. R. Co. 65 Me. 332, 20 Am. Rep. 698; *Rodsmacher v. Milwaukee & St. P. R. Co.* 41 Iowa, 297, 20 Am. Rep. 592; *Cairo & St. L. R. Co. v. Peoples*, 92 Ill. 97, 34 Am. Rep. 112; *Cairo & St. L. R. Co. v. Warrington*, 92 Ill. 157, 34 Am. Rep. 115, note; *Antisdel v. Chicago & N. W. R. Co.* 26 Wis. 145, 7 Am. Rep. 44, note; *Barnett v. Atlantic & P. R. Co.* 68 Mo. 56, 30 Am. Rep. 773; *Little Rock & Ft. S. R. Co. v. Payne*, *supra*.

The allowance of attorney's fees and doubling the damage on failure of company to pay single damage within thirty days after receiving certificate from justice of the peace of the amount is a valid statutory penalty for failure to comply with the fencing provision above mentioned.

Little Rock & Ft. S. R. Co. v. Payne, *Cairo & St. L. R. Co. v. Warrington*, and *Cairo & St. L. R. Co. v. Peoples*, *supra*; 1 Thomp. Neg. 539; *Tredway v. S. O. & St. P. R. Co.* 43 Iowa, 527, 29 Am. Rep. 362, note; *Peoria, D. & E. R. Co. v. Duggan*, 109 Ill. 537, 50 Am. Rep. 619.

The double damage for failure to keep stock record at company's station at Fairplay is a valid exercise of police power.

Little Rock & Ft. S. R. Co. v. Payne, *supra*. **Messrs. C. M. Kendall and Teller & Oranhood**, for defendant in error:

The statute on which this case is founded is unconstitutional, as depriving a person of its property without due process of law.

Zeigler v. South & North Ala. R. Co. 58 Ala. 594; *Little Rock & Ft. S. R. Co. v. Payne*, 33 Ark. 816, 34 Am. Rep. 55; *Bielenberg v. Montana Union R. Co.* 21 L. R. A. 818, 8 Mont. 271; *Thompson v. Northern Pac. R. Co.* 8 Mont. 279; *Cateril v. Union Pac. R. Co.* 2 Idaho, 540; *Jensen v. Union Pac. R. Co.* 4 L. R. A. 724, 6 Utah, 252; *Savannah, F. & W. R. Co. v. Geiger*, 21 Fla. 669, 58 Am. Rep. 703. See also *Ohio & M. R. Co. v. Lackey*, 78 Ill. 55, 20 Am. Rep. 259; *Wright v. Cradelbauch*, 3 Nev. 349; *Hutton v. Camden*, 39 N. J. L. 122, 23 Am. Rep. 203; *Corbin v. Hill*, 21 Iowa, 72; *Adams v. Beale*, 19 Iowa, 66; *McCready v. Sexton*, 29 Iowa, 391, 4 Am. Rep. 214; *Allen v. Armstrong*, 16 Iowa, 518; *Bannon v. Burnes*, 39 Fed. Rep. 392; *Abbott v. Lindenbover*, 42 Mo. 163; *Coolley*, Const. Lim. 453, *368, note, 454, *361, 481.

432; *State v. Doherty*, 60 Me. 509; *Greene v. Briggs*, 1 Curt. C. C. 325; *Windsor v. McVeigh*, 98 U. S. 277, 23 L. ed. 916; 5 Webster's Works, p. 487.

The law in force at the time of the killing of the animal, to wit, Law 1885, p. 335, was repealed by the Law of 1887, p. 420, enacted as a substitute therefor.

Keese v. Denver, 10 Colo. 112.

And the liability, if any existed, being a penal one, it was destroyed by the repeal of the statute inflicting the penalty.

Gregory v. German Bank of Denver, 8 Colo. 332, 25 Am. Rep. 760; *Denver & R. G. R. Co. v. Crawford*, 11 Colo. 598; *Union Pac. R. Co. v. Proctor*, 12 Colo. 194.

If the statute is construed to give double damages and attorney's fees, as a penalty for not paying within the time required by statute, it is unconstitutional, being in violation (sec. 6, art. 2) of the Constitution of Colorado, as well as other provisions of both the state and United States constitutions.

The defendant had the right to have the question of its liability determined in court, and it cannot be punished for so doing.

Cooley, Const. Lim. 445, *362; *St. Louis, I. M. & S. R. Co. v. Williams*, 49 Ark. 493; *Laferty v. Chicago & W. M. R. Co.* 71 Mich. 351; *Wilder v. Chicago & W. M. R. Co.* 70 Mich. 382; *Schut v. Chicago & W. M. R. Co.* Id. 433; *Chicago, St. L. & N. O. R. Co. v. Moss*, 60 Miss. 641; *Durkes v. Jonesville*, 28 Wis. 464, 9 Am. Rep. 600; *Davis v. Perse*, 7 Minn. 1, 32 Am. Dec. 65.

It is not the due process of law provided for in the state and United States constitutions.

Atchison & N. R. Co. v. Baty, 6 Neb. 37, 29 Am. Rep. 356.

Elliott, J., delivered the opinion of the court:

The dismissal of the action, as shown by the record, is assigned for error.

1. The dismissal was somewhat irregular, but it is not difficult to understand its meaning. The cause had been tried by jury, resulting in a verdict in plaintiff's favor, finding that the value of the horse killed was \$200, and assessing plaintiff's damages at \$400 on each of the two causes of action. Upon consideration of defendant's motion for a new trial, the court was of opinion that it should be allowed, and so announced its conclusion. Thereupon plaintiff declared that he elected to stand by his case as already made, and the district court then and there dismissed the action at plaintiff's costs. The declaration of plaintiff was equivalent to saying that he could not prove any better case, and that he desired to obviate the necessity for another trial. The bringing of the whole record to this court for review, including the bill of exceptions, containing "all the testimony offered, given, or received on the trial," clearly indicates that the intention of the parties was to treat the action of the court as though the court had dismissed the action or granted a nonsuit on the ground that plaintiff had failed to "prove a sufficient case for the jury." That such was the understanding and intention of plaintiff as well as the defendant is confirmed by the 23 L. R. A.

fact that the assignments of error and argument of counsel in this court extend to the conclusions of the trial court upon the evidence, the pleadings, and the statutes upon which the action is founded.

2. The Code of Civil Procedure contemplates that the substance, and not the mere form, of judicial proceedings shall be regarded in determining the rights of parties; hence we shall review this cause according to the intention of the parties, as above stated, since it is obvious that the ends of justice will be thereby accomplished. Code, § 78, also section 443; *Denier & R. G. R. Co. v. Chandler*, 8 Colo. 376; *Idaho Springs v. Filleau*, 10 Colo. 105.

3. Upon a careful examination of the evidence we are of the opinion that the court would not have been justified at the close of the evidence in dismissing the action or in granting a nonsuit on the ground that there was no evidence tending to prove that defendant's engine or cars ran over or against the plaintiff's horse, as stated in the finding of the court. The evidence on that phase of the case was somewhat conflicting, or of such a character that different conclusions might have been reasonably drawn therefrom; and so the evidence did not present a question of law for the court, but one of fact for the jury under proper instructions. 2 *Thomp. Trials*, § 2242 *et seq.*; *Lord v. Pueblo Smelting & Ref. Co.* 12 Colo. 394; *Denny v. Williams*, 5 Allen, 1-5.

4. But it is contended that, though the grounds for dismissing the action, as stated in the court's finding, are not sufficient in law, yet the judgment of dismissal should be upheld, since the record discloses other facts which, as a matter of law, show that plaintiff was not entitled, in any event, to recover in the action.

5. The complaint contains two causes of action. Each count is founded upon certain provisions of the statute relating to stock killed by the operation of railroads. The killing occurred in June, 1886; hence we must consider the law as it existed at that time. See Gen. Stat. 1883, chap. 93, § 2804 *et seq.* Also acts amendatory thereof,—Sess. Laws 1885, pp. 304, 338. Neither count of the complaint alleges any negligence on the part of the defendant company in respect to the killing of plaintiff's horse. Prior to the Act of 1885, above cited, it was provided by statute that any railroad company operating its road within this state which should damage or kill any domestic animal by running any of its engines or cars over or against such animal should be liable to the owner of such animal for the damages thereby occasioned. The statute contained a fixed schedule of prices to be paid for certain kinds of animals so killed. It also provided for an appraisalment of the value of the animals for which no schedule price was fixed, but the appraisalment was required to be made without any trial in court, and no proof of negligence on the part of the railway company was required in order to establish its liability. By the Act of 1885 an amendment to section 14 was added, relating to fences, cattle-guards, and gateways, by which it was provided that

under certain circumstances a railroad company should not be held liable for the killing or injury of any stock, unless such killing or injury was occasioned by the fault or negligence of the company or its employés. This peculiar proviso was again amended in 1891 (Sess. Laws, p. 281), but the amendment was too late to affect this case. The first count of the complaint contains an averment to the effect that defendant's railway line, at the place where plaintiff's horse was killed, was not then and there fenced with a good and lawful fence, or with any fence whatever; also a further averment that "said railway line, at the point thereon of said killing, was not fenced as by said statute advised." These averments were not sufficient, under the Act of 1885. According to the terms of that act, before plaintiff could claim that the defendant company owed him any duty in respect to fencing its railway, it was necessary for him to allege that he was the owner or holder of land adjacent to such railway; that he had requested defendant to fence its railroad, put in cattle-guards and gateways; and that his horse was killed by reason of defendant's neglect to comply with such request. The complaint does not contain such allegations. Moreover, according to the strict terms of the proviso, the company could not, even by fencing, putting in cattle-guards and gateways, exempt itself from the unconditional liability otherwise imposed by the statute, except as against the party requesting the gateway to be made. From the foregoing it follows that, in order to warrant a recovery for plaintiff under the first count of his complaint, as the statute existed when the first alleged cause of action arose, it must be held, unconditionally, that if any railroad company operating its road in this state should damage or kill a domestic animal by running its engines or cars over or against such animal, the railroad company would be liable therefor, irrespective of any act of negligence on the part of such company. If such statute were valid, then, according to its literal terms, plaintiff's right to recover must be upheld.

6. Counsel for plaintiff rely upon the case of *Union Pac. R. Co. v. De Busk*, 12 Colo. 294, 3 L. R. A. 350, as sustaining the stock-killing statute as it existed under the Act of 1885. In that case a statute declaring that every railroad company shall be liable for all damages by fire that is set out or caused by operating its road, in this state, was upheld as constitutional, the court holding that "such statutes are not penal, but purely remedial in their nature," and that the liability thus declared "was but the re-enactment, *pro tanto*, of the ancient common law, for the better protection of property exposed to such unusual dangers." The conclusion in the *De Busk Case* was sustained by numerous decisions by courts of last resort in other states having fire statutes similar to our own. As early as 1847 *Chief Justice Shaw* declared that the design as well as the legal effect of such a statute was to afford indemnity to those suffering damage from fire caused by the use of a dangerous apparatus. This same view was again expressed in 1863

by *Chief Justice Bigelow*, as follows. "It is not a penal statute, but purely remedial in its nature; and it is to be interpreted fairly and liberally, so as to secure to parties injured an indemnity from those who reap the advantages and profits arising from the use of a dangerous mode of locomotion, by means of which buildings and other property are destroyed." *Hart v. Western R. Corp.* 13 Met. 99; *Lyman v. Boston & W. R. Corp.* 4 Cush. 288; *Pratt v. Atlantic & St. L. R. Co.* 42 Me. 579; *Smith v. Boston & M. Railroad*, 63 N. H. 25; *Ross v. Boston & W. R. Co.* 6 Allen, 90; *Rodemacher v. Milwaukee & St. P. R. Co.* 41 Iowa, 297, 20 Am. Rep. 592.

It is true that in the *De Busk Case* various decisions relating to stock-killing statutes were referred to and commented upon by way of analogy or illustration. Such references and comments are not to be taken as sustaining the validity of the stock-killing statute. The question of the validity of such statute was not then before the court. As was said in *Johnson v. Bailey*, 17 Colo. 69: "It is not every remark in a judicial opinion that amounts to a judicial decision." In *Cohens v. Virginia*, 6 Wheat. 264, 5 L. ed. 257, *Chief Justice Marshall* said: "It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles, which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." The decision in *Denver & R. G. R. Co. v. Henderson*, 10 Colo. 1, cannot be considered as upholding the constitutionality of the stock-killing statute. True, it was remarked in the opinion in that case that the statute was a cumulative remedy; but the real question decided was that the statute did not repeal or suspend the common-law action for damages occasioned by negligence, and the judgment of the lower court was affirmed upon the ground that the evidence fairly tended to establish negligence. The first point of the syllabus in the *Henderson Case* was, therefore, unwarranted by the decision. In *Atchison, T. & S. F. R. Co. v. Lujan*, 6 Colo. 338, the decision turned upon a question of pleading. It does not appear that the constitutionality of the stock-killing statute was challenged, either in the *Lujan Case* or the *Henderson Case*. The maxim "*stare decisis*," therefore, cannot be fairly invoked as sustaining the constitutionality of such statute.

The statute making every railroad company unconditionally liable in case it shall kill or damage a domestic animal by running its trains over or against such animal stands on a footing quite different from the fire statute. Fire is a dangerous element, and according to the ancient common-law rule was, as stated in the *De Busk Case*, that "a person who

makes a fire must see that it does no harm, and must answer for the damage, if it does any." In the case of domestic animals, the general rule at common law was that, if such animals trespassed upon the lands of others, the owner was liable in damages, unless he could show that the lands should have been fenced. Besides, the rule at common law was that a party running coaches or other vehicles could be held liable for damages caused by such vehicles on the ground of negligence or willful misconduct, but not when the damage was the result of pure accident. Since by the progress of invention vehicles propelled by steam and electricity have come into use as a means of transporting persons and property, the common-law rule of liability on the ground of negligence has been applied to the operation of such vehicles, though a higher degree of diligence has been required on account of the greater liability to injury arising from the use of a more dangerous motive power. But we are not aware that it has ever been held as a common-law rule that steam or electric railway companies, lawfully operating their trains, are liable for damages thereby occasioned in the absence of negligence. By virtue of statutes, however, railway companies have frequently been required to provide additional safe-guards against accidents and injuries to persons and property from the operation of their trains. These requirements have been upheld as valid police regulations, and omissions to comply therewith have been held to constitute sufficient ground of liability. For example: It has been held that a statute requiring a railroad company to fence its line of railway is a valid police regulation, and in states where such statutes have been adopted railway companies have been held liable for injuries done to domestic animals where the injury is shown to have been occasioned by the neglect of the company to fence its railway. The element of neglect is the basis of liability in such cases. Perhaps the same rule may apply where the statute gives railway companies the option of fencing their roads on pain of being held liable for injuries caused to animals through neglect to avail themselves of the opportunity of fencing. *Hayes v. Michigan Cent. R. Co.* 111 U. S. 228, 28 L. ed. 410; *Missouri Pac. R. Co. v. Humes*, 115 U. S. 512, 29 L. ed. 463; *Cairo & St. L. R. Co. v. Peoples*, 92 Ill. 97, 34 Am. Rep. 112; *Wilder v. Maine Cent. R. Co.* 65 Me. 332, 20 Am. Rep. 698; *Barnett v. Atlantic & P. R. Co.* 68 Mo. 56, 30 Am. Rep. 773; *Thorpe v. Rutland & B. R. Co.* 27 Vt. 140, 62 Am. Dec. 625; *Dacres v. Oregon R. & Nav. Co.* 1 Wash. St. 525.

7. It is earnestly contended that the stock-killing statute as it existed under the Act of 1885 was unconstitutional. The power of the courts to declare legislative acts unconstitutional should be exercised with that delicacy and consideration which are always due to a co-ordinate department of the government. So long as a legislative act is within the sphere of legislative power—that is, so long as it is not an encroachment upon the province of some other department of the government—it will be upheld, unless clearly in

conflict with some provision of the constitution of the state or nation, or in violation of some private right thereby secured. The conflict between the legislative act and some specific provision of the fundamental law must, in general, be clearly apparent, or the act will not be deemed unconstitutional. That a statute may, in the opinion of the court, be against the spirit of the constitution, or against the policy of the government, is not sufficient to warrant the court in declaring it unconstitutional. The courts cannot arrest unwise or oppressive acts of legislation so long as such acts are within constitutional bounds. *Cooley, Const. Lim.* 6th ed. chap. 7.

8. Stock-killing statutes similar to our own have been considered and held unconstitutional in several states. The court of appeals of this state has also expressed a like opinion. These decisions have been placed upon various grounds. The statute in question was obviously intended to be remedial as well as penal. *Sutherland, Stat. Constr.* §§ 208, 859. The statute cannot be sustained upon the ground that it is penal. It lacks an essential element of a penal statute, in that it permits the penalty to be visited upon a party not guilty of doing anything prohibited, or of violating any duty imposed by law. *Potter's Dwar. Stat.* 74. The statute cannot be classed as merely remedial, nor as a statute of indemnity, in that it fixes the amount to be paid for certain kinds of animals by an arbitrary schedule of prices without allowing proof of their actual value. As to other kinds of animals, also, it provides for fixing their value by appraisers, without allowing proof of their real value, and in a certain contingency the value may be fixed by a proceeding wholly *ex parte*. It is no answer to these objections that the schedule of prices may be reasonable, or that railroad companies may join in the appraisal proceedings. A statute cannot be considered merely remedial or compensatory which compels a party to pay for property destroyed without allowing him to produce evidence of its value. It is true the statute says that "no railroad company shall at any time be required to pay more than the market value of any animal killed or damaged;" but nowhere in the statute is there any provision or an ascertainment of such value by evidence or by the usual mode of hearing and trial, or by any mode of actual trial. The statute not only makes a railroad company unconditionally liable for any domestic animal it may kill or damage, but it deprives the company of the mode of trial afforded to other litigants in like cases. By the terms of the statute, when the value of an animal is fixed by the schedule, neither party can vary the same; in the appraisalment of other animals neither party can be heard by witnesses or counsel. This would seem to bear equally against both parties, but it does not. The remedy of the statute being cumulative, the owner of animals killed or damaged may resort to the statute, or he may rely upon his common-law action, as was held in the *Henderson Case*. *Sutherland Stat. Constr.* § 899.

But when the owner resorts to the statute,

there is no alternative for the railroad company, if the statute be upheld. In these respects the statute denies to railroad companies "the equal protection of the laws." It provides that they may be subjected to liability and to a judgment without opportunity for hearing or trial according to "the law of the land," and thus they may be deprived of their property "without due process of law." Such a statute cannot be upheld as constitutional. In this connection the language of Mr. Webster is most appropriate: "By the law of the land is most clearly intended the general law; a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial." U. S. Const. art. 14; Colo. Const. art. 2, § 25; Cooley, Const. Lim. 6th ed. 431; *East Kingston v. Towle*, 48 N. H. 65, 97 Am. Dec. 575, 2 Am. Rep. 174; *San Mateo County v. Southern Pac. R. Co.* 13 Fed. Rep. 145; *Denver & R. G. R. Co. v. Outcalt*, 2 Colo. App. 395; *Graves v. Northern Pac. R. Co.* 5 Mont. 556, 51 Am. Rep. 81; *Dacres v. Oregon R. & Nav. Co.* 1 Wash. St. 525.

9. We do not decide that the legislature has not the power to enact a valid statute making railroad companies liable for domestic animals killed or damaged by the operation of their trains, irrespective of the question of negligence. What we decide is that, as the statute did not require the fencing of railways, either imperatively or optionally, under such circumstances as are disclosed in this record, there was no basis for a penalty and that the mode prescribed by the statute for enforcing liability as a matter of in-

demnity is in violation of constitutional rights.

10. By the second count of the complaint plaintiff seeks to recover twice the full value of the animal killed. This recovery is claimed on account of the alleged failure of the defendant company to keep the book and to file notice therein of the killing of said animal, as required by amended section 15 of the statute. If we were at liberty to ignore amended section 14, the question of the sufficiency of the second count might be somewhat difficult of determination. But we are of the opinion that section 15 must stand or fall with the other sections of the statute considered in this opinion. It evidently was not designed that there should be a trial, as in other civil actions to ascertain the actual value of the animal killed under section 15, while the schedule price or statutory mode of appraisal as provided by section 14 should be resorted to for other purposes; nor was it, in our opinion, the design of section 15 to give the owner of an animal killed twice the full value thereof in addition to the schedule price or appraised value, or double that sum, as provided by section 14. The sections of the statute considered in this opinion must be construed together as dependent, and not as independent, provisions.

Our conclusion is that, while the reason given for the dismissal of the action by the district court was not warranted, nevertheless, under the law as it then existed, no valid judgment could have been rendered upon the pleadings, and therefore *the judgment of dismissal must be affirmed.*

WISCONSIN SUPREME COURT.

Elizabeth DAVIS, *Resp't.*,
v.
Frank STEEPS *et al.*, *App'ts.*

(.....Wis.....)

The docket entry of a judgment against Edward Davis is not constructive notice that there is an incumbrance against either E. A. Davis or Edward A. Davis and does not affect the rights of a person who has no notice of the actual identity of Edward Davis and the judgment debtor.

(April 10, 1894.)

APPEAL by defendants from a judgment of the Winnebago County Court in favor of plaintiff in an action brought to enjoin the enforcement of a judgment against Edward Davis against real estate which plaintiff had procured from one E. A. Davis. *Affirmed.*

Statement by Pinney, J.:

This action was brought to obtain a per-

petual injunction restraining the defendant Frank Steeps, who had recovered a judgment against one Edward Davis for \$61.04, docketed in the office of the clerk of the circuit court of Winnebago county January 4, 1889, and the defendant Kloeckner, as sheriff of Winnebago county, from selling the premises described in the complaint on execution issued out of said court upon said judgment. One E. A. Davis, of Oshkosh, Wis., acquired the legal title to the lot in question November 21, 1887, by a warranty deed thereof to him by that name, and January 22, 1892, sold and conveyed it, by the same name, by warranty deed, to the plaintiff, for a valuable consideration then paid; and she had no knowledge or information at the time of the completion of her purchase that there was any judgment that was a lien against the lot, or that there was any judgment against her grantor, E. A. Davis, by any name whatever, though, as a matter of fact, the said Edward Davis, against whom the judgment had been rendered, was the E. A.

NOTE.—The general rule by which an initial of a middle name is regarded as no part of the name is denied application to the case of docketing a judgment for constructive notice. As to effect of errors in name in index of judgment, see *note to Dewey v. Sugg* (N. C.) 14 L. R. A. 393, in which it 23 L. R. A.

appears that the decisions are not entirely uniform on this subject.

As to acquisition and use of name generally, see *note to Laffin & Rand Powder Co. v. Stayler* (Pa.) 14 L. R. A. 690.

Davis, owner of the premises which were so sold and conveyed to the plaintiff. He was, and had been, a resident of Missouri ever since December, 1888, and there was no judgment docketed or filed in the office of the clerk of the circuit court of the county against the name of E. A. Davis. There was nothing in the transcript of the judgment so filed and docketed against the name of Edward Davis giving any information as to the description or residence of the plaintiff or defendant. That there are, and have been for a long time, other persons by the name of Edward Davis living in said county, who had no middle name or initial. The Christian name of the said E. A. Davis is Edward; and at the time of the plaintiff's purchase, and for a long time prior thereto, said E. A. Davis was generally known as "Edward Davis," and by some as "Edward Davis the Second" to distinguish him from the plaintiff's husband, who was known as "Edward the First," of which the plaintiff then had notice. That the defendant Steeps prior to the time of taking his judgment, knew that said E. A. Davis' name was Edward A. Davis. There was evidence that the plaintiff's husband acted as her agent in making the purchase, and made it from one C. D. Church, the agent of said E. A. Davis, and that said Church furnished an abstract of the title, procured from the Winnebago Abstract Company. And Mr. Powers, who made it, testified that he examined the records to see if there were any judgments against E. A. Davis, but found none; that he found one against Edward Davis, and one against E. H. Davis, but he did not put them on the abstract; did not think they ought to go on. The court held that the judgment in favor of the defendant Frank Steeps was not a lien on the premises in question, as against the plaintiff, or any one claiming under or through her, and gave judgment granting the perpetual injunction prayed for, from which the defendants appealed.

Messrs. Thompson, Harshaw & Davidson, with **Mr. J. W. Crozier**, for appellants:

Steeps, who was the plaintiff in the original action, sued the defendant by his Christian name. The defendant in that action is the grantor of the plaintiff in this, and for all legal purposes the full name of that defendant, and of this plaintiff's grantor, was Edward Davis.

Johnson v. Hess, 9 L. R. A. 471, 126 Ind. 298, and cases cited.

The law knows but one Christian name.

8 Washb. Real. Prop. 4th ed. p. 265; *Games v. Stiles*, 39 U. S. 14 Pet. 322, 10 L. ed. 476; *Franklin v. Talmadge*, 5 Johns. 84; *Keene v. Meade*, 23 U. S. 3 Pet. 1, 7 L. ed. 581; *Kellam v. Toms*, 38 Wis. 601.

The omission of the middle initial, or a mistake in such initial, is entirely immaterial in legal proceedings, whether civil or criminal. The law recognizes but one Christian name.

Johnson v. Day, 2 N. Dak. 295, 16 Am. & Eng. Encyclop. Law, p. 114.

The middle letter is no part of the name 23 L. R. A.

and may be omitted or rejected as surplusage.

Thompson v. Lee, 21 Ill. 242; *People v. Cook*, 14 Barb. 259; *Milk v. Christie*, 1 Hill, 102; *Roosevelt v. Gardinier*, 2 Cow. 463; *Rooks v. State*, 83 Ala. 79.

It is no part of the surname for it is supposed to be the exponent of an appellation received in baptism; and it is no part of the Christian name, for no person can have more than one Christian name.

Bratton v. Seymour, 4 Watts, 329; *People v. Cook*, 14 Barb. 259.

An initial letter expresses no word and is not a name. It can only be an abbreviation for a name.

People v. Ferguson, 8 Cow. 106; *Bratton v. Seymour*, *supra*; *People v. Cook*, 14 Barb. 307; *Seely v. Schenck*, 2 N. J. L. 71.

A full name consists of one Christian or given name, and one surname or patronymic. The two constitute the legal name of the person. Any one may have as many middle names or initials as he chooses, they do not affect his legal name; and they may be inserted or not in a deed or contract without affecting its legal validity.

Schofield v. Jennings, 68 Ind. 232, and cases cited; *Enewold v. Olsen* (Neb.) 23 L. R. A. 578.

Is a deed, mortgage, judgment or other lien inoperative if it runs to John Smith, because there are three or four persons of that name residing in the same city?

Coit v. Starkweather, 8 Conn. 289.

The middle initial is unimportant and suggests nothing.

Johnson v. Hess, 9 L. R. A. 471, 126 Ind. 312, and cases cited.

It is competent to show that a person is known as well without as with a middle name.

Games v. Stiles, 39 U. S. 14 Pet. 322, 10 L. ed. 476.

To purchase in good faith is to purchase without knowledge of the outstanding incumbrance or any information sufficient to put the purchaser upon inquiry.

Rovell v. Williams, 54 Wis. 636; *Mueller v. Brigham*, 53 Wis. 178; *Outler v. James*, 64 Wis. 178, 54 Am. Rep. 603; *Fallass v. Pierce*, 30 Wis. 443.

Failure to make inquiry in addition to examination of records is evidence of bad faith.

Wade, Notice, § 270; *Brinkman v. Jones*, 44 Wis. 498; *Shotwell v. Harrison*, 30 Mich. 179.

What is sufficient to put a purchaser upon an inquiry is good notice, that is, where a man has sufficient information to lead him to a fact, he shall be deemed conversant of it.

Green v. Sloyter, 4 Johns. Ch. 98, 1 L. ed. 756; *Coy v. Coy*, 15 Minn. 119; *Parker v. Kane*, 4 Wis. 1, 65 Am. Dec. 283; *Pringle v. Dunn*, 37 Wis. 449, 19 Am. Rep. 772; *Hall v. Delaplaine*, 5 Wis. 206, 68 Am. Dec. 57; *Deuster v. McCamus*, 14 Wis. 307.

Where a purchaser has knowledge of any fact sufficient to put a prudent man upon inquiry, which if prosecuted with ordinary diligence would lead to actual notice of some right or title in conflict with that he is about to purchase, it is his duty to make the in-

quity, and if he does not make it, it is evidence of bad faith or neglect to such an extent that the law will presume that he made it and will charge him with the actual notice he would have received if he had made it.

Cambridge Valley Bank v. Delano, 48 N. Y. 826; *Williamson v. Brown*, 15 N. Y. 354; *Baker v. Bliss*, 89 N. Y. 70; *Lamont v. Stimson*, 5 Wis. 443; *Brinkman v. Jones*, 44 Wis. 498; *Wade*, Notice, § 11, and cases cited in the note thereto.

A purchaser is chargeable with notice of what appears in his chain of title.

Pringle v. Dunn, 87 Wis. 466, 19 Am. Rep. 772.

When a purchaser cannot make out a title but by a deed which leads him to another fact, he will be presumed to have knowledge of that fact.

Ibid.; *Fitzhugh v. Barnard*, 12 Mich. 105; *Case v. Erwin*, 18 Mich. 434; *Baker v. Mather*, 25 Mich. 51; *Prost v. Beekman*, 1 Johns. Ch. 288, 1 L. ed. 143; *Gibert v. Peteler*, 88 N. Y. 165; 1 Story, Eq. 400.

A person who purchases property, knowing of a prior incumbrance is not a purchaser in good faith without notice actual or constructive.

Gilbert v. Jess, 81 Wis. 110; *Acer v. Westcott*, 46 N. Y. 884, 7 Am. Rep. 355.

Mr. B. E. Van Keuren, for respondent:

The middle name or initial is an essential part of the name.

Terry v. Sisson, 125 Mass. 560; *Parker v. Parker*, 146 Mass. 821; *Wood v. Reynolds*, 1 Watts & S. 406; *Hutchinson's App.* 92 Pa. 876; *Dutton v. Simmons*, 65 Me. 583, 20 Am. Rep. 729; *Com. v. Hall*, 8 Pick. 262; *Com. v. Shearman*, 11 Cush. 546; *Com. v. McAvoy*, 16 Gray, 235; *State v. Homer*, 40 Me. 438; *State v. Dresser*, 54 Me. 569; *McKay v. Speak*, 8 Tex. 876.

A party is not bound to notice or investigate mere neighborhood rumor, whether true or not.

Larzelere v. Starkweather, 88 Mich. 107; *Lamont v. Stimson*, 5 Wis. 443; *Pringle v. Dunn*, 87 Wis. 449, 19 Am. Rep. 772; *Butler v. Stevens*, 26 Me. 484.

If plaintiff was bound to know of the existence of this judgment, it certainly was no notice to plaintiff of any fact which it did not contain, and as other evidence was necessary to prove that this Edward Davis and E. A. Davis were the same person, it follows logically that there was nothing in the records or upon the docket that could be even constructive notice to plaintiff that this judgment was a lien upon the property purchased from E. A. Davis.

Hess v. Mann, 40 Wis. 589; *Pringle v. Dunn*, 87 Wis. 462, 19 Am. Rep. 772; *Hiles v. Atlee*, 80 Wis. 221.

Pinney, J., delivered the opinion of the court:

There is no ground for claiming that the plaintiff had actual notice of the existence of any judgment lien against the property of her grantor, or of any facts and circumstances sufficient to put her on inquiry in that behalf. The abstract of title was furnished by and on behalf of her vendor; and 23 L. R. A.

Mr. Powers, who prepared it, and in so doing discovered that there was a judgment docketed against Edward Davis, was not the agent of the plaintiff for any purpose connected with the sale and conveyance of the lot. Hence, there can be but one ground for affecting the plaintiff with notice of the existence of a judgment lien against the lot, namely, by constructive notice, by matter of record appearing upon the docket of judgments in the office of the clerk of the circuit court of the county. The docket of a judgment, in order to operate as constructive notice, must contain all the essential matters required by law. The statute in relation to the docketing of judgments requires the clerk of the circuit court to "enter in a judgment docket, either arranged alphabetically or accompanied by an alphabetical index, in books to be provided by the county and kept by him, a docket of such judgment [among other things] containing: (1) The name at length of each judgment debtor, with his place of abode, title and trade or profession, if any such be stated in the record. (2) The name of the judgment creditor, in like manner." It is only through the medium of a sufficient and legal docketing of the judgment that it can become a lien on the real estate of the judgment debtor; and it is the duty of the judgment creditor to see to it, if he would secure such lien, that his judgment is properly docketed, for, as against a bona fide purchaser for value, any material defect or omission in that respect is the fault of the judgment creditor, and the loss, if any, occasioned thereby, will be regarded as his own. *Wood v. Reynolds*, 7 Watts & S. 406; *Hutchinson's App.* 92 Pa. 186; *Johnson v. Hess*, 126 Ind. 296, 9 L. R. A. 471.

Was the name of the judgment debtor, whose true name is Edward A. Davis, so designated upon the judgment docket by the name of Edward Davis as to make the judgment in question a lien on his real estate, and constructive notice to subsequent purchasers? It is true that the common law, as a general rule, recognizes but one Christian name; and hence, for most purposes, the middle name or names, or the middle initial letter or letters, of a person's name, are not material, either in civil or criminal proceedings, and a variance in this respect is generally held to be immaterial. The omission or insertion of, or even a mistake in, a person's middle name or initial in a conveyance, is, as between the parties thereto, unimportant; and there can be no doubt but the judgment in this case, as between the parties, is a valid judgment against E. A. Davis or Edward A. Davis, by whichever name he may be known or called. The authorities collected in 16 Am. & Eng. Encyclop. Law, 114 *et seq.*, contain numerous citations to the foregoing effect. But the question, we think, is materially different in the case of a docket entry of a judgment, in order to make it a lien, and effective as constructive notice thereof to subsequent purchasers, where the statute for that purpose requires the entry upon the book of "the name at length of each judgment debtor." In *Terry v. Sisson*, 125

Mass. 560, which was a trustee process, it was held, in accordance with numerous decisions in that state, that the middle name or initial is an essential part of the name, and that Sarah Sisson and Sarah F. Sisson were different names, and that the service upon the bank of process, as trustee of Sarah Sisson, was not sufficient notice of itself to bind the funds of Sarah F. Sisson in the hands of the bank, and that, it having paid over the funds to the latter, it could not be made liable to pay the same again to the plaintiff in the suit. *Parker v. Parker*, 148 Mass. 320. In *Dutton v. Simmons*, 65 Me. 583, 20 Am. Rep. 729, the cases are considered at length, in this aspect of the question, in a learned opinion; and it was held that a certificate of attachment of the real estate of Henry M. Hawkins, when the name of the defendant in the writ was Henry F. Hawkins, was such a misdescription of the person sued as rendered the attachment of the real estate of the latter void. In *Wood v. Reynolds*, 7 Watts & S. 406, it was held that the omission of an initial letter in the defendant's name in the docket of judgment, which distinguishes him from others of the same name, whereby a purchaser of the defendant's real estate is deceived, although the judgment would be binding as to the or-

iginal parties to it, would be of no effect as against a purchaser; and there are many other cases in the Pennsylvania Reports to the same effect. In *Hutchinson's App.*, 92 Pa. 186, it was held that the omission of a middle letter in a name in the judgment index was fatal to a lien, and that the rule which requires the judgment index to give accurate information cannot be departed from; and very recently, in *Orouse v. Murphy*, 140 Pa. 335, 12 L. R. A. 58, the same ruling was repeated. The object of the statute is that the judgment docket shall, of itself, furnish reasonably satisfactory evidence whether an incumbrance by judgment exists against the party from whom one is about to make a purchase of real estate. Here the title was in E. A. Davis, and he conveyed the lot by the same name. The docket entry of a judgment against Edward Davis was not, we think, constructive notice that there was an incumbrance against either E. A. Davis or Edward A. Davis. As already observed, the plaintiff had no notice of the actual identity of Edward Davis and E. A. Davis. We think the cases referred to establish a safe, as well as a reasonable rule. "It follows that the judgment of the county court is correct.

The judgment of the County Court for Winnebago County is affirmed.

ILLINOIS SUPREME COURT.

Isadore COHN, *Plff. in Err.*,

v.

PEOPLE of the State of Illinois.

(.....Ill.....)

1. The punishment of imitators or counterfeiters of trade-marks may be provided for under the title of an Act "to Protect Associations, Unions of Workmen, and Persons in Their Labels, Trade-marks, and Forms of Advertising."

2. A statute giving the right to a trade-mark in a label adopted by "any person, association, or union of workmen" is not a local or special law granting special privileges, immunities, or franchises, since it is not limited to associations of any particular class of persons.

3. A label on cigars, stating that they are made by a first-class workman, a member of a certain union, "an organization opposed to inferior, rat-shop, coolie, prison, or filthy tenement-house workmanship," is neither immoral nor against public policy, since it attacks no other manufacturer of cigars, and cannot be denied protection as a trade-mark on that ground.

(March 31, 1894.)

ERROR to the Circuit Court for Cook County to review a judgment convicting

defendant of violating the trade-mark law. *Affirmed.*

The facts are stated in the opinion.

Messrs. Reed, Brown & Allen, for plaintiff in error:

A man can use trade-marks, labels, and advertisements to announce, establish, identify, and protect his own trade and his own goods; but when he goes further, and through the medium of a pretended label, trade-mark, or advertisement assails in direct and unequivocal terms the qualities of others' productions, he cannot ask the court to sustain, either by way of injunction or criminal or civil prosecution, this alleged right of injuring his neighbor. A trade-mark is a protection, and not a weapon for offensive warfare.

Browne, Trade marks, § 602; *McVey v. Brendel*, 13 L. R. A. 377, 144 Pa. 285.

That part of the statute, making the certificate of the public officer, who is authorized only to certify as to the record of a document, and who has no power except to record when presented, evidence of the right of the applicant to use a trade-mark and of his having adopted the same, is a plain infraction of the constitutional rights of the people of this state.

United States v. Braun, 39 Fed. Rep. 775.

All that portion of the act which relates to criminal prosecution, the imposition of penalties, fines, and imprisonment for counterfeit-

The charge that the trade-mark in question was immoral and against public policy raises a question somewhat like that in respect to the invalidity of a deceptive trade-mark, which is presented in the note to *Joseph v. Macowsky* (Cal.) 19 L. R. A. 52.

NOTE.—The statute of Illinois which governs the above case is clearly intended to change the law as established by decisions in the absence of statute in the cases of *Cigar makers' Prot. Union*, No. 98 v. *Conhalm* (Minn.) 3 L. R. A. 125; *Weener v. Brayton* (Mass.) 3 L. R. A. 640; *McVey v. Brendel* (Pa.) 13 L. R. A. 377.

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ing or imitating trade-marks, labels, and forms of advertisement, is designed not to protect the owners of labels or trade-marks, but to punish imitators and counterfeiters, and therefore the title is inadequate.

It is not civil legislation to protect civil rights but it is criminal legislation, creating and defining crimes and providing for their punishment. Article 5, section 19, of the Constitution provides that no act hereafter passed shall embrace more than one subject and that shall be expressed in the title.

Leach v. People, 123 Ill. 420; *People v. Melan*, 32 Ill. 181; *People v. Institute of Protestant Deaconesses*, 71 Ill. 229; *Middleport v. Atna L. Ins. Co.* 82 Ill. 562; *Welch v. Post*, 99 Ill. 471; *Larned v. Tiernan*, 110 Ill. 173; *Fuller v. People*, 92 Ill. 182; *Hicone v. People*, 8 L. R. A. 887, 184 Ill. 139; *McDuffie v. State*, 87 Ga. 687; *Snell v. Chicago*, 8 L. R. A. 858, 183 Ill. 418; *State v. Pierson*, 44 La. Ann. 90; *Darice v. Saginaw County Supra*, 89 Mich. 295; *Case v. Loftus*, 48 Fed. Rep. 889; *Johnson v. Jones*, 87 Ga. 85; *Ellicott Mach. Co. v. Search*, 72 Md. 22; *People v. Congdon*, 77 Mich. 351; *Re Breene*, 14 Colo. 401; *Brooks v. People*, Id. 418.

While persons are protected in their labels, without regard to their avocation, associations or unions, in order to avail themselves of the act, must be associations or unions of workmen. Capitalists, property owners, or manufacturers who associate themselves together either as unions or associations, cannot avail themselves of the privileges of this act.

The act is part and parcel of a series of acts passed by the General Assembly of 1891, and designed to favor workmen as a class. The court has already held two of these acts unconstitutional and void and is not called upon to decide the constitutionality about the last portion of this class legislation.

Wilder v. Chicago & W. M. R. Co. 70 Mich. 382; *Calder v. Bull*, 8 U. S. 8 Dall. 387, 1 L. ed. 648; *Durkee v. Janesville*, 28 Wis. 464, 9 Am. Rep. 600; *St. Louis, I. M. & S. R. Co. v. Williams*, 49 Ark. 492; *Shurpless v. Philadelphia*, 21 Pa. 168, 59 Am. Dec. 759; *Ramey v. People*, 17 L. R. A. 858, 142 Ill. 380; *Irorer v. People*, 16 L. R. A. 492, 141 Ill. 171.

The cigar maker's international union is organized and has adopted this label and procured the passage of this act of the general assembly for the purpose of coercing workmen into its ranks and compelling manufacturers to employ union men at the price dictated by them.

Such illegal use and purpose once demonstrated no protection can be accorded either this association or its label.

Old Dominion SS. Co. v. McKenna, 80 Fed. Rep. 48; *Emack v. Kane*, 34 Fed. Rep. 46; *Casey v. Cincinnati Typographical Union, No. 3*, 12 L. R. A. 193, 45 Fed. Rep. 135; *United States v. Kane*, 23 Fed. Rep. 748; *Sherry v. Perkins*, 147 Mass. 212; *Coeur D'Alene Consol. Min. Co. v. Miners Union of Wardner*, 19 L. R. A. 882, 51 Fed. Rep. 260.

Messrs. Clifford & More, for defendant in error:

The punishment of piracy of labels is a means naturally and "reasonably adapted to secure the object indicated by the title."

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Larned v. Tiernan, 110 Ill. 173; *McGurn v. Chicago Board of Education*, 183 Ill. 123; *People v. Hazelwood*, 116 Ill. 819.

A law is general, not because it embraces all the governed, but that it may, from its terms, when many are embraced in its provisions, and all others may be when they occupy the position of those who are embraced.

Hawthorn v. People, 109 Ill. 302, 50 Am. Rep. 610.

Shope, J. delivered the opinion of the court:

This was a prosecution of the plaintiff in error for the violation of section 2 of an Act entitled "An Act to Protect Associations, Unions of Workmen, and Persons in Their Labels, Trade-Marks, and Forms of Advertising," in force July 1, 1891. Before a justice of the peace he was found guilty, and a fine imposed. On appeal to the circuit court by the defendant, a trial was had by jury, resulting in a verdict of guilty, and a judgment for \$100 fine and costs rendered.

Section one of the Act under consideration provides: "Whenever any person, association or union of workmen, have adopted, or shall hereafter adopt for their protection, any label, trade-mark, or form of advertisement announcing that goods to which such label, trade-mark, or form of advertisement shall be attached, were manufactured by such person or by a member or members of such association or union, it shall be unlawful for any person or corporation to counterfeit or imitate such label, trade-mark or form of advertisement. Every person violating this section shall upon conviction be punished by imprisonment in the county jail for not less than three months nor more than one year, or by a fine of not less than one hundred dollars nor more than two hundred dollars, or both." Section 2 is as follows: "Every person who shall use any counterfeit or imitation of any label, trade-mark, or form of advertisement of any such person, union or association, knowing the same to be counterfeit or imitation, shall be guilty of a misdemeanor, and shall be punished by imprisonment in the county jail for a term of not less than three months nor more than one year, or by a fine of not less than one hundred dollars, nor more than two hundred dollars, or both." Laws 1891, p. 202.

The plaintiff in error was a dealer in cigars, and it is shown that certain witnesses, produced, applied to him for the purchase of cigars by the box; that they objected to purchasing unless there was upon the boxes what was known as the "Union Label;" that there were no such labels upon the boxes produced by the plaintiff in error, and offered to be sold. The plaintiff in error thereupon took these boxes of cigars, went into the back part of his store, and returned with boxes having labels on them. The witnesses then paid for them, and took them away. The boxes were produced and identified as being those sold to the witnesses by plaintiff in error, and upon each of which was a label purporting to be the label of the Cigarmakers' International Union of America. This label is a

small blue poster, on which is printed the following: "This certifies that the cigars contained in this box have been made by a first-class workman, a member of the Cigarmakers' International Union of America, an organization opposed to inferior, rat-shop, coolie, prison, or filthy tenement house workmanship. Therefore we recommend these cigars to all smokers throughout the world. All infringements upon this label will be punished according to law. A. Strasser, President C. M. I. U. of America." It is shown that the labels are issued by the association to its members, bearing the local stamp and factory number of the particular factory to which they are issued. It was shown that the labels upon the boxes purchased by the witnesses from Cohn were counterfeit imitations of the labels issued by the Cigarmakers' International Union of America. To prove the adoption of this trade-mark by the Cigarmakers' International Union of America, the people introduced in evidence a certificate of the secretary of state, under his hand and seal, issued in conformity with the provisions of section 8 of the Act under consideration. That section provides that every person, association, or union of workmen that has heretofore adopted, or shall hereafter adopt, a label, trade-mark, or form of advertisement, as aforesaid, may file the same for record in the office of the secretary of state, by leaving two copies, counterparts, or facsimiles thereof with the secretary of state; and the secretary shall deliver to such person, association, or union so filing the same a duly attested certificate of the record of the same. It is then provided that "such certificate of record shall, in all suits and prosecutions under this act, be sufficient proof of the adoption of such label, trade-mark, or form of advertisement, and of the right of said person, association, or union to adopt the same." It was proved that the Cigarmakers' International Union of America was an association of workmen,—of cigarmakers; that the cigars sold by Cohn were manufactured by Gustave Eddelstone; that at the time he sold the cigars to Cohn Bros., of which firm plaintiff in error was a member, there were no blue labels on the boxes, and none were delivered with the cigars; that they were not made by a union factory. It is objected that the evidence was insufficient to warrant the verdict. It need only be said that there was evidence sufficient to justify the jury in finding the defendant guilty of using a counterfeit or imitation label, within the meaning of section 2 of the Act before quoted.

It is next insisted that the statute is in violation of section 18 of article 4 of the Constitution, providing that "no act hereafter passed shall embrace more than one subject, and that shall be expressed in the title." The title of the act is, "An act to protect associations, unions of workmen and persons in their labels, trade-marks and forms of advertising." It is said by counsel that, while there are provisions of the act designed to protect trade-marks, the provisions of sections 1, 2, 4, 6, and 7 relate to the punishment of imitators or counterfeiters, and those

using such imitations or counterfeits, and are enacted for the protection of the owners of the labels, trade-marks, or forms of advertising, and therefore are not within the title of the Act. As said in *Larned v. Tiernan*, 110 Ill. 177: "The decisions concur in laying down substantially the rule that in consistency with that provision there may be included in an act means which are reasonably adapted to secure the objects indicated by the title." See cases there cited. When the general purpose is declared in the title, the means for its accomplishment, provided by the act, will be presumed to be intended as a necessary incident. *O'Leary v. Cook County*, 28 Ill. 534; *People v. Hazelwood*, 116 Ill. 819; *McGurn v. Chicago Board of Education*, 133 Ill. 123. The penalties for counterfeiting and use of imitations and counterfeits, while intended as punishment for the violation of public law, are imposed to protect, in the language of the title, associations and others entitled to use labels, trademarks, and forms of advertisement, in the use thereof. The objection is not well taken.

It is next said by counsel that "the statute is wholly void, because it is obnoxious to the constitutional inhibition (art. 4, § 22) which provides that the general assembly shall not pass local or special laws granting any incorporation, association, or individual any special privileges, immunity, or franchise whatever." It is urged that, while "persons" are protected in their labels, etc., without regard to their avocations, "associations or unions, to avail of the act, must be associations or unions of workmen." This contention arises from a misapprehension of the statute. It seems clear that the legislature intended that any person, or any association, of whomsoever formed, or any union of workmen, might adopt such labels, etc. If it be permissible to refer to the title of this act, this at once becomes apparent. By reference to section 1, before quoted, it will be seen it is there provided that "whenever any person, association or union of workmen have adopted a label," etc. The language of section 2 is "person, union or association," while sections 3 and 4 are the same as in section 1. Now, referring to the title, it is seen that it is "an act to protect associations, unions of workmen and persons in their labels," etc. Formerly, when the title of acts was no necessary part of legislation, the title was not to be considered in construing the statute. *Plummer v. People*, 74 Ill. 861; *Mills v. Wilkins*, 6 Mod. 62; *Endlich*, Interpretation of Statutes, § 58, and *note*. It is, however, otherwise where, by virtue of constitutional provision, the legislature must prepare and adopt the title, to the end that it shall express the general purposes of the Act. It cannot be resorted to to extend or restrain any positive provision in the body of the law itself. *Hadden v. Barney*, 72 U. S. 5 Wall. 107, 18 L. ed. 518; *Williams v. Williams*, 8 N. Y. 535; *Meyer v. Western Car Co.* 102 U. S. 1, 26 L. ed. 59; *Eby's App.* 70 Pa. 811; *Halderman's App.* 104 Pa. 251.

It is one of the cardinal principles of construction that the intention of the lawmakers

is to be found and given effect; and where there is otherwise doubt or obscurity in the act, or its meaning is doubtful, resort may be had to the title of the act, to enable the court to discover the intent, and remove what otherwise might be uncertain or ambiguous. *United States v. Palmer*, 16 U. S. 3 Wheat. 631, 4 L. ed. 477, cases *supra*. The term "unions," as thus applied, has come to have a definite and well understood meaning, and it is to be presumed that the legislature, in using the broader and more comprehensive term "associations," and at the same time making the law applicable to all persons, intended the use of the words in their ordinary sense and signification. There is, indeed, no more reason for saying that by "associations" is meant associations of workmen, thereby limiting the usual and ordinary meaning of the term, than there is to say that the word "persons," as used in the act, should be construed as applying to workmen only. The word "persons" would have the effect of extending the act to, and including, artificial, as well as natural, persons. Rev. Stat. chap. 181, § 1. The objection is not tenable. *Hawthorn v. People*, 109 Ill. 302, 50 Am. Rep. 610.

It is next objected that the label, an imitation and counterfeit of which is alleged to have been unlawfully used by plaintiff in error, could not have been rightfully adopted either as a label, trade-mark, or form of advertisement. It is said that it transgresses the rules of morality and public policy. We are referred to the rule in respect of trade-marks that, "to be a lawful trade-mark, the emblem must avoid transgressing the rules of morality and public policy" (Brownie, Trade-Marks, § 602), and also to the case of *McVey v. Brendel*, 144 Pa. 285, 18 L. R. A. 377, decided by the supreme court of Pennsylvania, which was a proceeding in equity to restrain the use of imitations of the label adopted by the Cigarmakers' International Union of America. It is conceded there is no statute in that state protecting labels adopted by dealers, etc. The case is cited mainly for the purpose of showing the construction placed upon the blue label by that court, the case having been decided upon other grounds. With all due deference, we are unable to concur in the views of the learned judge who delivered the opinion of the court. By reference to the label, heretofore set out, it will be seen that it is a certificate, signed by the president of the Cigarmakers' International

Union of America, certifying that the cigars contained in the box upon which it was placed were "made by a first-class workman, a member of the Cigarmakers' International Union of America, an organization opposed to inferior, rat-shop, coolie, prison, or filthy tenement house workmanship." And it concludes: "Therefore we recommend these cigars to all smokers throughout the world." The purpose, as derived from the label itself, is to send the cigars out to the public, with the assurance that they are made by a first-class workman, who belongs to an order opposed to the inferior workmanship designated. It will be observed that the label attacks no other manufacturer of cigars. It says simply, in effect, these cigars are not the product of inferior, rat-shop, coolie, prison, or filthy tenement house workmanship. Can it be said that one may not, without condemning or aspersing the product of other manufacturers, commend the article he has for sale? If he may do so himself, may he not procure the certificate of others as to the quality of the article he puts upon the market? If one is engaged in the manufacture of wine, is it an aspersion upon the product of other manufacturers that a wine-growers' association certifies that his wine is the pure juice of the grape, free from adulteration? Certainly not. This label does not say or purport to say that cigars made by nonunion men are of the inferior class mentioned, or that cigars made by nonunion men are not free from the impurity or taint to which they might be subjected by such workmanship. It does, in effect, say that cigars are upon the market which are the product of rat-shops, filthy basements, of Chinese establishments, of prisons and tenement houses, and proposes to assure customers that cigars sold under this label are not the product of such establishments. This, and nothing more. And can it be doubted that public policy would be best served, if all manufacturers of cigars would truthfully make the like assurance to the public? We need not extend this discussion. We are of opinion that the label adopted by the Cigarmakers' International Union of America is neither immoral nor against public policy, and might lawfully be adopted by that body.

Other errors are assigned which have been carefully considered, but are not deemed of sufficient importance to merit discussion.

The judgment of the Criminal Court of Cook County will be affirmed.

WISCONSIN SUPREME COURT.

William Wood LAMBERTON, *Resp't.*

James M. PERELES *et al.*, Trustees under the Will of William E. Lamberton, Deceased, *Appts.*

(....Wis....)

1. The circuit court in Wisconsin hav-

NOTE.—The assignability of income of a trust for support of the beneficiary when not affected by statute does not appear to have been much touched 28 L. R. A.

ing general jurisdiction is not precluded from taking jurisdiction of a suit against trustees under a will by the fact that the will has been proved in the county court and the estate finally settled in that court, except the execution of the trusts, although the county court is expressly given jurisdiction of such suits.

2. An assignment may be made of the

upon hitherto, if indeed there are any occasions upon the subject except the one here reported.

income arising out of personal property held in trust for the support of a person during life, where there is no statute restricting it and no restriction on the assignment in the will creating the trust, especially where the assignment is to the wife of the assignor, on her agreement to maintain and educate their children.

(April 10, 1894.)

APPPEAL by defendants from an order of the Circuit Court for Milwaukee County overruling a demurrer to the complaint in a proceeding to set aside an assignment by plaintiff of his interest in a trust estate and to enjoin the payment of the income to any one pending the litigation. *Reversed.*

Statement by Cassoday, J.:

This action was commenced August 26, 1893. The complaint alleges, in effect: That December 12, 1884, one William E. Lamberton, the father of this plaintiff, made his last will and testament, wherein and whereby he nominated one Jeremiah Quinn as the executor thereof, and did give, devise, and bequeath unto said Quinn and his successors all of his real and personal property, in trust, however, to certain uses and purposes therein named, and particularly upon the trust to divide the said personal property into four equal shares, and one of which to hold during the lifetime of this plaintiff, and to invest the same, and the income thereof to pay to this plaintiff, during his life, for his support and maintenance. That said trustee therein named, in his discretion, at certain times named, might pay over to this plaintiff certain sums of money out of the principal sum of said one-fourth part of the personal estate so devised; not exceeding, in all, however, one half of the one-fourth portion so directed to be held in trust for this plaintiff. That the remainder of said portion should be held and invested by said trustee, and the income arising therefrom should be paid semiannually to this plaintiff, during his lifetime, for his support and maintenance; and on his death the said trustee should hold the said remainder of said portion in trust for the lawful issue of the body of this plaintiff, and the same to invest, and the income thereof to pay to said issue for their support and education during minority, and upon reaching majority to pay to such issue as might then be living the principal sum so directed, and, failing such issue, then to certain other parties. That July 14, 1886, the said William E. Lamberton, being then a resident of Milwaukee, died, leaving said will as his last will and testament. That July 16, 1886, said will was duly presented to the county court for probate. That September 7, 1886, said will was duly admitted to probate. That said Quinn duly qualified as such executor, and entered upon the discharge of his duties, both as executor and trustee, and took possession of the said personal property, and divided and invested the same as provided in said will, and continued to hold the same until the time of his resignation, hereinafter mentioned. That October 4, 1887, by the final decree of said 23 L. R. A.

county court then entered, the said estate was adjudged and declared to be finally settled. That the said Quinn, as executor, was discharged from his duties as such executor, and the said personal estate of said deceased was assigned as provided in and by said will. That October 14, 1887, said Quinn tendered his resignation as trustee under said will, and the same was duly accepted by the county court; and the defendants James M. and Thomas J. Pereles were duly appointed trustees in the matter of said trust, in the place and stead of said Quinn, and duly qualified as such, and entered upon the execution thereof, and ever since have continued to be and are such trustees, and have possession of said personal property devised and invested as aforesaid, and all the income and increase thereof. That there has been paid to this plaintiff, out of the principal of the one-fourth portion directed to be held in trust as aforesaid, a sum of money which is equal to one half of said portion, and that there is now held in the hands of the defendants, as trustees, the balance of said portion upon the trust set forth, and in which said balance this plaintiff, under said will, has no title or interest, save only to receive the income thereof from said trustees during his life. That the whole of said income is no more than sufficient for the necessary support and maintenance of this plaintiff. That the income of the said trust fund invested and held for this plaintiff, and payable semiannually, as aforesaid, is due and payable on or about the 1st days of May and November in each year. That the same has heretofore, and until November 1, 1892, been paid to this plaintiff by said trustees, but that since said last date the said defendants, as such trustees, have neglected and refused, and still neglect and refuse, to account to this plaintiff for any of such income, and have neglected and refused, and still do neglect and refuse, to pay to this plaintiff any portion of said income. That the principal fund now held by the defendants as such trustees amounts to about the sum of \$10,000 and over, and that the net income therefrom, to which this plaintiff is entitled during his lifetime, amounts to about the sum of \$600 per annum, after discharging the expenses of the trustees, and that after such discharge said trustees have received, as the income of such funds, divers sums of money, now long since due and payable to this plaintiff, the exact amount of which this plaintiff is unable to state. That the sole and only ground upon which such trustees refuse to account to this plaintiff for said income, and to pay over the same, is that this plaintiff has assigned, transferred, and parted with the same by an instrument in writing executed by him, and delivered to Gladys L. Lamberton, on or about November 1, 1892, wherein and whereby it is recited that, for sundry considerations thereunto moving, the said William E. Lamberton "hereby transfers and conveys to his wife, the said Gladys L. Lamberton, both of Los Angeles, California, as her separate property, all the income, interest, and profits derived, or to be derived, or accruing from the said estate under said will, to which he

was or may be entitled under said will, and which has not heretofore become payable, and been paid to him, with the right in her to collect and receive all such income, interest, and profits directly from the executor, trustee, or other persons or parties, by, from, or through whom the same is or may be payable; that the right and title of the said Gladys L. Lamberton, as above stated, are to continue during her natural life, unless she should outlive said William E. Lamberton, in which event the same shall go to the children of said William E. Lamberton, as provided by said will, always excepting therefrom the farm and real estate, and the rents, issues, and profits thereof; that it is, however, expressly understood and agreed that said Gladys L. Lamberton, so long as she is in the receipt of said income, shall properly care for, educate, and maintain each and both of the children of the said William E. and Gladys L. Lamberton, namely, William Wood Lamberton and Ariel Rennie Lamberton; that in the event of the decease of Mrs. Lucy R. Lamberton, the mother of the said William E. Lamberton, prior to his own, all income from the funds and property which he is or may be entitled to, as resulting therefrom under the will, shall be and become the separate property of the said Gladys L. Lamberton for and during her natural life, but said last-mentioned funds and property shall be and become the property of the children of the said William E. and Gladys L. Lamberton, their heirs and assigns, subject only to the said Gladys L. Lamberton during her life, as aforesaid; that in case, however, either or both of said children shall die before becoming of age, the share or right of such child or children, as the case may be, shall thereupon cease, and be and become the property of the said William E. Lamberton, his heirs and assigns, subject to the right of income, as aforesaid, in said Gladys L. Lamberton during her natural life; that said income, funds, and property are hereby transferred and conveyed, respectively, to the said Gladys L. Lamberton and children, accordingly with the limitations above set forth; that the above includes the Clark manufacturing stock to the said Gladys L. Lamberton." That the defendant Gladys L. Lamberton claims and asserts that by virtue of said assignment she is now, and ever since the execution of said assignment has been, entitled to the said whole of the income of said trust fund. That the said Gladys L. Lamberton parted with no valuable consideration for such instrument. That the stock mentioned was certain stock in which said trust funds were invested, and out of which the aforesaid income was in part derived. That said stock has since been sold, and its proceeds otherwise invested by said trustees, as a part of the funds mentioned. That said Gladys L. Lamberton, at the time of the execution and delivery of said assignment, was, and still is, the lawful wife of this plaintiff. That he has no adequate remedy at law, and prays judgment that said pretended assignment be adjudged and declared to be of no force or effect, and that said trustees may be required to ac-

count to this plaintiff for, and pay over to him the income of said trust fund; and that, until the final determination of this action, said trustees may be restrained and prohibited from paying any of said income to said Gladys L. Lamberton, or to any other person for her. To that complaint the trustees, James M. and Thomas J. Pereles, demurred on the ground that the court had no jurisdiction of the subject-matter of the action and that the complaint does not state facts sufficient to constitute a cause of action against them. From the order overruling that demurrer the defendants James M. and Thomas J. Pereles, as such trustees, bring this appeal.

Mr. James G. Flanders, with Messrs. Nath, Pereles & Sons, for appellants:

In this state, a conveyance by the husband to the wife conveys an equitable title, and if free from fraud is good as against creditors, and the wife is not bound to show that she paid a valuable consideration, even as against contesting creditors.

Wheeler & Wilson Mfg. Co. v. Monahan, 63 Wis. 198, and cases therein cited.

It was competent for the respondent, William W. Lamberton, to assign and transfer his interest in the income arising from the quarter of the personal property set apart for his use.

In most of the cases which hold that the plaintiff cannot alienate the whole or any portion of the income set apart for his support, it appears either that the amount to be paid the beneficiary was left wholly to the discretion of the trustees, or that by the terms of the trust said income was not to be paid to him, but for his support, or else that the will in express terms, provided that it should be held by the trustees in such manner that the beneficiary could not alienate the income. In cases where the trust required the exercise of discretion of the trustee, it has been held that until such discretion was exercised, there was nothing which could be alienated.

See *Leavitt v. Beirns*, 21 Conn. 1; *Watson v. Cleveland*, Id. 587; *Westmore v. Trustors*, 51 N. Y. 842; *Williams v. Thorn*, 70 N. Y. 270.

In the will the income is to be paid to the beneficiary during his life for his support and maintenance. The words "support and maintenance" are not words creating a trust. The whole amount of the income is to be paid to William W. Lamberton, whether he applies the same to his support or not. No discretion is given to the executor or trustees, either as to the amount to be paid to or how it shall be used by him.

Paisley's App. 70 Pa. 153; *Rife v. Geyer*, 59 Pa. 896, 98 Am. Dec. 851.

The income provided to be paid to the respondent Lamberton is subject to alienation by him before the same has actually accumulated in the hands of the trustees.

Williams v. Thorn, 70 N. Y. 278.

The trustees in this will have no power to direct or control the respondent, Lamberton, in his expenditures of the income bequeathed to him, and no discretion has been conferred upon the trustees as to such income.

Watson v. Cleveland, 21 Conn. 541; *Sparhawk v. Cloon*, 125 Mass. 266.

Messrs. Ogden, Hunter & Bottum, for respondent:

A trust for the receipt of the income of personality is analogous to a trust for the receipt of the rents and profits of land, and is not assignable by the person beneficially interested.

That this is a valid trust admits of no doubt. *Webster v. Morris*, 66 Wis. 386, 57 Am. Rep. 278.

The early trust in personal property, as known to the common law, was not alienable and followed the nature of trusts in realty.

Lewin, Tr. pp. 4, 13; *Witham's Case*, 4 Inst. 87; *Johnson's Case*, Popham, 106.

Originally a trust was a mere confidence reposed in the trustee and the only security for the execution of the trust was the honor of the trustee. As this confidence was held to be personal between the trustee and the *cestui que trust* the beneficial interest was naturally not assignable.

Lewin, Tr. pp. 3, 4.

But the doctrine above noticed was gradually modified and the interest of the *cestui que trust* became assignable and the older cases were disapproved.

Lewin, Tr. pp. 10, 692, and cases cited.

By the later common law, a trust could not be created with a proviso that the interest of the *cestui que trust* should not be alienated or be made subject to the claims of creditors; but in case of the creation of a trust, such as the one before us, the right of the beneficiary would pass, for instance, to an assignee in bankruptcy.

Snouidon v. Dates, 6 Sim. 524; Lewin, Tr. pp. 98, 99; Gray, *Restraints on Alienation*, §§ 175-277.

The law with reference to trusts of realty and of personality was administered upon the same principles.

Hallett v. Thompson, 5 Paige, 588, 3 L. ed. 888.

The ruling in *Hallett v. Thompson*, that the income of a trust of personality was not assignable in analogy to the rule as to rents and profits was again stated by the chancellor in *Gott v. Cook*, 7 Paige, 521, 584, 535, 4 L. ed. 256, 264, but on appeal to the court of errors, Cowen, J., criticised the ruling.

Kane v. Gott, 24 Wend. 641, 35 Am. Dec. 641.

Hone v. Van Schaick, 7 Paige, 221, 233, 4 L. ed. 132, 136, held that because section 2 of title 4 of chap. 4, part 2, Rev. Stat. 1820, provided that limitations of future or contingent interests in personal property should be subject to the rules prescribed for real estate that on that account the interest of a *cestui que trust* in the income from personality was not assignable.

This position that section 63 of the New York Statute, which makes the beneficial interest in a trust for rents and profits inalienable, refers to the income of personality by virtue of the above quoted section 2, title 4, chap. 4, part 2, was taken by the courts in the following cases:

Clute v. Bool, 8 Paige, 83, 85, 4 L. ed. 353, 355; *Degraw v. Mason*, 11 Paige, 136, 5 L. ed. 84; *Sillick v. Mason*, 2 Barb. Ch. 79, 5 L. ed. 564. See *Craig v. Hone*, 2 Edw. Ch. 554, 6 L. ed. 501; *Rider v. Mason*, 4 Sandf. Ch. 351, 7 L. ed. 1130; *Roosevelt v. Roosevelt*, 6 Hun, 31; *Scott v. Nevins*, 6 Duer, 672.

23 L. R. A.

In *Kane v. Gott*, *supra*, Justice Cowen, while denying the extension of the principle by analogy, maintained that the rules of real property were not impressed on personal property except as to future contingent limitations.

This position of Justice Cowen was followed in—

Grout v. Van Schoonhoven, 1 Sandf. Ch. 336, 7 L. ed. 350; *Arnold v. Gilbert*, 5 Barb. 190; *Cruger v. Cruger*, Id. 225; *Vail v. Vail*, 7 Barb. 226; *Brown v. Harris*, 25 Barb. 134; *Titus v. Weeks*, 37 Barb. 186; *Perry v. Foster*, 62 How. Pr. 223.

Much of this inconsistency disappears when we come to the decisions of the court of appeals and the decisions show a steady approach to the position contended for by the respondent and an ever present readiness to discard the theory of the chancellors that by the act concerning personality and not otherwise, there was extended to that species of property the rule as to the inalienability of rents and profits of land.

Graff v. Bonnett, 31 N. Y. 9, 88 Am. Dec. 236; *Campbell v. Foster*, 35 N. Y. 361.

Clearly in the nature of things there is no reason why a gift or bequest of personal property, with a power of disposition, should not be measured by the same rule as a grant or devise of real estate with the same power.

Cutting v. Cutting, 86 N. Y. 522; *Hutton v. Benkurd*, 92 N. Y. 295. See *Cook v. Lowry*, 95 N. Y. 103.

Unless the proposition contended for is correct, a peculiar state of affairs results from the effect of section 3029, Rev. Stat. of Wisconsin (N. Y. Rev. Stat. § 88, art. 2, part 3, chap. 1).

By this section a debtor's property held in trust, may be reached in equity by a judgment creditor, except in the instance of the trust having been created by or the fund having proceeded from some person other than the debtor. Now, it has always been the rule in New York that the statutes in force there, similar to sections 2083 and 2089 of the Wisconsin Statute, enable a creditor to reach that portion of rents and profits of real estate held upon a trust which is not necessary for the debtor's support. See *Williams v. Thorn*, 70 N. Y. 270. And, in accordance with the law as laid down in the cases cited, a like interest could be reached in the income of personal property held in trust.

But if it be denied that section 2089 relates to personal property, then it follows that section 2083 refers exclusively to real estate. And since section 3029 is only modified, if at all, by section 2083, it follows that creditors cannot reach personal property held in trust, while they can reach the rents and profits of real estate so held. So that section 2083 would be nullified by any conversion of realty into personality.

That this result can follow does not seem reasonable.

See *Arzbacher v. Mayer*, 53 Wis. 330; *Sumner v. Newton*, 64 Wis. 210.

Cassoday, J., delivered the opinion of the court:

The will in question was admitted to probate by the county court for Milwaukee county. The estate has been fully and fi-

nally settled in that court. Nothing remains but for the trustees to execute the trust as directed by the will. The jurisdiction of that court, however, is expressly extended by statute "to all cases of trusts created by will admitted to probate in such court." Section 2448. But such jurisdiction of the county court is not made exclusive. It is to be remembered that the circuit courts have original jurisdiction in all matters, civil and criminal, within this state, not excepted in the constitution, nor prohibited by law. Const. art. 7, § 8. Such judicial power is vested in such courts, "both as to matters of law and equity." Id. § 2. The trustees in charge of the estate were within the jurisdiction of the circuit court for Milwaukee county. The contention that that court did not have jurisdiction to prevent the diversion or dissipation of the income of the trust fund, or control the direction of its payment, is clearly untenable. There is no longer any particular reason in this case why such jurisdiction should be confined to the county court. The facts stated are sufficient to justify the circuit court in taking jurisdiction. *Willis v. Fox*, 25 Wis. 646; *Cutlin v. Wheeler*, 49 Wis. 507; *Hawley v. Tesch*, 72 Wis. 299. The question presented is peculiarly one of general equitable cognizance. Thus, in *Ewing v. Ewing*, L. R. 9 App. Cas. 40, 41, the testator was domiciled in Scotland, where the will was probated, and afterwards confirmed in England; and it was held that the court of chancery in England had jurisdiction to administer the trusts of the will. The Earl of Selborne, L. C., after declaring, in effect, that courts of equity, in England, are, and always have been, courts of conscience, operating *in personam*, and accustomed to compel the performance of contracts and trusts as to subjects not within their jurisdiction, and, in speaking for the court, said: "A jurisdiction against trustees, which is not excluded, *ratione legis rei sitæ*, as to land, cannot be excluded, as to movables, because the author of the trust may have a foreign domicile; and for this purpose it makes no difference whether the trust is constituted *inter vivos*, or by a will or *mortis causa* deed. Accordingly, it has always been the practice of the English courts of chancery to administer, as against executors and trustees personally subject to its jurisdiction, the whole personal estate of testators or intestates who have died domiciled abroad, by decrees like that now in question." See 1 Perry, Tr. §§ 70, 71. We must hold that the circuit court had jurisdiction.

The principal controversy is as to whether the written instrument executed by the plaintiff, and delivered to his wife, Gladys L. Lamberton, on or about November 1, 1892, whereby he assigned and transferred to her the income of the trust fund in question, as mentioned, is valid. The validity of the trust is expressly conceded. The contention on the part of the plaintiff is, and it is said that the trial court held, that our statutes applicable were borrowed from New York, and that under these statutes, as construed in that state, the assignment is void. The 23 L. R. A.

sections particularly relied upon are 2063, 2089. One of these declares that: "No person beneficially interested in a trust for the receipt of the rents and profits of lands, can assign or in any manner dispose of such interest; but the rights and interests of every person for whose benefit a trust for the payment of a sum in gross is created, are assignable." Section 2089. The other declares that: "When a trust is created to receive the rents and profits of lands, and no valid direction for accumulation is given, the surplus of such rents and profits, beyond the sum that may be necessary for the education and support of the person for whose benefit the trust is created, shall be liable in equity, to the claims of the creditors of such person, in the same manner as other personal property which cannot be reached by an execution." These sections are contained in the chapter of "Uses and Trusts," found under the title "Of Real Property and the Nature and Qualities of Estates therein." They were taken almost literally from sections 57 and 63 of the article on "Uses and Trusts" in New York. 4 N. Y. Rev. Stat. 8th ed. 2488, 2489. Until the recent amendments the same was true respecting sections 2037-2089, Rev. Stat., relating to "vested and contingent estates," the "suspension of power of alienation," and the "limitation on power of suspending alienation." 4 N. Y. Rev. Stat. p. 2432, §§ 13-15. These statutes relate expressly to real estate. They may possibly become applicable to the rents and profits of the farm mentioned upon the death of the plaintiff's mother. The assignability of such rents and profits of lands is not involved in this controversy. The controversy here is confined to the assignability of the income arising, and to arise, out of personal property held in trust, as stated. The New York statutes, unlike ours, in addition to the sections cited, also place an express limit on the power of the suspension of the ownership of personal property longer than two lives in being. Id. p. 2516, § 1. This difference in the statutes of the two states has been repeatedly recognized by this court. *De Wolf v. Lawson*, 61 Wis. 474, 50 Am. Rep. 148; *Scott v. West*, 63 Wis. 581, 582, and *Webster v. Morris*, 66 Wis. 382, 57 Am. Rep. 278. The same distinction has been observed by the supreme court of Minnesota, citing numerous New York cases. *Re Tower's Estate*, 49 Minn. 871. In addition to the statute so limiting the power of the suspension of the ownership of personal property, the New York statutes expressly declare that: "In all other respects limitations of future or contingent interests in personal property shall be subject to the rules prescribed in the first chapter of this act, in relation to future estates in lands." 4 N. Y. Rev. Stat. p. 2516, § 2. That includes, not only uses and trusts, but the whole field of real property, and the nature, qualities, and alienation of estates therein. The section last quoted is followed by others prescribing the manner in which "an accumulation of the interest of money, the produce of stock or other income or profits arising from personal property, may and may not be

secured." Id. §§ 8-5. The question presented has elicited much discussion in New York. In speaking of these statutes in *Graff v. Bonnett*, 81 N. Y. 18, 88 Am. Dec. 286, Hogeboom, J., said, in behalf of the court, that: "It is undeniable that if this were an interest in a trust, for the receipt of the rents and profits of lands, it would not be assignable; and it has been held in several cases that the statute which provides that limitations of future or contingent interests in personal property shall be subject to the statutory rules prescribed in relation to future estates in lands was, in effect, a legislative application of the same principles and policy to both classes of property, and that, even if the provisions of the statute were not sufficiently comprehensive absolutely to require, as a peremptory injunction of statute law, their application in all their length and breadth, and in the same degree, to both classes of property, the argument to be derived from the general similarity of the legislative enactments in regard to both classes of property, from the similar, if not equal, mischiefs to be remedied, and from the general policy of the law, would authorize a court of equity, in the exercise of its acknowledged powers, to apply the same rule of construction to both." The same is expressly sanctioned by Judge Wright, speaking for the whole court, in *Campbell v. Foster*, 35 N. Y. 371, 372. To a similar effect is *Cook v. Lowry*, 95 N. Y. 108. In *Graff v. Bonnett*, Denio, Ch. J., dissented, and, after reviewing the prior decisions in that state, said: "Hence, I conclude that there is nothing in our statute law which restrains the alienability of the interest of the beneficiary in a trust to receive and pay over the interest of money or of personal property." 31 N. Y. 19. Thus it appears that notwithstanding the statutes of New York, so making the statutes respecting real estate also applicable to personal property, yet the highest court of that state very reluctantly reached the conclusions mentioned, and then only by a divided court. In this state we have no statute making the chapter on uses and trusts, or any part of it, applicable to personal property. This distinction was not observed by our late Brother Taylor in *Arzbacher v. Mayer*, 53 Wis. 880; and the question here considered was not there involved. It would seem that the founder of a trust fund may secure the benefits of the same to the object of his bounty by providing that the income thereof shall not be alienable by anticipation, nor subject to be taken for his debts. *Holdship v. Patterson*, 7 Watts, 547; *Rife v. Geyer*, 59 Pa. 893, 98 Am. Dec. 351; *White v. White*, 30 Vt. 838; *Pope v. Elliott*, 8 B. Mon. 60; *Nichols v. Eaton*, 91 U. S. 716, 23 L. ed. 254; *Broadway Nat. Bank v. Adams*, 138 Mass. 170, 48 Am. Rep. 504. This seems to be more unfavorable to the free assignability of such income than the English cases. *Brandon v. Robinson*, 18 Ves. Jr. 429; *Rochford v. Hackman*, 9 Hare, 475; *Re Dugdale* (*Dugdale v. Dugdale*), L. R. 38 Ch. Div. 176.

These cases make a distinction between a

gift void on condition and an absolute gift coupled with a limitation upon the ordinary incidents of the property or income so given. But in the case at bar the founder of the trust has imposed no such condition, and made no such restriction. On the contrary, he has left the plaintiff free to receive the entire income during his life. Upon the death of the testator, and the admission of the will to probate, the equitable right to the income in question at once became vested in the plaintiff. *Scott v. West*, 68 Wis. 571-573. The trust in question is an active trust. Until the plaintiff parted with his right to the income, or the same became otherwise divested, he could enforce payment thereof as it became due. "The right to control the disposition of property is fundamental." *Dodson v. Ball*, 60 Pa. 495, 100 Am. Dec. 586; *Sparhawk v. Cloon*, 125 Mass. 266. Of course, such right may be regulated by law. But, as indicated, there are here no restraints upon such alienation, statutory or otherwise. When, as here, it is established that an interest in, or right to, the income of a trust fund is vested in the *cestui que trust*, the mode in which, or the time when, he is to reap the benefit, is immaterial. 1 Perry, Tr. § 886. The distinguished author there says: "The law does not allow property, whether legal or equitable, to be fettered by restraints upon alienation. Therefore, when an equitable interest is once vested in the *cestui que trust*, he may dispose of it, or it may pass to his assignees by operation of law, if he becomes a bankrupt." To the same effect, *Sparhawk v. Cloon*, *supra*; *Forbes v. Lothrop*, 187 Mass. 525; *Sears v. Choate*, 146 Mass. 895; *Maynard v. Cleaves*, 149 Mass. 807.

In speaking of the English cases, Gray, Ch. J., in the first of these cases, said: "Where the income of a trust estate is given to any person (other than a married woman) for life, the equitable estate for life is alienable by, and liable in equity to, the debts of the *cestui que trust*, and this quality is so inseparable from the estate that no provision, however express, which does not operate as a *cesser* or limitation of the estate itself, can protect it from his debts." We must hold that the income arising from the personal property so held in trust was assignable. Under our statutes, we are satisfied that it was competent for the wife to take title or acquire the equitable right to such income from her husband, especially as it is in the line of the bequest in the testator's will, and made upon the agreement of the wife to properly care for, educate, and maintain each and both of the infant children of her and the plaintiff. *Wheeler & Wilson Mfg. Co. v. Monahan*, 68 Wis. 198; *Gettelmann v. Gite*, 78 Wis. 439; *State v. Wallace*, 67 Iowa, 77.

We must hold that the written instrument in question was a valid assignment of the income of the personal property held in trust, which has accrued or may accrue during the life of the plaintiff.

The order of the Circuit Court is reversed, and the cause is remanded for further proceedings according to law.

NEW YORK COURT OF APPEALS.

PEOPLE of the State of New York, *Rept.*,William D. HAYES, *Appt.*

(140 N. Y. 484.)

1. The trial of an indictment for perjury in a civil action is not outside the jurisdiction of the court because the civil action is not yet determined.
2. A change in a statute by leaving out the minimum limitation of the term of imprisonment for a crime, so that the punishment may be for a less but cannot be for a greater term than before, cannot be regarded as an *ex post facto* law.
3. Under a stipulation that the evidence of a witness taken upon a former trial on the part of defendant might be read subject to all legal objections, the defendant, who offers a portion of the direct examination in evidence, may be compelled to read it all, as the legal objections intended by the stipulation those to be made by the party against whom the evidence, either direct or on cross-examination, was offered.
4. Letters contradicting a witness for defendant on trial for perjury in respect to her belief as to the paternity of a child alleged to be that of defendant are not inadmissible on the ground that the contradiction is on an immaterial matter.
5. The privilege as to confidential communications from a wife to her husband in letters is lost when he, after they have been received, gives them to a third person.
6. There is no covert insinuation against the accused in a charge to the jury that he is not bound to go on the stand, but can say: "Prove your case against me, it is my judgment that the situation is such that I am not bound to take the witness stand; and the law gives me that right and the law gives me that privilege," where the judge also charges that no presumption can be taken against defendant for failure to take the witness stand.
7. Committing to jail one of the witnesses for defendant in the presence of the jury on account of alleged false evidence is within the discretion of the judge, for which no legal error can be assigned.

(January 16, 1894.)

A PPEAL by defendant from a judgment of the General Term of the Supreme Court, First Department, affirming a judgment of the general Sessions of the Peace for the City and County of New York convicting him of perjury. *Affirmed.*

The facts are stated in the opinion.

Mr. David B. Hill, with Mr. George M. Curtis, for appellant:

It was error to proceed to a conviction of the

defendant prior to a determination of the civil suit.

Where the alleged perjury is the very question involved in a civil suit between the prosecutor and the defendant, a conviction will not be tolerated until after the trial of the civil suit. 2 Wharton, *Crim. L.* § 2280; 2 Russell, *Crimes*, 6th Am. ed. 664; *Com. v. Dickinson*, 8 Pa. L. J. 164.

The alleged perjury was committed, if at all, prior to the passage of chapter 662 of the Laws of 1892, amending section 106 of the Penal Code.

This amendment changed the penalty previously prescribed for this offense by abolishing the minimum limitation.

The right to punish in accordance with the statute, as it existed before amendment, offenses previously committed, was nowhere reserved.

The amendment, as applicable to perjury committed prior to its passage, was *ex post facto*.

Fletcher v. Peck, 10 U. S. 6 Cranch, 87, 3 L. ed. 163; *Shepherd v. People*, 25 N. Y. 415; *Hartung v. People*, 22 N. Y. 95; *State v. Daley*, 29 Conn. 272; *Com. v. Wyman*, 12 Cush. 237.

Neither the prosecuting officer nor the judge has the right even to allude to the fact that the defendant has not availed himself of the statute which permits him to be sworn in his own behalf.

Ruloff v. People, 45 N. Y. 222.

To direct a witness's apprehension in the midst of the trial, while he was in the presence of the jury, declaring him to be a felon, was to inflict an incurable wound upon defendant's case, and tended to deprive him of the fair and impartial trial contemplated by the law and constitution of his country. In order to insure conviction, an intent to defraud must be established; that is overwhelmingly settled in this and other states of the Union.

See *People v. DeKroyft*, 49 Hun, 71; *Kerrains v. People*, 60 N. Y. 222, 14 Am. Rep. 153; *People v. Stearns*, 21 Wend. 409; *Parmeles v. People*, 8 Hun, 623; *Montgomery v. State*, 13 Tex. App. 823.

The purpose in the arrest of Noah was to convince the jury that upon a vital point in the evidence of the case, the principal witness for the defendant was a felon, and unworthy to be believed. This impression was enhanced by the spectacular features of his arrest.

Mr. Henry B. B. Stapler, with Mr. De Lancey Nicoll, *Dist. Atty.*, for the People:

The effect of an amendment of a statute made by subsequent statute declaring that such statute should be amended so as to read as follows, retaining part of the statute amended and incorporating therein new provisions, was not to repeal the part retained and re-enact the same, but that such part of the statute continued in force from the first enactment, and

NOTE.—For a review of the authorities as to the loss of privilege in respect to confidential communications in writings when their possession is lost, see *note* to *State v. Mathers* (Vt.) 15 L. R. A. 268.

In respect to *ex post facto* laws, see the prior cases in this series on the subject, viz.: *Com. v. Graves* 23 L. R. A.

(Mass.) 16 L. R. A. 256; *Re Wright* (Wyo.) 13 L. R. A. 748; *Ex parte Larkins* (Okla. Terr.) 11 L. R. A. 418; *Re Tyson* (Colo.) 6 L. R. A. 472; *State v. Cooler* (S. C.) 8 L. R. A. 181; *Anderson v. O'Donnell* (S. C.) 1 L. R. A. 632.

that the new provisions incorporated became operative from the time the amendatory statute took effect.

Moore v. Mausert, 49 N. Y. 832, citing *Ely v. Holton*, 15 N. Y. 595; *People v. Wilmerding*, 186 N. Y. 868.

The doctrine of repeal by implication is not favored by policy of the law.

Sedgw. Stat. & Const. L. 2d ed. p. 98; *Sutherland, Stat. Constr.* § 138, and cases cited; *Mongeon v. People*, 55 N. Y. 618.

Under the old statute a person convicted of perjury could not be sentenced to imprisonment for a less term than two years, while under the present statute there is no such minimum limitation and the maximum limitation is the same in both statutes, *i. e.*, ten years.

This does not make the statute *ex post facto*.

Com. v. Wyman, 12 Cush. 237; *Com. v. McKenney*, 14 Gray, 8; *Miles v. State*, 40 Ala. 89; *Walker v. State*, 7 Tex. App. 245, 82 Am. Rep. 595; *State v. Miller*, 58 Ind. 399; *Sifred v. Com.* 104 Pa. 181; *Shepherd v. People*, 25 N. Y. 415; *Hartung v. People*, 22 N. Y. 105; *Fletcher v. Peck*, 10 U. S. 8 Cranch, 87, 3 L. ed. 162.

There is no merit in the contention of the appellant that the judgment of conviction should be reversed on account of the fact that the civil action in which the crime of perjury was committed is still pending.

It is believed that there is no case in the books in which a conviction of perjury had been reversed on account of the fact that the indictment was found and the case tried before the civil action.

Penal Code, § 98; *Chamberlain v. People*, 23 N. Y. 85, 80 Am. Dec. 255; *People v. Boue*, 3 N. Y. Crim. Rep. 151.

If a witness swears falsely in respect to any material fact, he is guilty of perjury, though the civil action fails from defect of proof of any other essential fact.

Wood v. People, 59 N. Y. 117; *People v. Grimshaw*, 33 Hun, 507; *People v. Courtney*, 1 N. Y. Crim. Rep. 557; *Reg. v. Meek*, 9 Car. & P. 513; 2 Bishop, Crim. L. § 1028, subd. 5.

There was no error in the action of the learned trial judge in committing the witness Noah.

A letter written confidentially from husband to wife is admissible against the husband, when brought into court by a third party.

Wharton, Crim. Ev. § 398; *Com. v. Griffin*, 110 Mass. 181; *Com. v. Capont*, 155 Mass. 584; *Mercer v. Patterson*, 41 Ind. 440; *State v. Buffington*, 20 Kan. 593, 27 Am. Rep. 198; *State v. Hoyt*, 47 Conn. 518, 36 Am. Rep. 89.

There is no ground for the contention of the appellant, that the learned trial justice erred in alluding to the failure of the defendant to take the stand as a witness on his own behalf.

The learned trial justice did not comment unfavorably upon the failure of the defendant to take the stand. He merely stated to the jury that it was the law that the failure of the defendant to testify did not raise any presumption against him.

In Indiana, Louisiana, Nevada, Oregon, Vermont, and Washington it is by statute made the duty of the court to instruct the jury as in the case at bar.

Ind. Rev. Stat. § 1798; La. Laws 1886, p. 39, 23 L. R. A.

§ 1; Nev. Gen. Stat. § 4563; Or. Crim. Code, §§ 1865; Vt. Rev. Laws, § 1656; Wash. Code, § 1067

Peckham, J., delivered the opinion of the court:

In January, 1891, there was pending in the supreme court of this state an action brought by one Annie M. Keating against the above defendant. The action was brought to recover on a promissory note alleged to have been made by defendant, dated New York, October 27, 1887, and payable to the order of Annie M. Keating two years after the date thereof, for some \$2,000, with interest at 6 per cent. Judgment by default was entered January 31, 1891, against the defendant, in Monroe county, for the full amount of the note. A motion was subsequently, and in April, 1891, made, on the part of the defendant, to open that default, and for the purpose of that motion the defendant, in New York county, swore to an affidavit that he never owed Annie M. Keating a dollar in his life; that he had never given to her a promissory note, and that he had never seen the note upon which the action was brought, and knew nothing whatever about it; that at the time the note bore date the defendant was in Florida, and remained there the whole winter; and that he went there the 1st of September, 1887, and did not return until May, 1888. The default was opened, and an answer was thereupon interposed, setting up substantially the facts as contained in the affidavit. The action is still pending, never having been brought to trial. In January, 1892, the defendant was indicted by the grand jury of the county of New York for perjury in swearing to the affidavit; the indictment averring that the allegations of fact set forth in the affidavit, and above mentioned, were false, to the knowledge of the defendant, and that in swearing to them the defendant had committed willful and corrupt perjury. In February, 1893, the defendant was placed on trial for the offense in the court of general sessions of New York. He had previously been tried at the same term upon the same indictment, and the jury had disagreed. Upon the second trial the defendant was convicted, and sentenced to imprisonment in the state prison for eight years; and he is now undergoing such imprisonment, a stay of proceedings after the conviction having been refused. From an affirmation of the judgment by the general term the defendant has appealed here. The counsel for the defendant has argued several grounds for a new trial, some of which will be now referred to:

1. It is claimed on behalf of the defendant that when it appeared, as it did in the course of the trial, that the civil suit brought by Annie M. Keating against him had not yet been tried and determined upon its merits, the court should have deferred the trial, upon its own motion, until the determination of that action. It is couceded that no motion was made to postpone the trial of the indictment until after the determination of the civil action. The record does show that the counsel for the defendant, in the course of the trial of the indictment, and after a large amount of evidence had been given, made the objection that no indictment for perjury could stand while the ac-

tion in which it is alleged it was committed is still undetermined, and that the court had no jurisdiction to proceed with the trial of the indictment. This objection was overruled. Again, the counsel asked the court to charge the jury that the court had no jurisdiction to try the indictment until the determination of the civil action. This was refused, and an exception taken. The court committed no error in refusing to hold as requested by the counsel. It is not a question of jurisdiction, at all. The court had jurisdiction over the offense, and over the person of the defendant, and whether the civil suit had or had not been determined was a matter of not the slightest importance upon that question. The English authorities cited in the brief of counsel only show what is said to have been the practice in the English courts, which was to postpone the trial of the indictment until after the disposition of the civil action, not because the court had no jurisdiction to try the indictment before that event, but because, as matter of judgment, it was thought better to take such a course. *Rea v. Simmons*, 8 Car. & P. 50, note a. The rule in Pennsylvania does not show that the court has held that there was a lack of jurisdiction. *Conn. v. Dickinson*, 3 Pa. L. J. 164. The rule is one of convenience and propriety, addressed to the sound discretion of the court; and the attention of the court should be called to the matter before entering upon the trial, and an application made to postpone on that ground. Upon this subject, we cannot add to what has already been said at the general term.

2. It is also urged that the court had no power to sentence the defendant, because the law which was in force at the time of the sentence was, as to the defendant, an *ex post facto* law. The perjury is alleged in the indictment to have been committed in 1891, at which time the statute provided that any one convicted of perjury, in any case other than upon the trial of an indictment for a felony, should be punished for not less than two nor more than ten years. Before the trial the statute was amended (Laws 1892, chap. 682) by leaving out the minimum limitation of the term of imprisonment, so that the punishment might be imprisonment for a less, but could not be for a greater, term than under the statute thus amended. A statute which permits the infliction of a lesser degree of the same kind of punishment than was permissible when the offense was committed cannot be termed or regarded as an *ex post facto* law. The leading object in prohibiting the enactment of such a law in this country was to create another barrier between the citizen and the exercise of arbitrary power by a legislative assembly. It was well understood by the framers of our federal constitution that the executive was not the only power, in a government such as they were about to establish, which would require constitutional limitations. The possible tyranny by a majority of a representative assemblage was well understood and appreciated, and there were for that reason many provisions inserted in the constitution limiting the exercise of legislative power by the federal and also by state legislatures. Bills of attainder and *ex post facto* laws had at that time a quite well understood meaning. The former was a legislative judgment of conviction;

an exercise of judicial power by parliament without a hearing, and in disregard of the first principles of natural justice. Such bills had been passed in England, and the parties thereby condemned had been put to death. The *ex post facto* law was regarded as a law which provided for the infliction of punishment upon a person for an act done, which, when it was committed, was innocent. 1 BL. Com. *46.

Enlarging upon this definition as being of the same species, and coming within the same principle, a law which aggravated a crime, or made it greater than it was when committed, or one which changed the punishment, or inflicted a greater punishment than the law annexed to the crime when committed, or a law which changed the rules of evidence, and received less or different testimony than was required at the time of the commission of the crime, in order to convict the offender, was included in the definition of an "*ex post facto* law." *Caldar v. Bull*, 8 U. S. 3 Dall. 386, 1 L. ed. 648, Chase, J., at 890. In the case just cited Mr. Justice Chase said that the restriction not to pass any *ex post facto* law was to secure the person of the subject from injury or punishment in consequence of such law; that it was an additional bulwark in favor of the personal security of the subject,—to protect his person from punishment by legislative acts having a retrospective operation. No act that mollified the rigor of the criminal law was regarded as an *ex post facto* law, but only a law that created or aggravated the crime, increased the punishment, or changed the rules of evidence in order to secure conviction. The same view of the subject was taken by Denio, J., in *Hartung v. People*, 23 N. Y. 95, at 105. See also *Shepherd v. People*, 25 N. Y. 406. Nowhere is it suggested that legislative interference by way of mitigating the punishment of an offense could be regarded as an *ex post facto* law, if applicable to offenses committed before its passage. There is no reason for any such holding. It was never supposed that constitutional obstacles would be necessary in order to prevent the improper exercise of legislative clemency. There was little to fear from that quarter upon such a subject. Those who framed the constitution were not engaged in creating obstacles to be placed in the path of those legislators who desired, by legislative enactment, to exercise clemency towards offenders, nor were they anxious lest those who were intrusted with power should be disinclined to exercise it with sufficient sternness. Human experience had furnished them with no examples of danger from that direction, and their anxiety on that account cannot be discerned from a perusal of the federal constitution. In many, if not in most cases, the reasons for mitigating the severity of the punishment for any particular kind of crime would apply with equal force to those cases in which the crime had been committed before, as well as to those in which the crime might be committed subsequent to, the enactment of the law; and we are aware of no policy which prevents such a construction of the constitutional provision as would permit that kind of a retrospective act. That it materially affects the punishment prescribed for a crime

is not the true test of an *ex post facto* law. In regard to punishment, it must affect the offender unfavorably before it can be thus determined. It seems to us plain that there can be no reason for any other view. I do not think that the mere fact of an alteration in the manner of punishment, without reference to the question of mitigation, necessarily renders an act obnoxious to the constitutional provision. I know it is alluded to in the two cases in this state above cited,—that of Hartung and Shepherd. In those cases the alteration was not merely in the manner. It was an alteration from capital punishment, to be inflicted in a certain manner, and within a certain time after sentence was pronounced, to a punishment of a year's hard labor in state prison, and then a possibility of capital punishment thereafter, at any time during the life of the criminal, at the pleasure of the governor for the time being, with imprisonment in the mean time at hard labor. As Judge Denio said, "The sword is indefinitely suspended over his head, ready to fall at any time." It was said also by the same learned judge that it was not enough to say that most persons would probably prefer such a fate to the former capital sentence, because there were no means of knowing whether the one or the other punishment would be the most severe, in a given case, as that would depend upon the disposition and temperament of the convict. I think that where a change is made in the manner of the punishment, if the change be of that nature which no sane man could by any possibility regard in any other light than that of a mitigation of punishment, the act would not be *ex post facto* where made applicable to the offenses committed before its passage. The present case does not involve the question, and it is only mentioned for the purpose of calling attention to it as one which has not yet been squarely decided in this court. We have been referred to the case of *State v. Daley*, 29 Conn. 272, as holding the principle urged upon us by counsel for the defendant. A reference to the case shows that the court held that on account of the repeal of the statute before his trial, which was in existence when the crime was committed, the offender could not be punished, because the statute which was passed to take its place applied only to cases which occurred subsequent to its passage. The decision was made with reference to the language used in the amending act, which the court held was clearly prospective, while the absolute repeal, in so many words, of the former act, took away all right to use it for any purpose whatever. No fault can be found with the principle decided by the Connecticut court, but it has no application to this case. Precisely the same principle was decided in *Com. v. Marshall*, 11 Pick. 350, 23 Am. Dec. 377. In *Com. v. Wyman*, 12 Cush. 237, the Massachusetts court held that the alteration of the punishment from that of death to imprisonment for life was not *ex post facto*, when applied to offenses committed prior to the passage of the act. We have seen that in our own state such an alteration, under the peculiarities of the statute then under discussion, was held to be an *ex post facto* law. I have seen no such case where such an alteration as is disclosed

by the act under discussion has been held to be an *ex post facto* law. In the *Hartung Case* the power of the legislature to remit any separable portion of the prescribed penalty was declared, and the very case of the reduction in the term of imprisonment was cited as an instance of legislative power. We are clear there is no constitutional objection to the statute.

3. There were certain letters written to the defendant by his wife. These letters were offered by the people, and received in evidence, under the objection of the defendant; and it is now urged that their admission was error, for which a new trial should be granted. The counsel for the defendant, upon this trial, had called the wife of defendant as a witness; and she had broken down in health before the examination was concluded, and became so ill that it was impossible to take her examination at the house. In order to obtain the benefit of her evidence in the case, the defendant had to come to some understanding with the district attorney, or the testimony already given would have to go out, and nothing further could be admitted. Hence, the stipulation as to the reading of all the evidence of the witness taken upon the former trial, subject to all legal objections. That meant the legal objections of the party against whom the testimony was given. When the defendant read the direct examination, it was subject to the legal objections, which the district attorney might make, and when the latter read the cross-examination it was subject to the legal objections thereto made by the counsel for the defendant; but each side was, by the very terms of the stipulation, to read the whole of the direct cross examination, as the case might be. The objection on this occasion was first made by the defendant's counsel, who refused to read the particular portion of the direct examination, which, as the district attorney claimed, rendered some portions of the subsequent cross examination (these particular letters included) admissible in evidence. The court, because of the stipulation, committed no error in compelling the reading of the evidence, and the defendant's exception to that ruling is not good. Subsequently, when the district attorney offered the letters in evidence, the defendant's counsel objected to their introduction upon the ground that they were confidential communications from a wife to her husband, and hence were inadmissible. Some expressions in one or two of the letters were undoubtedly contradictory of a portion of the testimony given by the witness upon the first trial. That particular portion of the wife's evidence the defendant had been compelled by the court to read. The people were entitled to the benefit of whatever contradiction there was. If some of the letters contained nothing by the way of contradiction, and hence might have been claimed to be inadmissible for that reason, it is seen that there was no separate and distinct objection made to a particular letter, that it contained no contradictory matter. The objection of immateriality, made by the defendant, was upon the ground that the letters only contradicted the witness upon an immaterial matter, viz., her belief as to the paternity of the child of the

prosecutrix, Miss Keating,—whether it was the child of the witness' husband, or his brother's. We think the letters which contradicted the witness upon that question were properly received in evidence, and there was no separate objection taken to the others. Those which contradicted the witness might, as evidence, have some weight upon the question of her credibility, and the contradiction cannot be said to have been so plainly upon an immaterial matter as to have rendered the admission of the letters error on that ground. The further ground of objection to their admission was that they were confidential communications from a wife to her husband. The answer to this objection is that the letters, after they had been received by the defendant, were given by him to his mistress, the prosecutrix, Annie M. Keating, and she subsequently delivered them to the district attorney, by whom they were offered in evidence. Comment upon the baseness of this act of the defendant is unnecessary. It speaks for itself. The result, however, is to release the letters from the operation of the rules as to confidential communications between husband and wife, and to leave them open to use as evidence to the same extent as if no such rule had ever guarded them. The rule which protects confidential communications of this nature was founded upon a wise public policy, adopted and pursued for the purpose of encouraging to the utmost that mutual confidence between husband and wife, which is the strongest guaranty of a happy marriage. To this end the common law provided that all communications between husband and wife, which were of a confidential nature should be kept inviolate, and should not be drawn from either party by any process of law. 1 Stark. Ev. *39; Greenl. Ev. 14th ed. § 254. The law appreciated the fact that even truth itself might be pursued too keenly, and might cost too much. The general evil of infusing reserve and dissimulation between parties occupying such relations to each other would be too great a price to pay for the chance of obtaining and establishing the truth in regard to some matter under legal investigation. 1 Greenl. Ev. § 240, *note a*, citing *Mineo v. Morgan*, L. R. 8 Ch. App. 361. The case just cited related to confidential communications between attorney and client, but the principles are also applicable and with added force, to communications between husband and wife. If, however, the privilege has been once waived by the parties, it cannot be again invoked. It is personal; so that if one overhear such a communication he may testify to it, if it be otherwise admissible in evidence. *Com. v. Griffin*, 110 Mass. 181; *State v. Center*, 35 Vt. 378, 386; *Rez v. Simons*, 6 Car. & P. 540. And when the husband or wife, to whom a written confidential communication is addressed, makes it public by giving it to another, the confidential character of the communication has departed; and it may be treated like any other communication, and put in evidence if otherwise admissible. *State v.*

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Hoyt, 47 Conn. 518, 540, 36 Am. Rep. 89; *State v. Buffington*, 20 Kan. 599, 618, 27 Am. Rep. 198. In this case every reason upon which the rule rejecting a confidential communication was originally founded is absent. The letters were addressed by the wife to her husband, and he, deliberately violating every principle of honor and decency, gives the letters to his mistress, by whom they were delivered to the district attorney. A rule which would still preserve the confidential character of these letters, as against her husband, would be founded upon more sentiment than sense.

4. The charge of the learned judge in regard to the defendant not going on the stand as a witness was not subject to legal objection. The court told the jury that the defendant was not bound to go on the stand, and that he could say to the prosecution: "Prove your case against me. It is my judgment that the situation is such that I am not bound to take the witness stand, and the law gives me that right, and the law gives me that privilege." I charge you that the law says there is no presumption to be taken against a defendant, by reason of the fact that he does not take the witness stand." The charge is criticized on the ground, as alleged, that the language which the judge put in the mouth of the defendant amounted to a covert insinuation that the situation was such that it would be disastrous to the defendant if he took the stand. I think the criticism ill-founded. The jury were plainly instructed as to the law, and the rights of the defendant. The insinuation suggested would be unwarranted from the language used. On the contrary, the natural interpretation would be that the defendant regarded the situation as one wholly lacking in proof of guilt, and he was under no obligation to go on the stand and explain what as yet required no explanation. The case of *Ruloff v. People*, 45 N. Y. 213, 232, is authority for the correctness of the course pursued by the learned judge.

5. The defendant's counsel complains, also, that one of the witnesses for defendant was committed to jail by the court in the presence of the jury, because of the character of his evidence given while on the stand as a witness. This is not a question of legal error. The action of the court was within its power, and to be exercised within the sound discretion of the judge. That it might have a bad effect upon the jury, and thereby prejudice the defendant's case, was one of the matters to be considered by the judge before making the order; but we do not think it was legal error to make the order, under the circumstances.

We have carefully looked at and considered each and all the other grounds for a new trial which are set forth and discussed in the brief of the counsel for defendant, and we are quite clear that they do not show any errors committed to the prejudice of the defendant.

The judgment should be affirmed.

All concur, except Bartlett, J., not sitting.

COURT OF COMMON PLEAS FOR THE CITY AND COUNTY OF NEW YORK,
(Special Term).

RE Application of Ann McCARRAN *et al.*,
to Vacate an Order Admitting Patrick McKenna to be a Citizen of the United States.

(3 Misc. 423.)

- 1. Neglect for more than twenty-five years to make an application for the setting aside of an order of naturalization is fatal to the application.**
- 2. A private individual has no standing in court to institute a proceeding to set aside an order admitting an alien to citizenship.**

(May —, 1894.)

MOTION to set aside an order admitting Patrick McKenna to citizenship of the United States. *Denied.*

The facts sufficiently appear in the opinion. Mr. George Bliss in support of the motion.

Mr. Charles W. Dayton for the heirs of Patrick McKenna.

Mr. C. C. Clarke for Caroline Hermann in opposition to the motion.

Giegerich, J., filed the following opinion:

This is a motion to set aside an order made by this court, of date of 25th of October, 1866, whereby one Patrick McKenna was admitted to citizenship of the United States. The application is based upon allegations that misrepresentations were made by the appellant, in the course of the proceeding wherein such order was granted, relating to the period of his residence in this country prior to the date when his majority was attained. The motion is made by Ann McCarran, a sister, and joined in by Francis McKenna, a nephew of said Patrick McKenna, and appears to be made in support of ejectment suits brought in the Supreme Court by the said Ann McCarran against certain parties claiming through said Patrick McKenna, who died on April 23, 1891, intestate; the order in question, unless vacated, being expected to materially affect the successful prosecution of such suits. As to limitations, this motion does not fall within the provisions of sections 1282 *et seq.* of the Code, relative to the setting aside of a judgment for irregularity, in view of the nature of the proceeding attacked (*Re Buffalo*, 78 N. Y. 863); but apart from the provisions of the code of civil procedure, the application, if based upon an alleged irregularity merely, would come too late at this time. *Jackson v. Robins*, 16 Johns. 571; *Thompson v. Skinner*, 7 Johns. 556; *Soulden v. Cook*, 4 Wend. 217.

It is contended, however, that the motion, being based upon alleged fraud in obtaining

NOTE.—The above case from New York court of common pleas is reported here as an important contribution to the law on the subject of naturalization and one which no decision from a court of last resort might present within a long period.

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the order which is sought to be set aside, is barred by no limitation; but this contention is founded solely upon certain authorities holding that such a proceeding does not fall within the limitation prescribed in the case where irregularity or error of fact is assigned. These authorities do not warrant the assumption that no limitation (running from the date when the facts were discovered) may operate upon a motion of this character, especially in view of section 888 of the Code, which applies as a rule to equitable actions (*Butler v. Johnson*, 111 N. Y. 904), a motion being governed by the rules of limitation applicable to actions. *Dewey v. Dewey*, 2 Thomp. & C. 515, affirmed, 56 N. Y. 657.

Whatever express statutory limitation may here apply, however, it is not necessary to determine, for the neglect of the parties to make this motion during the great period which has elapsed is fatal to the application. *Corwith v. Griffing*, 21 Barb. 9-14; *Strong v. Strong*, 8 Redf. 477, 485, 486, and citations; *Re Salisbury's Estate*, 6 N. Y. Supp. 932, 934.

No explanation is here offered for the negligence of the moving parties in this regard, the affidavits submitted tending to show that the facts constituting the alleged fraud were known to the affiants from the commencement of the period in question.

It is well settled that an order admitting an alien to citizenship, which contains the necessary recitals, is conclusive as to the existence of facts upon which it depends for validity when attacked collaterally (*Spratt v. Spratt*, 26 U. S. 4 Pet. 350, 7 L. ed. 174; *McCarthy v. Marsh*, 5 N. Y. 263; *Ritchie v. Putnam*, 13 Wend. 524); but authorities dealing with such a case in the aspect of a direct attack are not abundant. The cases of *Com. v. Paper*, 1 Brewst. (Pa.) 263, and *Re Shaw*, 2 Pa. Dist. Rep. 250, however, are in point, and I am well content to follow them, in the absence of any contrary ruling by the courts of this state so far as research discloses. These cases hold that the civil authorities, and not a private individual, should institute a proceeding of this character, and, to my mind, the reasoning is founded upon sound principles.

Moreover in view of the grave importance which attaches to the question now considered, by reason of the property rights involved, the parties to be affected should certainly have recourse to the protection afforded by the settled rules of evidence when litigating this matter, and I am by no means satisfied that the provisions of section 829 of the Code of Civil Procedure would not oppose the successful prosecution of an action to set aside the order here attacked. This section is not in terms applicable to matter contained in affidavits submitted upon a motion, and, in my opinion, justice would require that the parties be relegated to a proper action where the question can be determined upon whatever competent evidence may be adduced.

Motion denied, with \$10 costs.

UNITED STATES CIRCUIT COURT, WESTERN DISTRICT OF CALIFORNIA.

P. FLANNAGAN *et al.*

v.

CALIFORNIA NATIONAL BANK *et al.*

(56 Fed. Rep. 968.)

A national bank is not bound by the promise without consideration of its cashier, to pay a draft drawn, or to be drawn, upon a depositor; since the power so to contract is not embraced within those given by U. S. Rev. Stat., § 5136, subd. 7, to exercise all incidental powers necessary to carry on the business of banking, by discounting and negotiating notes, drafts, bills, and other evidences of debt, receiv-

ing deposits, buying and selling exchange, coin and bullion, loaning money on personal security, and issuing and circulating notes.

(June 19, 1898.)

ACTION on an alleged contract by which defendants agreed to pay a draft drawn upon them by a third person in favor of plaintiffs. *Judgment for defendants.*

The facts are stated in the opinion.

Messrs. Burnett & Gibbon for plaintiffs.

Mr. M. T. Allen, for defendants:

The authority of a national bank to guarantee commercial paper is restricted to the cases

NOTE.—Liability of bank as accommodation indorser.

The cashier of a bank has no authority to indorse accommodation paper so as to bind his bank. *Blair v. First Nat. Bank of Mansfield*, 2 Flipp. 111; *West St. Louis Sav. Bank v. Parmelee*, 95 U. S. 557, 24 L. ed. 483, affirming 8 Dill. 403.

And a national bank cannot become an accommodation indorser. *National Bank of Commerce of Kansas City v. Atkinson*, 55 Fed. Rep. 465.

In *National Bank of Gloversville v. Wells*, 79 N. Y. 498 (1880), it was stated that a national bank cannot loan its credits or become an accommodation indorser on a promissory note, but this question was not involved in this case.

The cashier of a bank has no power to accept bills of exchange for the accommodation, merely of the drawers, and no recovery can be had against the bank, by the holder of such bill, having knowledge. *Farmers & M. Bank v. Troy City Bank*, 1 Dougl. (Mich.) 457.

A bank is not liable on an accommodation indorsement made by the president of the bank on his own paper, under New York Laws 1840, chap. 663, prohibiting a bank association from issuing a bill or note of the association unless payable on demand and without interest. *Morford v. Farmers Bank of Saratoga County*, 26 Barb. 568.

In *Pendleton v. Bank of Kentucky*, 1 T. B. Mon. 179, which was a suit on a cashier's bond by the bank, it was said that the drawing and acceptance of a draft by him without authority would not render the bank liable.

In *Bridgeport City Bank v. Empire Stone Dressing Co.*, 30 Barb. 421, it was said that a bank is not authorized to make accommodation indorsements, but the question involved in that case was the liability of a corporation.

But an indorsement by the cashier in proper form, done on behalf of the bank, negotiated to a bona fide holder, concludes the bank in favor of such holder, although the indorsement was for the accommodation of another party. *Bank of Genesee v. Patchin Bank*, 19 N. Y. 312.

On the former trial of the same case, the court of appeals held that a bank was not authorized to make an accommodation indorsement, but if it had been proved that advances were made upon this paper in good faith on the representation that the paper belonged to the bank, it would be liable. *Bank of Genesee v. Patchin Bank*, 18 N. Y. 306.

In *Robb v. Ross County Bank*, 41 Barb. 586, where the cashier of that bank had indorsed a bill of exchange, it is said that even if Ross County Bank had never owned the bill or had no interest in it, that fact, if proved and found, would not have affected the right of purchasers for value before maturity, to recover.

In *Houghton v. First Nat. Bank of Elkhorn*, 25 38 L. R. A.

Wis. 663, 7 Am. Rep. 107, it was held that an indorsement on the note by the cashier merely for the accommodation of the payee and prior indorser, where the note did not belong to the bank, will bind the bank as against the purchaser in good faith for value before maturity.

An indorsement by a cashier of a draft, payable to his order as cashier, renders the bank liable to a bona fide holder, where the note has been fraudulently circulated by an agent of the bank, without authority. *Bank of the State of New York v. Muskingum Branch of the Bank of State of Ohio*, 23 N. Y. 619.

A banker was held liable for sending out a telegram, "Will pay A. H. draft \$2300.00, for stock," in answer to a telegram "Will you honor a draft drawn by A. H. for \$2300.00," and is an absolute acceptance that he will pay the draft, and the words "for stock" do not mean that stock was to be consigned to the acceptor of the draft. *Coffman v. Campbell*, 87 Ill. 93.

Where a telegram came to a bank, asking if they would pay J. T.'s check for \$22,000, and the answer was, "J. T. is good, send on your paper," and was signed by the bank, and the vendor parted with his cattle and accepted the check as payment on the faith of the telegram, the bank was liable. *Garretson v. North Atchison Bank*, 47 Fed. Rep. 867.

The former decision in this case in 30 Fed. Rep. 103, was based on the ground that it was the same as a certified check, and on the further ground that under the Missouri statute, it was an acceptance of bill of exchange in writing.

A telegram offering to pay a draft for a certain sum will not bind the bank to pay a draft for any larger sum. *Brinkman v. Hunter*, 78 Mo. 172, 30 Am. Rep. 492; *Lindley v. First National Bank of Waterloo*, 2 L. R. A. 709, 76 Iowa, 629.

Where the cashier of a bank wrote to the secretary of the treasury, saying that the bearer was authorized to make a contract for transferring money from New York to Louisiana, and such transaction was not within the power of the cashier, the bank is not liable for the money which the secretary advanced to this agent. *United States v. City Bank of Columbus*, 63 U. S. 21 How. 356, 16 L. ed. 180.

In the main case where in answer to a telegram sent to the bank, "Will you pay B's draft on G. by the 16th of next month for \$6,000?" the answer was "Yes" it was held that this was a promise to answer for the obligation of G. which the cashier had no power to make. The court says, however, that if the bank had promised to pay a draft on it, and the plaintiff had parted with money on the strength of that promise, the ruling would be different, and this is sustained by the cases *supra*.

In this note cases on certified checks and certificates of deposit are not included.

L. T.

of re discounting or transferring of the paper of the bank, and a consideration moves to the bank on account of such transfer or re-discount.

Rev. Stat. § 5136.

No authority is given a bank to guarantee payment of the paper of its customers.

Morawetz, Priv. Corp. § 232; Seligman v. Charlottesville Nat. Bank, 3 Hughes, C. C. 647; *Johnston v. Charlottesville Nat. Bank*, Id. 657; *Lafayette Sav. Bank v. St. Louis Stoneware Co.* 2 Mo. App. 299; *Bank of Genesee v. Patchin Bank*, 18 N. Y. 809; *Morford v. Farmers Bank of Saratoga County*, 26 Barb. 568; *Savage Mfg. Co. v. Worthington*, 1 Gill, 284.

The cashier and president have only power to bind the bank in the discharge of their ordinary duties.

Bank of United States v. Dunn, 81 U. S. 6 Pet. 51, 8 L. ed. 316; *United States v. City Bank of Columbus*, 62 U. S. 21 How. 356, 16 L. ed. 180; *West St. Louis Sav. Bank v. Parmelee*, 95 U. S. 557, 24 L. ed. 490.

Ross, District Judge, delivered the opinion of the court:

The plaintiffs, who are citizens of Oregon, and bankers doing business at the city of Marshfield, in that state, bring this suit to recover the amount of a certain draft drawn by one Baines on the defendant Graham. By their complaint the plaintiffs seek to charge the defendant, the California National Bank of San Diego, now in the hands of the defendant receiver, with the payment of the draft; and a demurrer filed by the receiver, on behalf of the bank, raises the question of the latter's liability.

The complaint alleges that on the 15th of September, 1891, Graham, through his agent, Baines, applied to the plaintiffs, at their bank in Marshfield, for a loan of \$6,000, "to be paid by draft upon said California National Bank of San Diego." This allegation in respect to the proposed drawee was probably a mistake of the pleader, for that allegation is immediately followed by this:

"At the same time, plaintiffs received a telegram, sent by said California National Bank to plaintiffs, in which it stated that Baines' draft on Graham for \$6,000 was [would be] good on the 16th of the next month."

To which telegram plaintiffs replied by a telegram as follows:

"Marshfield, Coos Co., Or., Sept. 16, 1891.

"To California National Bank, San Diego, California. Will you pay Baines' draft on Graham for \$6,000 on October 15, next?"

"Flannagan & Bennett."

In reply to this telegram, plaintiffs received, on September 18, 1891, the following, by telegraph, from the defendant bank:

"San Diego, Cal., Sept. 18, 1891.

"To Flannagan & Bennett, Marshfield, Or.: See our telegram of 15th. Should Graham money arrive earlier, we will pay when it comes, possibly tenth.

"California National Bank."

To which plaintiffs, on the 19th of September, replied by telegraph as follows:

"Marshfield, Coos Co., Or., Sept. 19, 1891.

"To California National Bank, San Diego, 23 L. R. A.

Cal.: Are we to understand that you will pay Baines' draft on Graham for \$6,000.00 not later than 16th of next month?

"Flannagan & Bennett."

Receiving in reply the following:

"San Diego, Cal., Sept. 21, 1891.

"To Flannagan & Bennett: Yes.

"G. N. O'Brien, Cashier."

O'Brien was at the time the cashier of the California National Bank. Upon the receipt of the last mentioned telegram the plaintiffs paid to Baines, for the use of Graham, \$6,000, and received from Baines a draft, signed by him, in words and figures as follows:

"\$6,000.00. Marshfield, Sept. 23rd, 1891.

"On October 16th, 1891, pay to the order of Flannagan & Bennett six thousand dollars, value received, and charge the same to account of W. E. Baines."

"To R. A. Graham, California National Bank, San Diego."

On the 16th of October, 1891, the draft was duly presented to the defendant bank, and payment demanded, which was refused, and subsequently payment was demanded of defendant Graham, who likewise failed to pay the same.

It is apparent from the averments of the complaint that at no time did the defendant bank, or its cashier, promise to pay any draft drawn on the defendant bank. Had such promise been made, and plaintiffs had parted with their money on the strength of it, the case would be like that of *Garretson v. North Atchison Bank*, 47 Fed. Rep. 867, and a like ruling would be made here, for I have no doubt of the correctness of that decision. But the present case is altogether unlike that. The promise here counted on was the promise of the cashier of the defendant bank to pay Baines' draft on Graham, who, it would seem from the telegrams, was a customer of the defendant bank, and an anticipated depositor; and the question for decision is, whether such a promise of the cashier of a national bank is binding upon the bank. A national bank is empowered, by the seventh subdivision of section 5136 of the Revised Statutes, "to exercise, by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of" the title providing for the organization of such banks. Every one dealing with such a bank does so with notice of, and subject to, the powers conferred, and limitations imposed, by the law of its creation. The provision of the statute quoted, under which the defendant bank was organized, did not authorize its board of directors, or any of its officers or agents, to bind it to pay a draft of one of its customers or depositors. The telegraphic correspondence in the case at bar shows that the defendant bank was anticipating that it would have funds of Graham not later than the 16th of October, 1891, out of which it proposed to pay the draft to be drawn

by Baines on Graham; and the definite promise made by the cashier of the bank, by his telegram of September 21, 1891, in answer to that of the plaintiff's, asking, "Are we to understand that you will pay Baines' draft on Graham, for \$6,000, not later than 16th of next [October] month?" was, in effect, a promise to answer for the obligation of Graham. Such a promise was beyond the power of the cashier to make, and the defendant bank was unaffected by it. It was organized to carry on the business of banking "by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes, according to the provisions of" the statute under which it was organized. None of these things embrace, directly or incidentally, a promise to pay, without consideration moving to it, a draft drawn by a third party on one of its customers or depositors. In *Bank of the United States v. Dunn*, 81 U. S. 6 Pet. 51, 8 L. ed. 316, the court would not permit the president and cashier of the bank to bind it by their agreement with the indorser of a promissory note that he should not be liable on his indorsement. It said it is not the duty of the cashier and president to make such contracts, nor have they power to bind the bank, except in the discharge of their ordinary duties.

In the case of *United States v. City Bank of Columbus*, 62 U. S. 21 How. 356, 16 L. ed. 130, the cashier of the defendant bank wrote to the secretary of the treasury, saying that the bearer of the letter, one Miner, who was one of the directors of the bank, was authorized to contract for the transfer of money from New York to New Orleans. Upon that representation the secretary turned over to Miner \$100,000 of the government money for transfer from New York to New Orleans, and, Miner having failed to deliver or account for it, the govern-

ment sought to recover the amount from the bank. But, it appearing that the action of the cashier was without the authority or knowledge of the president or board of directors, the supreme court held that it was outside of his duties and powers, and that the bank was not liable. In *West St. Louis Sav. Bank v. Parmelee*, 95 U. S. 557, 24 L. ed. 490, where it was attempted, but unsuccessfully, to bind a bank as an accommodation indorser on the individual note of its cashier, the court said:

"Ordinarily, the cashier, being the ostensible executive officer of a bank, is presumed to have, in the absence of positive restrictions, all the powers necessary for such an officer in the transaction of the legitimate business of banking. Thus, he is generally understood to have authority to indorse the commercial paper of his bank, and bind the bank by the indorsement. So, too, in the absence of restrictions, if he has procured bona fide rediscount of the paper of the bank, his acts will be binding, because of his implied power to transact such business; but certainly he is not presumed to have power, by reason of his official position, to bind his bank as an accommodation indorser of his own promissory note. Such a transaction would not be within the scope of his general powers; and one who accepts an indorsement of that character, if a contest arises, must prove actual authority before he can recover. There are no presumptions in favor of such a delegation of power. The very form of the paper itself carried notice to a purchaser of a possible want of power to make the indorsement, and is sufficient to put him on his guard. If he fails to avail himself of the notice, and obtains the information which is thus suggested to him, it is his own fault, and, as against an innocent party, he must bear the loss."

The principle controlling the decisions cited is equally applicable to the case at bar.

Demurrer sustained.

CALIFORNIA SUPREME COURT (Department 1).

PEOPLE of the State of California, *ex rel.*
Isaac W. WELLS, *Respt.*,

v.

Town of BERKELEY, *Appt.*

(.....Cal.....)

1. Signatures to a petition which are cut off and attached to another petition, which is identical with the former, cannot be counted in making the required number of signatures to the petition.

2. The annual election for municipal officers is a general election within the meaning of a constitutional and statutory pro-

NOTE.—The telescoping of duplicate petitions by cutting off the signatures from all but one and attaching them all to that one raises a question of considerable importance and one on which there is little authority.

The briefs in the present case show that there is some conflict among the few decisions that have touched the question.

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vision authorizing the submission of the question of reorganization, where the elections are classed only as general and special.

3. A constitutional requirement of a majority of the electors voting at a general election on the question of the reorganization of a municipality is not satisfied by a majority of those who vote on that question, if they are less than a majority of all who vote at the election.

(April 23, 1894.)

A PPEAL by defendant from a judgment of the Superior Court for Alameda County in favor of relator in quo warranto proceedings to test the legality of an attempt to organize the defendant into a municipal corporation of the fifth class. *Affirmed.*

The facts are stated in the commissioner's opinion.

Messrs. William Lair Hill and Edward A. Holman, with Mr. Edward C. Robinson, for appellant:

The statute has been complied with if a pe-

tion, whether made up of several petitions attached together, identical in language and form, or whether made up of such several petitions with the headings of all but one cut off and detached therefrom by a stranger, having no authority so to do, and the whole then consolidated, presented and received in that form as and for one petition so appearing on its face.

Campbell v. Park, 82 Ohio St. 544; *Corry v. Gayner*, 23 Ohio St. 584; *Douglass v. Baker County Comrs.* 28 Fla. 419; *McKinney v. Bradford County Comrs.* 26 Fla. 267.

The election under sections 4 and 5 of the town charter was a "general election" such as is meant by section 6, article 11, of the Constitution.

People v. Brenham, 8 Cal. 478; *Foots v. Cincinnati*, 11 Ohio, 406, 88 Am. Dec. 787; *Rugles v. Woodland Trustees*, 88 Cal. 480; *Ottawa v. La Salle County*, 11 Ill. 654.

A majority of all the electors voting at the election upon the proposition is sufficient and a majority of all the electors voting at the election upon other propositions receiving a higher number of votes is not necessary.

Cooley, Const. Lim. 6th ed. p. 747, note 1.

Those of the electors of the county or town who could have voted upon the proposition and did not, being present, are deemed to assent, consent, concur, or determine with the will of the majority voting upon the proposition.

"A majority of the voters of the county" means a majority of those who actually vote.

Louisville & N. R. Co. v. Davidson County Ct. 1 Sneed, 687, 62 Am. Dec. 424; *People v. Warfield*, 20 Ill. 159; *Walker v. Oswald*, 68 Md. 146; *Oldknow v. Wainwright*, 2 Burr. 1017; *Gillespie v. Palmer*, 20 Wis. 544; *State v. Barnes* (N. Dak.) May 9, 1893; *State v. Grace*, 20 Or. 154; *State v. Echols*, 41 Kan. 1; *Marion County Comrs. v. Winkley*, 29 Kan. 86; *Metcalf v. Seattle*, 1 Wash. 297; *Yesler v. Seattle*, Id. 308; *McCrory*, Elections, 3d ed. § 175; *Paine*, Elections, § 575, and authorities cited; *People v. Rider*, 16 Barb. 370.

After an election has been properly proposed, whoever has a majority of those who vote, the assembly being sufficient, is elected although the majority of the entire assembly wholly abstain from voting.

Boone, Corp. § 67; *Oldknow v. Wainwright*, *supra*; *Eberett v. Smith*, 22 Minn. 53; *King v. Miller*, 6 T. R. 263; *Buell v. Buckingham*, 16 Iowa, 284, 85 Am. Dec. 516; *Dill*, Mun. Corp. 4th ed. § 44; *Smith v. Proctor*, 14 L. R. A. 403, 180 N. Y. 319.

A minority of the whole body of qualified electors may elect to an office when a majority of that body refuse or decline to vote for any one for that office.

People v. Clute, 50 N. Y. 451, 10 Am. Rep. 508; *St. Joseph Twp. v. Rogers*, 88 U. S. 16 Wall. 644, 21 L. ed. 828; *State v. Echols*, *supra*; *Cass County v. Johnston*, 95 U. S. 860, 24 L. ed. 416; *Marion County Comrs. v. Winkley*, *supra*.

Whenever electors are present and do not vote at all they virtually acquiesce in the election of those who do

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Oldknow v. Wainwright, *People v. Clute*, and *Walker v. Oswald*, *supra*.

Messrs. C. L. Colvin, T. F. Graber, and W. H. Hart, Atty-Gen., for respondents:

The petition was not sufficient because it did not have the requisite number of signers.

Fox v. San Mateo County Suprs. 49 Cal. 568.

The question was not submitted at a general election, as provided in the municipal corporation act.

A general election is one at which the officers to be elected are such as belong to the general government—that is, the general and central political organization of the whole state as distinguished from an election of officers for a particular locality only.

Black, Law Dict. p. 535; *Desmond v. Dunn*, 55 Cal. 242; *Re Stuart*, 53 Cal. 745; *Barton v. Kalloch*, 56 Cal. 95; *People v. Ransom*, 58 Cal. 558; *Wood v. Election Comrs.* Id. 561; *Stayde v. San Francisco City and County Election Comrs.* 61 Cal. 313.

The proposition to reorganize did not receive a sufficient number of votes.

The constitution of Nebraska provides as follows: "The legislature shall provide by general laws for township organization under which any county may organize whenever a majority of the legal voters of the county voting at any general election shall so determine.

Neb. Const. art. 10, § 5.

The court said: "This provision is mandatory; therefore to adopt a township organization it requires a majority of all the legal voters of the county, voting at the general election at which the question is submitted," and held that a majority of those voting on the proposition was not sufficient.

State v. Lancaster County Comrs. 6 Neb. 474. See also *State v. Babcock*, 17 Neb. 188; *State v. Anderson*, 26 Neb. 517; *Inavale Twp. v. Bailey*, 35 Neb. 458; *People v. Brown*, 11 Ill. 478; *People v. Wiant*, 48 Ill. 263; *Chestnutwood v. Hood*, 68 Ill. 183; *Taylor v. Taylor*, 10 Minn. 107; *Bayard v. Klinge*, 16 Minn. 249; *Eberett v. Smith*, 22 Minn. 53; *State v. Winkelmeier*, 35 Mo. 103; *State v. Butterfield*, 54 Mo. 392; *State v. Brassfield*, 67 Mo. 331; *State v. St. Louis*, 73 Mo. 435; *State v. Francis*, 95 Mo. 44; *Re County Seat of Linn County*, 15 Kan. 500; *State v. Swift*, 69 Ind. 505; *Hawkins v. Carroll County Suprs.* 50 Miss. 735.

The cases in Tennessee are strongly in favor of the same construction.

Cocke v. Gooch, 5 Heisk. 294; *Bouldin v. Lockhardt*, 3 Baxt. 262; *Braden v. Stumph*, 16 Lea, 582.

In New York the same law prevails.

People v. Fort Edward Trustees, 70 N. Y. 28.

In North Carolina it has been held that to justify the issuance of municipal bonds, under the constitution of that state, it must be authorized by a majority vote of the whole number of qualified voters of the municipality whether they attend the election or not.

Duke v. Brown, 96 N. C. 129; *Southerland v. Goldsboro Aldermen*, Id. 49. See also *Armour Bros. Bkg. Co. v. Finney County Comrs.* 41 Fed. Rep. 321.

This construction has been placed upon similar language in Ohio.

Enyart v. Hanover Twp. 25 Ohio St. 618;
State v. Foraker, 6 L. R. A. 422, 46 Ohio St. 677.

Belcher, C., filed the following opinion: This is an appeal from a judgment on the judgment roll, and the only contention of appellant is that the judgment is not supported by the findings. The action was instituted by the attorney-general upon the relation of one Wells, challenging the legality of the proceedings taken for the reorganization of appellant, as a municipal corporation of the fifth class, under the general laws of the state. The court found the facts to be, in substance, as follows: The town of Berkeley was organized as a municipal corporation in 1878 under an Act of the legislature approved April 1, 1878, and entitled "An Act to Incorporate the Town of Berkeley, in Alameda County;" and thereafter it continued to exercise its corporate franchise, under and by virtue of said Act, until June 28, 1893. On April 8, 1893, at a regular meeting of the board of trustees of the town, there was presented to said board, read, and placed on file, a petition asking that the question of the reorganization of the town as a city of the fifth class, under the general laws relating to municipal corporations, should be submitted to the electors thereof at the next general election to be held therein. This petition was signed by only 47 qualified electors of the town, but attached to it were seven other sheets of paper, signed by qualified electors of the town, numbering in the aggregate 165. The signatures were obtained as follows: Prior to April 3, 1893, eight separate petitions, identical in form and language, were circulated by different persons, and signatures were obtained to each of them. After these petitions had all been signed, the signatures on seven of them were cut off and detached by a person having no authority to do so, and were then attached to the other one so that they appeared to constitute a part of it. The petition to which the seven detached sheets were thus attached was then, by the same person, presented and filed, as aforesaid, and for a genuine petition containing 212 signatures. The whole number of votes cast at the last prior municipal election held in the town was 1,055. On the day the said petition was presented, April 8, the board of trustees, acting upon the same, passed an ordinance submitting to the electors of the town at the next general election to be held therein, to wit, on the 8th day of May, 1893, the question of the reorganization of the town as a city of the fifth class. The election on May 8th was the annual election provided for by the charter of 1878 for the election of municipal officers; and at that election 1,287 electors voted for town officers, and 533 in favor of reorganization, and 517 against reorganization. In due time the board of trustees canvassed the vote, and declared the proposition to reorganize carried, and thereupon caused their clerk to make, and transmit to the secretary of state, a certified abstract of such vote. Thereafter, the said board called a special election for the election of the officers required by law to be elected in cities of the fifth class, and the election was held on June 26th. On June 28th the board canvassed the vote, and declared the re-

sult; and from and since the said last-named date the defendant has been, and still is, holding and exercising the franchise of a municipal corporation of the fifth class, under and by virtue of the proceedings hereinbefore set forth, and not otherwise. And, as conclusions of law, the court found "that said defendant has never been legally organized as a city of the fifth class, and that all the steps, proceedings, and elections held in that behalf, as in the findings of fact herein are stated, were and are void; that defendant has usurped, intruded into, and unlawfully held and exercised, the franchise of a municipal corporation of the fifth class, and is now usurping, intruding into, and unlawfully holding and exercising such franchise." Three questions are presented, and counsel on both sides earnestly ask that each of them be considered and decided. They are: First. Was the petition presented to the board of trustees sufficient to give it jurisdiction to submit the proposition of reorganization to a vote of the electors? Second. Was the election at which the proposition was submitted a general election, within the meaning of the statute? Third. To carry the proposition, was a majority of all the electors voting upon it sufficient, or was a majority of all those voting at the election necessary?

1. The constitution provides: "Corporations for municipal purposes shall not be created by special laws; but the legislature, by general laws, shall provide for the incorporation, organization, and classification, in proportion to population, of cities and towns, which laws may be altered, amended, or repealed. Cities and towns heretofore organized or incorporated may become organized under such general laws whenever a majority of the electors voting at a general election shall so determine, and shall organize in conformity therewith." Section 6, art. 11. In obedience to this mandate of the constitution, an Act was passed by the legislature, and approved March 13, 1893, entitled "An Act to Provide for the Organization, Incorporation, and Government of Municipal Corporations." Stat. 1893, p. 93. Section 4 of this Act provides: "The common council, board of trustees, or other legislative body of any city and county, city or town, organized or incorporated prior to the first day of January, eighteen hundred and eighty, at twelve o'clock meridian, shall, upon receiving a petition therefor, signed by not less than one fifth of the qualified electors of such city and county, city, or town, as shown by the vote cast at the last municipal election held therein, submit to the electors of such city and county, city, or town, at the next general election to be held therein, the question whether such city and county, city, or town, shall become organized under the general laws of the state relating to municipal corporations of the class to which such city and county, city, or town may belong." It is clear that under these provisions a municipality could only be reorganized in the manner and after a compliance with all the conditions prescribed. It follows, therefore, in this case, that a petition was necessary, and that, unless one signed by the requisite number of electors was presented to the board, it had no jurisdiction to submit the question of reorganization to the electors, and they had no right

to vote upon it. As before stated, the number of votes cast at the last municipal election held in the town was 1,055. It was necessary, therefore, that the petition be signed by at least 211 electors. The petition presented was signed by only 47; and, unless the signature on the attached sheets could be counted, it was clearly insufficient. Probably, if the several petitions, as signed, had been presented, they might and should be regarded and treated as "a petition," within the meaning of the statute; and in a similar case it was so held by the supreme court of Florida. *McKinney v. Bradford County Comrs.* 26 Fla. 267. In *Fox v. San Mateo County Suprs.* 49 Cal. 563, the same question now in hand arose; and it was held that "if two petitions identical in language are circulated and signed, and, to make the required number of names, the signatures on one petition are cut off and pasted onto the other, which is presented, the board have no authority to order the election." The court, by Wallace, *Ch. J.*, said: "The petition presented to the board must be that petition which was signed by the petitioners. Both signature and presentation are necessary. In this view, the identity of the instrument presented as being that which came from the hands of the petitioners is indispensable. To say that, though the signers did not affix their names to the petition presented, they did affix them to another and similar petition, not presented to the board, is no answer. Nor does it satisfy either the terms of the statute, or its obvious policy, which was to shut the door against frauds which would inevitably occur if the practice of detaching signatures from one petition, and attaching them to another, were permitted." And Crockett, *J.*, in a concurring opinion, also said: "If numerous petitions with similar headings be circulated for signatures, and if the headings from all the petitions, except one, be cut off, and all the names, without the knowledge or consent of the signers, be pasted to the one heading, and in that form presented to the board, it is clear that the paper thus presented was not 'signed' by those whose signatures were affixed to it by pasting. Whether they signed another paper with a similar heading will rest entirely in parol, and can only be ascertained by oral proofs. If such proof will suffice as to a portion of the petitioners, it will be equally effective as to all. We might then have the case of a petition never in fact signed by any one, and the omission could be supplied only by oral proof that the petitioners had signed other similar petitions. If a practice of this kind was tolerated, it would open the door to numerous frauds, and would result in substituting oral proof for that which the statute requires to be in writing." There are some conflicting authorities in other states, and counsel for appellant insist that the decision in the *Fox Case* should be overruled. It has, however, so far as we know, remained unquestioned in this state for nearly twenty years, and seems to be based on sound and convincing reasoning. It should, therefore, in our opinion, be upheld and followed.

2. The election held on May 8, 1893, was the annual election provided for by law for the election of municipal officers, and in our
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opinion it was a general election, at which the question of reorganization might properly be submitted. It is true that the words "general election" are ordinarily used to designate one at which state and county officers are elected, but we know of no provisions in the constitution or statutes limiting them to such an election. Two classes of elections, only, are spoken of—general and special; and a regular annual municipal election cannot be included in the latter class, but must be treated as a general election. In *Ruggles v. Woodland Trustees*, 88 Cal. 490, application was made for a writ of mandate to compel the trustees to call and provide for the holding of an election of city officers. The court said: "Prior to May 6, 1890, the city of Woodland, in Yolo county, was a municipal corporation under a special charter. On that date a proposition to reorganize as a city of the fifth class, under the general incorporation act approved March 13, 1883, was duly submitted to the electors of said city and approved by a majority vote." And it was held that a peremptory writ should issue. No general state or county election took place on May 6, but the court must have considered the election held on that day a general election, or it could not have said that the proposition to reorganize "was duly submitted to the electors."

8. At the election held on May 8th, a majority of all the electors who voted upon the proposition to reorganize were in favor of it, but not a majority of all who voted at the election. The provision of the constitution in regard to elections like that under consideration has been quoted, and it will be observed that the words used are, "whenever a majority of the electors voting at a general election shall so determine." These words clearly do not indicate that only a majority of the electors voting upon the proposition is necessary, but would seem to imply that a majority of all those voting at the election is required. And such was evidently the interpretation placed upon this provision by the legislature when it passed the general Municipal Incorporation Act of 1883. Section 4 of that Act, after providing for the presentation of a petition, the submission of the question at the next general election, etc., proceeds as follows: "The votes so cast shall be canvassed at the time and in the manner in which the other votes cast at such election are canvassed. If upon such canvass a majority of all the electors voting at such election shall be found to have voted for such reorganization, the said council, board, or other legislative body shall, by an order entered upon their minutes, cause their clerk or other officer performing the duties of clerk, to make and transmit to the secretary of state a certified abstract of such vote, which abstract shall show the whole number of electors voting at such election, the number of votes cast for reorganization and the number of votes cast against reorganization." This language plainly implies, we think, that a majority of all the electors voting at the election is necessary to carry the proposition to reorganize. Counsel on both sides have argued the proposition at great length, and have cited numerous authorities, but we do not deem it necessary to follow

their arguments further, or to review the cases referred to.

It follows that the court below drew correct

conclusions from the facts and that *the judgment should be affirmed.*

We concur: *Searls, C.; VanChief, O*

OHIO SUPREME COURT.

James M. KERR *et al.*, *Plffs. in Err.*,
v.

Charles LYDECKER, Admr., etc., of Ellis
H. Elias, Deceased.

(11 Ohio St. —)

***A mortgage is a specialty, and an action for its foreclosure and sale of the premises, comes within the provisions of section 4980, Rev. Stat., and the period of limitation is fifteen years, unless extended by virtue of section 4902, Rev. Stat.**

(April 24, 1894.)

ERROR to the Circuit Court for Gallia County to review a judgment reversing a judgment of the Court of Common Pleas in favor of defendants in an action brought to enforce a mortgage on certain real estate. *Reversed.*

Statement by *Burket, J.*:

This action was originally commenced on the 28th day of February, 1889, by Richard J. Morrison, then the administrator of the estate of Ellis H. Elias, deceased, and afterward Charles E. Lydecker became the administrator, and was substituted in the place of Mr. Morrison.

The petition in the court of common pleas is as follows:

"The plaintiff says that on the 28th day of January, A. D. 1885, he was, by the Surrogate Court of New York City, County of New York, and State of New York, duly appointed administrator of the estate of Ellis H. Elias, deceased, that he gave bond as such administrator and was duly qualified and entered upon the discharge of the duties of his said office, and is now the duly acting and sole administrator of said estate. That Ellis H. Elias died intestate, and was at the time of his death a resident of the city of New York, county of New York, and State of New York, and that said surrogate court of New York City, at the time of the appointment of said administrator, had jurisdiction both of the subject-matter and the person. The plaintiff says further, that on or about the 2d day of March, A. D. 1868, in the county of Gallia, Ohio, one Thomas Hill then in full life but since deceased, was then and there the owner in fee simple and in possession of certain real estate in the said Gallia county, Ohio, to wit: The southeast half of

city lot in the city of Gallipolis, Gallia county, Ohio, numbered fifty-four (54) on the original plat of said town of Gallipolis; that the said Thomas Hill did on the 2d day of March, A. D. 1868, by his deed of that date, duly executed and delivered, convey in fee simple to the said Ellis H. Elias, plaintiff's intestate, then in full life, but since deceased, his heirs and assigns forever the lands and tenements aforesaid, to wit: The southeast half of city lot numbered fifty-four (54) in the city of Gallipolis, Gallia county, Ohio, on the original plat thereof, which said deed of mortgage was on the 18th day of February, A. D. 1869, at the hour of 10 o'clock A. M. duly left for record in the recorder's office of said county of Gallia, Ohio, and was duly recorded in book 5, at page 509 and 510, record of mortgages of said county of Gallia. The plaintiff further says that the said deed of mortgage had a condition thereunder written providing that if the said Thomas Hill should pay or cause to be paid his certain promissory note of said date, to wit: March 2, 1868, for the sum of \$1,000 (one thousand dollars), due one year after date, to wit: March 2, 1869, then that the said deed of conveyance should be of no effect, but otherwise it was to be and continue in full force and virtue in law; and the said plaintiff further says that the said Thomas Hill did not pay the said sum of \$1,000 nor any part thereof at the time it became due nor at any time, nor has he or any one else since or at any time paid said sum or any part thereof to plaintiff's intestate, the said Ellis H. Elias, nor to the plaintiff, nor to any one for him or said intestate; wherefore said deed has become absolute. The plaintiff further says that the said Thomas Hill departed this life on or about the — day of —, 1875; that prior to his death he conveyed said real estate, and that the defendant, Mary J. Martin is now in possession of said real estate claiming title under the said Thomas Hill, deceased, but that said claim is subsequent to and inferior to the claim of this plaintiff. That the defendants James M. Kerr and August Ufferman have some claim or interest in said premises by virtue of certain mortgage deeds from the defendant Mary J. Martin, but this plaintiff says that all of said claims of said defendants are subsequent to and inferior to the claim of this plaintiff.

"Wherefore plaintiff prays that an accounting may be had of the amount due him, to wit: \$1,000 with interest from the 2d day of March, A. D. 1869, that the court find and decree that plaintiff's claim is prior to and su-

*Headnote by the COURT.

NOTE.—The above decision is in accordance with the tendency of modern decisions to regard a real estate mortgage as personality rather than as an interest in land, as it holds that the limitation applicable is that as to "specialties" rather than that as to "recovery of the title or possession of real

property," there being no express provision of statute in relation to mortgages.

As to the effect of a statutory bar of the principal debt on the right to foreclose a mortgage or deed of trust securing it, see note to *Kulp v. Kulp* (Kan.) 21 L. R. A. 533.

prior to that of all of said defendants, and that in default of payment of the amount so found due within a short time to be named by the court that the said real estate herein described may be adjudged to the appraised, advertised and sold, and the money arising therefrom be first applied to the payment of said sum of \$1,000, with interest as found due this plaintiff."

To this petition defendants below filed the following demurrer, omitting the caption here:

"Defendants demur to the petition of plaintiff for the following reasons:

"First—That the plaintiff has not legal capacity to sue.

"Second—That there is a defect of parties defendant.

"Third—That the petition does not state facts sufficient to constitute a cause of action."

This demurrer was overruled and an answer filed pleading the statute of limitations, and averring that the action was not brought within fifteen years after the cause of action accrued.

A demurrer to this answer was filed by plaintiff below, and in the circuit court the demurrer to the petition was overruled, and the demurrer to the answer was sustained, to all of which proper exceptions were taken.

The case was tried in the circuit court upon the issues tendered by other parts of the answer, and a finding of facts made separate from the conclusions of law, which finding of facts and conclusions of law are as follows:

"First, that on March 2, 1868, Thomas Hill, then in full life, but since deceased, was the owner of the premises described in the petition in fee simple; that on said date, the said Thomas Hill executed and delivered to Ellis H. Elias, plaintiff's intestate, the mortgage deed referred to in the petition, whereby he conveyed to Ellis H. Elias, his heirs and assigns forever, the premises so in the petition described; that said mortgage had a condition thereunder written, that said mortgage was executed and delivered to secure the payment of a certain promissory note made by said mortgagor at the date of said mortgage, payable to the order of said plaintiff's intestate for the sum of \$1,000, due and payable one year after date, to wit, on the 5th day of March, 1869; that said mortgage was duly recorded in the records of mortgages of said Galia county, where said premises were situate, on the 18th day of February, 1869, and became a lien on the said premises described therein and in said petition; that said note and mortgage were made and executed for the full and bona fide indebtedness of \$1,000, payable by said Thomas Hill to plaintiff's intestate, according to the tenor and effect of said promissory note referred to in the condition of said mortgage; that the said indebtedness so referred to in the condition of said mortgage has never been paid or discharged, and said mortgage has never been released, but still stands as an existing and unsatisfied mortgage deed, and that the defendants now own and hold title fee to said premises from said Thomas Hill, the mortgagor, subject to whatever rights the plaintiff, as the representative of the deceased mortgagee has therein by reason of said unsatisfied mortgage; that the said Charles E. Lydecker is the duly appointed and

acting administrator *de bonis non* of said estate, and has been duly made party plaintiff herein in place and stead of Richard J. Morrison. That the amount named in the condition of said mortgage as the sum to be secured thereby, including interest, the court finds to be on the first day of this term of this court, to wit, February 25, 1891, the sum of \$2,819.

"The court upon the facts so as aforesaid found, finds as matters of law, that the plaintiff has the right to maintain his said action, and is entitled to the relief prayed for, and in his petition demanded, to wit, to a judgment ordering the sale of said premises in the petition described for the payment of the amount so found due on the sum named in the condition of said mortgage deed.

"It is, therefore, ordered and adjudged that unless the said defendants pay the sum to be paid in ten days, an order of sale issue to the sheriff of this county commanding him to cause the land and tenements in the petition described to be appraised, advertised, and sold according to law, and that he bring the proceeds of such sale into court at the term next of this court to which time this case is continued, to which finding and conclusions of law as herein found and set forth, and to the judgment and order of the court in ordering a sale of said premises, the said defendants then and there excepted, and said exceptions were made a part of the record."

Judgment having been rendered in favor of the plaintiff below, the case is brought here by plaintiffs in error, defendants below, to reverse the judgment of the circuit court.

Mr. A. J. Greene, for plaintiffs in error:

In all cases to recover the debt secured by mortgage a sale of the mortgaged premises shall be ordered.

3 Curwen, Stat. at L. § 1966.

A mortgage is a mere security for the payment of and a mere incident to the debt.

Swartz v. Leist, 18 Ohio St. 419; *Neslin v. Wells, Fargo & Co.* 104 U. S. 440, 26 L. ed. 807; *Terrell v. Allison*, 87 U. S. 21 Wall. 298, 23 L. ed. 635.

Therefore if the mortgagor remains in possession of the mortgaged premises or not, he holds the legal title and not the mortgagee.

Martin v. Alter, 42 Ohio St. 94.

This action is the same in object as the action on the judgment of a lien holder, to sell the premises on which the lien rests to pay the judgment.

Peck v. Jenness, 48 U. S. 7 How. 620, 12 L. ed. 844.

The term "foreclosure" is still applied to the process but it is evidently a misnomer when used to describe the effect produced on the mortgagor's interest. No equity of redemption is foreclosed or cut off but a legal estate is taken from the mortgagor and transferred to the purchaser. The mortgagee is permitted to buy the land at the sale, and may thus acquire it not as mortgagee (as object of his action) but as purchaser at the sale.

3 Pom. Eq. Jur. § 1190.

Can there be any doubt which period of limitation can apply, or under which section this class of actions come. *Id.* § 4960.

When in possession the mortgagor has

twenty-one years to redeem. The suit to recover on the mortgage must be brought in fifteen years, that is to recover the debt and secure sale of the security to satisfy it, if not paid in a short day to be fixed by the court, if not done in fifteen years, his right to put the property to sale is lost by limitation. *Ibid.*

A contract in writing under seal is called a specialty or deed.

1 Bouvier, Inst. pl. 874; Bishop, Cont. § 105; *Fisher v. Mossman*, 11 Ohio St. 43; 1 Nash, Pl. & Pr. 4th ed. 724; *Newman v. DeLorimer*, 19 Iowa, 244; *Lord v. Morris*, 18 Cal. 482; *Day v. Baldwin*, 84 Iowa, 880; *Morrison v. Martin*, 23 Ohio L. J. 246; *Martin v. Alter*, *supra*; *Horkrader v. Leiby*, 4 Ohio St. 612; *Moore v. Burnet*, 11 Ohio, 838; *Morris v. Way*, 16 Ohio, 469; *Baird v. Kirtland*, 8 Ohio, 21; *Hill v. West*, Id. 222, 81 Am. Dec. 442.

Mr. A. L. Roadarmour for defendant in error.

Burket, J., delivered the opinion of the court:

The principal error relied upon is, that the circuit court erred in sustaining the demurrer to so much of the answer as pleads the fifteen years statute of limitations, and in overruling the demurrer to the petition.

The first and second causes of demurrer were not well taken, and were properly overruled. A court in this state cannot take judicial notice of the laws or courts of another state. If there is no such court as the surrogate court of New York city, having jurisdiction of probate matters, such fact should be made to appear by answer. Upon demurrer, the facts in that behalf set up in the petition, must be taken as true.

The demurrer as to the statute of limitations raises a more difficult question. Section 4977 provides that: "An action for the recovery of the title or possession of real property can only be brought within twenty-one years after the cause of such action accrues."

Section 4980 provides that an action upon a specialty, or an agreement, contract, or promise in writing, may be brought within fifteen years after the cause of action accrues.

Defendant in error contends that the case comes within section 4977, while the plaintiff in error contends that it comes within section 4980.

As to which is right, can only be determined by ascertaining the character of the action, as made by the petition. If it is an action for the recovery of the title or possession of real estate, it falls within the provisions of section 4977; but if it is an action on a specialty, or on agreement, contract, or promise in writing, it falls within section 4980.

That the petition is, both in form and substance, a petition for the foreclosure of a mortgage and sale of mortgaged premises, cannot be questioned; and both the finding of facts and judgment of the court are in line with the petition.

But it is urged that such a proceeding is an action for the recovery of the title or possession of real estate, as in the end the result of the proceeding is to deprive the mortgagor of the lands.

This leads us to an inquiry as to the legal

effect of a mortgage, and of a proceeding to enforce the same by action in court.

A mortgage of real estate is regarded, in equity, as a mere security for the performance of its conditions of defeasance, and where that condition is the payment of a debt, the security is regarded as an incident of the debt. *Swartz v. Leist*, 18 Ohio St. 419.

The mortgage being, in equity, regarded as a mere security for the debt, the legal title to the mortgaged premises remains in the mortgagor, as against all the world, except the mortgagee, and also as against him until condition broken, but after condition broken the legal title, as between mortgagor and mortgagee, is vested in the mortgagee. *Allen v. Everly*, 23 Ohio St. 97; *Ely v. McGuire*, 3 Ohio, 223; *Hibbs v. Union Cent. L. Ins. Co.* 40 Ohio St. 548, 559; *Martin v. Alter*, 43 Ohio St. 94.

A mortgage in its origin was in reality what it still purports to be, an absolute sale of the lands by the mortgagor to the mortgagee, subject to be determined by performance of the conditions contained in the mortgage within the time therein specified, and upon failure to perform by the day named, the title to the lands became absolute in the mortgagee. On condition broken, the only remedy of the mortgagee was to take the lands for the debt, peaceably if possible, otherwise, by ejectment.

Later on courts of chancery began to regard the mortgage as a mere security for the debt, and to grant relief to the mortgagor by allowing him a certain time, to be fixed by the chancellor, usually six months, in which to pay the debt and redeem the land; the decree in such cases provided that in case the mortgagor should fail to pay the debt within the time so fixed, that his right to redeem should be forever cut off and barred, or as it was usually expressed, foreclosed. Ohio Forms and Practice, by Wilcox, 2d ed. 794.

Upon his failure to pay the debt within the time so fixed, the mortgagee became the absolute owner of the lands in fee, and thereby the debt was discharged.

Still later on, and about the beginning of the present century, courts of chancery, by degrees, adopted a further rule of practice, whereby the mortgagee was allowed, at his election, to either foreclose his mortgage and take the land for the debt, or to have the mortgage foreclosed, the equity of redemption cut off, and then have a master sell the land by order of the court, and apply the proceeds to the payment of the debt, rendering any surplus to the mortgagor, and in case of a deficiency have execution awarded in his favor therefor.

This rule of practice of the courts of chancery ordering a sale of the mortgaged premises, met with so much favor that in many of the states it was enacted into statute.

In England, by Statutes 15 and 16 Vict. chap. 86, § 48, the court, at the request of either party to a foreclosure suit, may direct a sale of the mortgaged property instead of decreeing a strict foreclosure.

In our own state, the right to foreclose a mortgage after condition broken, either by a strict foreclosure, or by a foreclosure and sale of the mortgaged property, continued down to the adoption of the Code of Civil Procedure in

1868. By section 874 of the Code, now section 5316, Revised Statutes, it is provided that: "When a mortgage is foreclosed, a sale of the premises shall be ordered." This prohibits a strict foreclosure in this state, and now, after condition broken, if the mortgagee appeals to the courts to enforce his mortgage, he must elect between two remedies. He may sue for the recovery of the possession of the land in a real action in the nature of ejectment, using this mortgage to prove his title; or, he may sue for a foreclosure of his mortgage, and a sale of the mortgaged premises.

After condition broken, the title is vested in the mortgagee, as between him and the mortgagor, and as the right of the mortgagee to recover the possession of the land by ejectment always existed at common law, and has not been taken away by statute, it still exists in this state. *Highway v. Pendleton*, 15 Ohio, 735; *Allen v. Every*, 24 Ohio St. 97; *Hibbs v. Union Cent. L. Ins. Co.* 40 Ohio St. 548-559.

If such right does not exist, then it must be clear that an action on a mortgage is not a direct proceeding for the recovery of title or possession of real estate. In title or possession recovered in such an action indirectly, or at all? Conceding such right of ejectment to exist, as we do, what is the result?

In case of a strict foreclosure in chancery, if the mortgagee was out of possession, his foreclosure had no further effect than to cut off the right to redeem, and after foreclosure he was still compelled to bring ejectment to obtain possession. *Sutton v. Stone*, 2 Atk. 101; Ohio Forms and Practices, by Wilcox, 2d ed. 795, note a.

A strict foreclosure was, therefore, in no sense a recovery of either title or possession, because he already had the title vested in him, and the strict foreclosure did not give him possession.

The same is true of a foreclosure and sale under the code. The right to redeem is cut off by the foreclosure, but no title is thereby recovered by the mortgagee, because the title, as between him and the mortgagor, is already in the mortgagee. No possession is thereby recovered, because a strict foreclosure did not award possession. Some attorneys improperly incorporated into the decree for foreclosure an order for a writ of possession. An instance of the kind is mentioned in the case of *Allen v. Every*, 24 Ohio St. 109. The authorities are, however, against such practice. *Lansing v. Goelet*, 9 Cow. 846; *Sutton v. Stone*, 2 Atk. 101.

The sale ordered and made by virtue of the code, is only an additional step added to a strict foreclosure (and not a change of the nature of the action), and thereby a transfer is made of the title and possession of both mortgagor and mortgagee to a purchaser for value. The deed of the sheriff as completely transfers to the purchaser the title and right of possession as would a joint deed made by both mortgagor and mortgagee. In such case, instead of a recovery of title or possession by the mortgagee, all title and possession already in him, under the mortgage, is transferred to the purchaser.

True, in case the mortgagee buys in the land at the sale made by the sheriff, the land is transferred to him by the sheriff's deed, but such

transfer is to him as a purchaser and not as a mortgagee. In such case the mortgagee no more recovers the title or possession, than would a purchaser who is a stranger to the suit.

A sale on foreclosure is no more a recovery of title or possession than a sale made by order of court to satisfy mechanic's liens, or judgment liens.

It is therefore clear that an action for the foreclosure of a mortgage and sale of mortgaged premises is not an action for the recovery of the title or possession of real property, and the limitation provided for in section 4977 does not apply thereto.

Does the limitation provided for in section 4980 apply to such action?

Blackstone in his Commentaries, vol. 2, page 465, says: "Debts by specialty, or special contract, are such whereby a sum of money becomes, or is acknowledged to be, due by deed or instrument under seal." See also *Tyler v. Winslow*, 15 Ohio St. 364.

Again a specialty is defined to be, "An obligation or contract under seal; an instrument sealed and delivered." 22 Am. & Eng. Encyclop. Law, 905.

In the case of *Stockwell v. Coleman*, 10 Ohio St., the court says on page 40, that "the term 'specialty,' in the strict and early use of the word, was regarded as only applicable to bonds, deeds, or other instruments under seal."

In the case of *Marriott v. Thompson*, Willes Report, the court says on page 189: "Whenever a man by deed obliges himself to pay money to another, it is a debt by specialty."

A mortgage is an instrument whereby a debt or duty is acknowledged to be due or owing to another, and very often an agreement, contract, or promise in writing, is also contained therein. In 1868, when the mortgage in question was executed, the law required a mortgage to be under seal, that is, sealed and delivered.

It is, therefore, clear that a mortgage is a specialty, and that an action for the foreclosure thereof, and sale of the premises, comes within the provisions of section 4980, and is barred in fifteen years after the cause of action accrued, unless extended by virtue of the provisions of section 4993. No such extension of time appears in this case, and it therefore follows that the circuit court erred in overruling the third cause of demurrer to the petition and in sustaining the demurrer to so much of the answer as pleads the statute of limitations, and in the judgment rendered against the defendants below.

The case of *Longworth v. Taylor*, 2 Cin. Sup. Ct. Rep. 89, which seems to regard the limitation in such cases to be twenty-one years, is very meagerly reported, and there is some error or mistake, either in the report of the case or in the decision thereof. The syllabus is certainly not now law in this state.

The case of *Fisher v. Mossman*, 11 Ohio St. 42, correctly holds that the bar of the note, or other instruments secured by mortgage, does not necessarily bar an action on the mortgage. The case did not show that the action was commenced more than fifteen years after it accrued, and also fails to show that the fifteen years' statute was pleaded against the action on the mortgage. The only statute which the opinion of

the court mentions, is the four years' statute in favor of administrators.

The case does not decide that the statute of twenty-one years applies to an action for the foreclosure of a mortgage.

Neither does the case of *Bailey v. Smith*, 14 Ohio St. 396, 411, 84 Am. Dec. 885, so decide. Both of these cases have often been cited as holding that an action for the foreclosure of a mortgage and sale of mortgaged premises, is not barred short of twenty-one years; but a careful examination of these cases will show that no such question is decided in either of them.

A mortgage may be made to secure an account, and an action on an account may be barred in six years, while the action on the mortgage would not be barred short of fifteen years.

The payment of the account would extinguish the right of action on the mortgage, and in an action for the foreclosure of the mortgage after action on the account is barred, the presumption of payment of the account arising

from the lapse of time, might be used as an item of evidence to prove payment, but such presumption would not be conclusive and might be overcome by satisfactory proof showing that in fact such account remains unpaid. In such case the lapse of six years is not the equivalent of payment. The condition of the mortgage is for payment of the account, and not for its bar by the statute of limitations. *Allen v. Everly*, 24 Ohio St. 97; *Bissell v. Javdon*, 16 Ohio St. 493.

But when a note is secured by the mortgage, the statute of limitations as to both is the same; and therefore the mortgage will be available as a security to the note in an action for foreclosure and sale until the note shall be either paid or barred by the statute; but in such case an action for foreclosure and sale cannot be maintained on the mortgage after an action on the note shall be barred by the statute of limitations.

The judgment of the Circuit Court is reversed, and judgment rendered on the findings of facts in favor of defendants below.

MASSACHUSETTS SUPREME JUDICIAL COURT.

C. E. BUSWELL *et al.*

SUPREME SITTING OF ORDER OF IRON HALL.

(.....Mass.....)

1. A receiver of a foreign corporation appointed at its domicile, to whom all the assets of the corporation have been assigned as fully as can be done in accordance with a decree of the court, may be allowed to intervene in Massachusetts and be heard in a proceeding for the appointment of a receiver of the property of the corporation found within the latter state.
2. The legal title to the 20 per cent of assessment received by local branches of the order of iron hall, which they are allowed to retain as a reserve fund, which by the law of the order is declared to be the property of the supreme sitting and subject to its control at all times, and which is to be called for in its annual installments after the period of six years and six months, is like the other 80 per cent which is paid over immediately in the supreme sitting, although the possession is for the time retained by the branches.
3. A receiver of the property in Massachusetts of a benefit society incorporated in Indiana may, by the exercise of comity, be ordered, after paying his charges and expenses and the expenses of the suit, to pay over the balance to a receiver in Indiana, where the courts of both states have adopted the same principles governing the distribution of the fund, and it appears by the decree of the Indiana court that it will admit the proof of claims against the

funds made in the Massachusetts court, when it regularly certifies them, subject to such revision in Indiana as justice may seem to the court to require, and will distribute the fund so that benefit certificate members in Massachusetts will receive the same proportionate dividends as members in Indiana and other states.

(April 16, 1894.)

A PPEALS by petitioners from orders of the Superior Court for Worcester County, made pending proceedings for the settlement of the affairs of the subordinate lodges of the Order of Iron Hall situated in Massachusetts by means of a Massachusetts receiver refusing to permit petitioners, who were the Indiana receiver, and alleged creditors living in Massachusetts, to intervene and be heard in the proceedings. *Reversed.*

The case sufficiently appears in the opinion. *Messrs. George Fred. Williams and G. W. Anderson*, for appellants:

The appointment of a receiver under the general equity powers of the court determines no right, changes no lien, dissolves no attachment.

Hubbard v. Hamilton Bank, 7 Met. 840.

The effect of the appointment of a receiver is not to oust any party of his right to the property, but merely to retain it for the benefit of the party who may appear to be entitled to it; and when the party entitled to the estate has been ascertained, the receiver will be considered as his receiver.

Quincy, M. & P. R. Co. v. Humphreys, 145

NOTE.—The exercise of comity toward a receiver appointed in another state while guarding the rights of local creditors, is well illustrated in the above case by the direction to a local receiver to turn over assets for distribution to the receiver in another state. The case shows the modern liberal tendency toward recognition of foreign receivers.

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so far as it can be done without prejudice to the rights of local creditors.

For a review of the authorities as to the rights of a receiver as to property outside of the jurisdiction in which he is appointed including his right to bring suit, see *note* to *Gilman v. Hudson River Boot & Shoe Mfg. Co. (Wia.) ante*, 52.

U. S. 83, 97, 86 L. ed. 632, 637; *Union Bank of Chicago v. Bank of Kansas City*, 136 U. S. 223, 236, 84 L. ed. 341, 346; Dan. Ch. Pr. 5th ed. *1742; Kerr, Receivers, 158, 159; *State v. Railroad Comrs.* 41 N. J. L. 235; *Willink v. Morris Canal & Bkg. Co.* 4 N. J. Eq. 377; *Kincaid v. Dwinelle*, 59 N. Y. 548; *First National Bank of Bethel v. National Pahquoque Bank*, 81 U. S. 14 Wall. 383, 20 L. ed. 840.

Doubtless a receiver for a foreign corporation may be appointed on application of proper parties in interest, for the purpose of preserving property in danger of waste or dissipation, although even in these cases the courts move with exceeding caution.

See *Redmond v. Hoge*, 8 Hun, 171; High, Receivers, § 306; *Hamilton v. Accessory Transit Co.* 26 Barb. 46; *Murray v. Vanderbilt*, 89 Barb. 141; *DeBemer v. Drew*, 57 Barb. 438.

A court of equity acts *in personam* only, and has no power to act *in rem*, except under special statutory authority.

See *Spurr v. Seville*, 8 Cush. 578; *Felch v. Hooper*, 119 Mass. 53; *McCann v. Randall*, 147 Mass. 81, and cases cited; *Wilson v. Martin*, *Wilson Automatic Fire Alarm Co.* 149 Mass. 24, 8 L. R. A. 309, 151 Mass. 515; *Atlas Bank v. Nahant Bank*, 23 Pick. 438; 3 Pom. Eq. Jur. § 1317; 1 Pom. Eq. Jur. §§ 134, 135, 170; *Booth v. Clark*, 58 U. S. 17 How. 322, 15 L. ed. 104.

We can find no case of a receivership for distribution in accordance with insolvency principles, except under statutory authority.

Quincy, M. & P. R. Co. v. Humphreys, supra; *Gaither v. Stockbridge*, 67 Md. 222; 3 Pom. Eq. Jur. § 1317; 1 Pom. Eq. Jur. §§ 134, 135, 170.

The appointment of a receiver to collect the fund in this commonwealth may be sustained as an equitable proceeding to facilitate the settlement of the affairs of an insolvent corporation in the state under whose laws that corporation was created.

Life Assn. of America v. Rundle, 103 U. S. 232, 26 L. ed. 337; *Parsons v. Charter Oak L. Ins. Co.* 81 Fed. Rep. 805; *Fry v. Charter Oak L. Ins. Co.* Id. 197; *Weingartner v. Charter Oak L. Ins. Co.* 32 Fed. Rep. 314; *Williams v. Hintermeister*, 26 Fed. Rep. 889; *National Trust Co. of New York v. Miller*, 83 N. J. Eq. 155; *Hurd v. Elizabeth*, 41 N. J. L. 1.

Those who deal with a foreign corporation subject themselves to the laws of the government which creates that corporation.

Canada Southern R. Co. v. Gebhard, 109 U. S. 527, 27 L. ed. 1020.

Failey should have been admitted as a party and a receiver appointed here for the purpose of administering all the assets of the Indiana corporation according to the law of Indiana. The existing receivership can be supported on no other principle of equitable jurisprudence.

Chafes v. Fourth Nat. Bank of New York, 71 Me. 514, 36 Am. Rep. 345; *Bank of Augusta v. Earle*, 88 U. S. 13 Pet. 519, 10 L. ed. 274; *Runyan v. Coster*, 39 U. S. 14 Pet. 122, 10 L. ed. 332; *Tombigbee R. Co. v. Kneeland*, 45 U. S. 4 How. 16, 11 L. ed. 855.

Mr. Failey is a statutory receiver, and not a mere officer of a court of equity *pendente lite*. Ind. Rev. Stat. 1888, § 1223, chap. 5; *Quincy, M. & P. R. Co. v. Humphreys*, and *Union Bank* 23 L. R. A.

of Chicago v. Bank of Kansas City, supra; *Gluck & B. Receivers of Corporations*, §§ 2, 7, 11, p. 35, *note*; High, Receivers, § 244.

A receiver who is also an assignee under an instrument executed by the owner of the property has always been held to have title in foreign jurisdictions.

Graydon v. Church, 7 Mich. 36; *Hazard v. Durant*, 19 Fed. Rep. 471; *Failey v. Talbee*, 55 Fed. Rep. 892.

There is no doubt that the great weight of American authority permits the attachment of the assets of a foreign debtor to hold as against the officer of a foreign court who would otherwise take them for *pro rata* distribution.

Taylor v. Columbian Ins. Co. 14 Allen, 358.

The rule in England is otherwise.

See 5 Harvard L. Rev. p. 221; Foote, Private International Law, 2d ed. pp. 302-308; *Moore v. Bonnell*, 31 N. J. L. 90; *Varnum v. Camp*, 18 N. J. L. 326, 25 Am. Dec. 476; *Wharton, Conf. Laws*, §§ 390, 799; *Cramton v. Valido Marble Co.* 1 L. R. A. 120, 60 Vt. 291; *Ogden v. Saunders*, 25 U. S. 12 Wheat. 213, 6 L. ed. 606; *Cook v. Moffat*, 46 U. S. 5 How. 295, 12 L. ed. 159.

The American courts, after a good deal of discussion, rejected the English rule.

Blake v. Williams, 6 Pick. 286, 17 Am. Dec. 372; *Daves v. Head*, 3 Pick. 128; *Holmes v. Remsen*, 4 Johns. Ch. 460, 1 L. ed. 902, 8 Am. Dec. 581; *Burk v. M'Clain*, 1 Hard. & McH. 336; *Taylor v. Geary*, Kirby, 313; *Harrison v. Sterry*, 9 U. S. 5 Cranch, 239, 3 L. ed. 104; *Taylor v. Columbian Ins. Co. supra*; *May v. Wannemacher*, 111 Mass. 202; *Faulkner v. Hyman*, 142 Mass. 58.

No one ever heard of a creditor's bill for the benefit of the citizens of a single state.

Ex parte Virginia, 100 U. S. 339, 367, 25 L. ed. 676; *McPherson v. Blacker*, 146 U. S. 89, 36 L. ed. 878; *United States v. Oriskany*, 93 U. S. 542, 28 L. ed. 533.

A careful examination of the authorities discloses no case disallowing the title of a foreign assignee in insolvency, or a foreign receiver for the purpose of equitable distribution, except to respect the lien of an attaching creditor.

All that has been settled by the decisions, to which we have been referred on this subject, is, that our courts will not sustain the lien of foreign assignees or receivers in opposition to a lien created by attachment under our own laws.

Runk v. St. John, 29 Barb. 587.

These plaintiffs by the very act of coming into a court of equity are estopped from asking any inequitable preference; or, what is the same thing, objecting to an equal, *pro rata* distribution of the funds of the defendant corporation.

Foster, Fed. Pr. § 243, and cases cited; *Burnham v. Bowen*, 111 U. S. 776, 28 L. ed. 596.

If Mr. Failey's claim rested merely on comity—if he had no assignment—it is good, for Indiana recognizes the right of a foreign receiver to sue in that state, if authorized by the decree of the court appointing him.

Metzner v. Bauer, 98 Ind. 425.

Foreign creditors are treated as well as domestic creditors in our insolvency courts.

Scribner v. Fisher, 2 Gray, 43; *Baldwin v.*

Itale, 68 U. S. 1 Wall. 223, 17 L. ed. 531; *Kelley v. Drury*, 9 Allen, 27; *Dehon v. Foster*, 4 Allen, 545, 7 Allen, 57.

The tendency of modern adjudications is in favor of a liberal extension of interstate comity, and against a narrow and provincial policy, which would deny proper effect to judicial proceedings of sister states under their statutes and rights claimed under them, simply because technically, they are foreign, and not domestic.

The principle is universal that the assets of insolvent corporations are to be regarded as a trust fund for the benefit of all the creditors, and "that kind of diligence by which one creditor of an insolvent corporation secures to himself a prior right to its property, and an unequal advantage over other creditors, is without merit, and more selfish than just."

Gilman v. Hudson River Boot & Shoe Mfg. Co. ante, 56, 84 Wis. 60; *Booth v. Clark*, 58 U. S. 17 How. 322, 15 L. ed. 164, as explained by *Mr. Justice Shiras in Parsons v. Charter Oak L. Ins. Co.* 31 Fed. Rep. 305; *Gluck & Becker, Receivers of Corporations*, §§ 2, 7, 11, and cases cited; *Bockover v. Life Assn. of America*, 77 Va. 85, *Boulware v. Davis*, 9 L. R. A. 601, 90 Ala. 207; *Merchants Nat. Bank v. McLeod*, 38 Ohio St. 184; *Lycoming F. Ins. Co. v. Wright*, 55 Vt. 526; *Runk v. St. John*, 29 Barb. 585.

When a railroad corporation becomes insolvent, the application for receivership is based mainly on the danger of attachment at law.

Foster, Fed. Pr. § 240, p. 397, § 246.

These receiverships extend through several states, and the property is under the jurisdiction of various courts. Technically, no receivership is ancillary.

Mercantile Trust Co. v. Kanauba & O. R. Co. 39 Fed. Rep. 837; *Re U. S. Rolling Stock Co.* 57 How. Pr. 16.

But by comity, questions of accounting, etc., are ordinarily contested in only one court, generally the court first taking jurisdiction and appointing a receiver, and after the decree of that court, similar decrees are entered, practically by consent, in the other courts.

Foster, Fed. Pr. § 242; *Jennings v. Philadelphia & R. R. Co.* 23 Fed. Rep. 569; *Central Trust Co. of New York v. Wabash, St. L. & P. R. Co.* 29 Fed. Rep. 618; *Reynolds v. Stockton*, 140 U. S. 254, 272, 55 L. ed. 464, 470; *Bank of Augusta v. Earle*, 38 U. S. 13 Pet. 590, 10 L. ed. 808.

Mr. Louis C. Southard, for Hiram Williams *et al.*, appellees:

It is the duty of the courts of this commonwealth to so administer the trust in its charge, to wit, the funds belonging to the order of the iron hall within the state of Massachusetts and such other funds as may hereafter come to the possession of the receiver appointed by the courts of this commonwealth, as shall best serve the interests of the Massachusetts certificate holders as a whole; and that the rights of these certificate holders are paramount to those of the receiver for Indiana or the receiver for Massachusetts.

Fawcett v. Supreme Sitting, Order of the Iron Hall, Sup. Jud. Court Ct., opinion unpublished.

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Messrs. W. S. B. Hopkins, H. L. Parker and A. S. Pinkerton for appellee Buswell. *Mr. C. U. Bell* for David Beattie *et al.*, appellees.

Mr. George L. Magberry for Libby, Higginbotham & Dow.

Messrs. Lowell, Stimson & Lowell for Suffolk Savings Bank.

Messrs. Joseph Bennett and Freeman Hunt for William E. Barnes *et al.*

Mr. Prescott Keyes for Joshua B. Stearns.

Field, Ch. J., delivered the opinion of the court:

On October 26, 1892, James F. Failey the receiver of the defendant corporation, appointed by the superior court of Marion county, in the state of Indiana, presented his petition to the superior court of this commonwealth to be admitted as a party respondent in the present suit; and he prayed that some person might be appointed as receiver ancillary to the proceedings in Indiana, with the usual authority to take possession of all the property of the corporation in this commonwealth, to collect all debts due to said corporation here, and that after deducting the proper charges and expenses, to be determined by the superior court here, said ancillary receiver should be ordered to "pay over to said Failey, receiver, for distribution to the membership of the said order, including the citizens of this state, said funds: provided, that before such remittance be made this court reserves the right to require assurances from the Marion superior court, aforesaid, that upon the receipt of said funds, and in making the distribution, all citizens of this state, members of said order, or creditors thereof, shall be entitled to receive as much, ratably, in proportion to their several claims, as the citizens of Indiana, or any other state." This petition was denied by the superior court here, and Mr. Failey appealed to this court. On December 31, 1893, Joshua B. Stearns filed in the superior court his petition, averring that he was a member of local branch No. 34 of the order, existing at Cambridgeport, in the county of Middlesex, and was the owner of the certificate No. 35,953, for the sum of \$1,000, issued by the defendant order under date of January 30, 1835; and he recited various orders and decrees made by the court in Indiana, and made, in substance, the same prayer as Mr. Failey. George W. Whitney was also admitted as a copetitioner with Mr. Stearns. Both Stearns and Whitney were admitted as parties defendant, and at the hearing on the petition they offered competent evidence to prove the allegations of the petition, to which the plaintiff objected, upon the following grounds: "First, that the petitioners, being defendants, had no standing in court for the relief sought for in the petition; second, that the allegations of the petition were insufficient to warrant the relief sought for." The presiding justice sustained the objections and dismissed the petition, and the petitioners appealed. The report of the justice of the superior court before whom the hearing was had then proceeds as fol-

lows: "It was then stipulated by the parties, in open court, that if the decree dismissing the petition was erroneous, upon the ground that the petitioners had a right to be heard upon their petition, although defendants in the case, the said decree should be annulled, and the petition should be sent back for a hearing thereon, provided that the allegations of the petition were sufficient to authorize a decree, in the discretion of the court, for the petitioners. It was further stipulated that the twelfth edition of the constitution and by-laws of the defendant corporation should be considered a part of the record, and that any part thereof may be referred to at the argument, but without prejudice to the right of any party to question the accuracy of such constitution and by-laws in any future proceedings; also, that the reports of the receiver on file in this case may be referred to, and arguments may be based upon facts therein stated." Thereupon, the justice, being of opinion that his decree so affected the merits of the controversy that the matter ought to be determined by this court before further proceedings were had, reported the questions to this court.

The bill in the present suit was filed on August 25, 1892, in the superior court for the county of Worcester, by C. E. Buswell, against the supreme sitting of the order of the iron hall, described as "a foreign corporation organized under the laws of the state of Indiana, and having its legal location in the city of Indianapolis and state of Indiana, and doing business in this commonwealth," and "against the local branch No. 36 of the order of the iron hall, located at Worcester, in the county of Worcester, and commonwealth of Massachusetts,—a voluntary association holding a charter from, and working under the jurisdiction of, the supreme sitting of the order of the iron hall," etc.,—and against certain savings banks with which said local branch had deposited the 20 per cent of the amount received from the assessments collected from its members, "which amount constitutes a reserve fund, and is claimed to be the property of, and under the control of, said supreme sitting." The plaintiff, Buswell, was a member of said local branch, and the holder of a benefit certificate for \$1,000. He prayed for a receiver of said local branch, for an injunction, and for a *pro rata* distribution of said reserve fund among the certificate holders of said local branch. This bill was afterwards amended by the plaintiff so that it should stand as brought "in behalf of himself, and any and all other certificate holders of the order of the iron hall hereinafter mentioned who may hereafter be joined as parties herein;" and the prayer of the bill was amended so that it should read as follows: "That a receiver may be appointed to take charge of all the business, property, goods, effects, and assets of said defendant, the supreme sitting of the order of the iron hall, within this commonwealth, and distribute the same among certificate holders of the local and sisterhood branches organized in, and creditors residing in, this commonwealth, according to law and

the order of the court." And an order was obtained that all such local and sisterhood branches pay over and deliver to the receivers appointed by the court all property of the principal defendant, and all moneys and property deposited by the officers of the local branches in this commonwealth, and by a subsequent order the receiver was empowered "to receive any and all property out of this commonwealth belonging to said defendant corporation, the supreme sitting of the order of the iron hall, and deposited in any banking institution, or with any corporation, association, or individual, by officers or trustees of local branches in this commonwealth, and all moneys, funds, and property, wherever situated and being, which, in law or equity, belong to certificate holders, members of subordinate branches, or lodges, within this commonwealth." The receiver appointed here holds a large sum of money which he has collected from these local branches, or from their officers or depositaries. A decree has been entered in the superior court to the effect that the reserve fund be distributed "among the members of local and sisterhood branches organized within this commonwealth, the funds of which branches have been transferred to the receiver here appointed," etc. The decree also declares that what is called the "general fund," as well as the paraphernalia, etc., is to be deemed to be the property of the local and sisterhood branch, the members of which contributed to the same, and that this property is to be charged with the debts of such branch, and directs that it shall be repaid or redelivered to such branch, provided that the branch "has so far maintained its organization as to empower some person to receive the same;" otherwise, it is to be applied to the payment of the debts of the branch, in full or *pro rata*, as the case may be, the surplus, if any, to be distributed among the members of the branch to which the property belongs.

Although the facts averred in the petition of Mr. Failey and the petition of Mr. Stearns have not been found to be true, yet, for the purpose of determining the questions of law before this court, the averment of facts in their petitions must be taken to be true. The principal facts are that Mr. Failey was appointed receiver on August 23, 1892, by the court in Indiana, under the laws of which state the corporation was organized. It is not contended that the court in Indiana did not have jurisdiction over the defendant, or that the appointment of a receiver was not within the power of that court. The receiver appointed by that court was empowered to sue—in his own name, as receiver—all persons within or without the state of Indiana, and to receive and collect all the property of the defendant within or without that state, and all persons within or without that state were ordered to deliver said property to said receiver. The defendant, its officers and agents, were ordered to assign and deliver to said receiver all its property and effects; and it appears that the defendant has assigned and transferred to said James F. Failey, as such receiver, "all the moneys and securities of every kind belonging to the reserve fund

of said supreme sitting, and held by each of the branches thereof, and the officers of such having the same in possession and control." Mr. Failey, then, on the facts averred, is not merely a receiver, but he is an assignee of the reserve fund of the order held by the several branches, as fully as the court in Indiana, and the assignment of the supreme sitting of the order, in accordance with the decree of that court, can make him an assignee.

Without considering the right of a receiver appointed by a court of equity in a foreign jurisdiction, under general equity powers, to sue or intervene in his own name in this commonwealth, we think it clear that Mr. Failey, on the allegations of his petition, must be taken to be, in effect, an assignee of a foreign insolvent corporation, acting under a court of competent jurisdiction of the state by which the corporation was created, and in which its principal offices were situated, and its principal business was carried on. We think such an assignee has a standing to intervene in and be heard on a proceeding in this commonwealth for the appointment of a receiver of the property of the corporation found here. We assume that the proceedings in this commonwealth, whether they be regarded as ancillary to the proceedings in Indiana, or as independent proceedings, are within the jurisdiction of the superior court here, and as no creditor of the defendant has appealed from the decrees entered by the superior court here, that the creditors are satisfied therewith. See Stat. 1892, chap. 435. The receiver reports that he holds only \$697.85 money belonging to the general fund, with a small amount of other property, against which there are outstanding claims far exceeding the amount of the money and property belonging to this fund in his hands. The amount of the claims of creditors upon this fund is not stated in the papers before us. The only dispute between the parties is with regard to the benefit and reserve funds, and the rights of benefit certificate holders thereto. This renders it necessary to examine the constitution and laws of the order. Law 1, section 1, is as follows: "There shall be attached to this order a benefit fund, in which members may participate (except social members), as they may severally elect, either in the sum of one thousand dollars, eight hundred dollars, six hundred dollars, four hundred dollars, or two hundred dollars, on which they shall pay the rates, and be entitled to the benefits, prescribed in the following table," etc. One of the objects of the organization, as stated in article 2, section 3, of the Constitution, is as follows: "To establish a benefit fund from which those who have held membership in the order for thirty days or more may, should they so desire, on proper application, and complying with all the rules and regulations governing said benefit fund, become participants therein, and may receive the benefit of a sum not exceeding twenty-five dollars per week, nor more than one half the amount of the benefit certificate held by each member, when, by reason of disease or accident, they become totally disabled from following any avoca-

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tion, or, in case of death, if a member for more than two years, one half of the amount of the benefit certificate will be paid, less benefit received, or an amount of not more than one thousand dollars when they have held a continuous membership in the order for seven years: provided, however, that the sum total drawn from this order by any of its members shall never exceed, in sick, disability, death, and final benefits, the sum named in the benefit certificate." This benefit fund is derived from assessments upon the holders of benefit certificates, which assessments are made by the supreme sitting of the order from time to time, and out of which benefits are paid in case of the sickness, disability, or death of a member. The assessments are made through the local branches, and 80 per cent thereof are sent to the supreme cashier of the supreme sitting. Law 2, section 1, is as follows: "Twenty per cent of the amount received by each branch on each assessment shall be set aside and retained as a reserve fund, which fund is the property of the supreme sitting, and shall be subject to its control at all times, as hereinafter provided. At the expiration of the first term of six years and six months from the date of the organization of the order, one seventh of the reserve fund then on hand shall be called for by the supreme accountant, and used by the supreme cashier in the payment of benefits, and annually thereafter one seventh of the reserve fund on hand shall be called for, and used in like manner, unless otherwise ordered by the supreme sitting." The greater part of the property in the hands of the receiver appointed by the superior court here is derived from this reserve fund held by the local branches organized within this commonwealth.

An examination of the various provisions of the constitution and laws of the order convinces us that the legal title to this reserve fund is in the supreme sitting of the order, and not in the different local branches; that the 20 per cent of the assessment retained by each local branch differs from the 80 per cent transmitted to the supreme sitting mainly in this: that the possession and supervision, subject to the constitution and laws, remain with the local branches. The whole fund is for the protection of, and payment of benefits to, holders of benefit certificates; and the reserve fund seems to us essentially a part of the benefit fund, although it may be in the nature of a safety fund to insure the payment of maturing certificates. See *Burdon v. Massachusetts Safety Fund Assn.*, 147 Mass. 360, 1 L. R. A. 146. We infer that the superior court here has not regarded the reserve fund held by each branch as the special property of that branch. It has ordered all the reserve funds received from all the branches in this commonwealth to be distributed as one fund among the certificate holders of all said branches. It appears, indeed, from the receiver's second report, that there are some branches in this commonwealth which have transferred the reserve fund in their possession to Mr. Failey, as receiver; and we infer that the decree of the superior court here does not admit certificate holders of these branches

as claimants to the fund in the possession of the receiver here. It appears by the petition of Mr. Failey that the court in Indiana has authorized him to collect all the moneys belonging to the order in the possession of all the branches, wherever organized, for the purpose of equally and ratably distributing them among the creditors and certificate holders of the corporation, whether residing in Indiana or elsewhere, and the purpose of Mr. Failey, in filing his petition here, was to obtain the funds in the hands of the receiver here for such distribution. Mr. Failey represents that in the states and territories of the United States there are about 69,190 members, of whom about 10,002 are Massachusetts members, and that he has in his possession, as receiver, more than \$700,000 in money. The second report of the receiver appointed here shows that he has in his hands about \$280,000, which, with the exception of the amount hereinbefore stated-as received from the general fund, has been received from the reserve fund or the benefit fund, nearly all being received from the reserve fund found in the possession of the branches in this commonwealth. Under the constitution and laws of the order, we regard the whole benefit fund, including the reserve fund, as held in trust for the holders of all the benefit certificates of the order. *Coe v. Washington Mills*, 149 Mass. 548. Although the possession of the fund reserved out of the assessments upon the members of each branch may be in that branch, the legal title is in the supreme sitting. This reserve fund, as held by each branch under the constitution and laws, was not intended to be used exclusively in paying benefits to the members of that particular branch, but was ultimately to be transmitted to the supreme cashier of the supreme sitting, to be used for the payment of benefits generally. Having been kept apart from the general benefit fund, the reserve fund in the possession of each branch is shown to have been derived exclusively from assessments upon the past or present certificate members of that branch; and in that respect it may differ from the benefit fund generally, although, in the accounts of property kept by the supreme sitting, it should appear what proportion of the general benefit fund in its possession has been derived from each branch.

It is impracticable to lay down a general rule which must govern all receivers, appointed here, of the property of foreign corporations in this commonwealth. If any person has obtained, by attachment or otherwise, any valid lien on the property of the corporation in this commonwealth, such lien is not dissolved by the filing of the bill, and the appointment of a receiver, but must be enforced. *Hubbard v. Hamilton Bank*, 7 Met. 340; *Taylor v. Columbian Ins. Co.* 14 Allen, 353; *Folger v. Columbian Ins. Co.* 99 Mass. 267. When there is no such lien, the general principle is that the property should be so administered that all claimants should receive their equal ratable shares of the whole property of the corporation; and the court here will, if necessary, protect claimants who are citizens of Massachusetts in their right to receive such shares. This is the principle

adopted by Stat. 1890, chap. 321, relating to the insolvency of foreign corporations in this commonwealth. It is there provided that it shall be the duty of the assignees appointed here "so far as practicable to distribute such assets in such manner that all creditors of the insolvent corporation whether within this state or elsewhere shall receive proportionate dividends out of the assets of said corporation whether the same are within the control of the assignees or not." The same principle was adopted in the settlement of the insolvent probate estates of deceased persons not resident within this commonwealth, before there was any statute on the subject. *Davis v. Estey*, 8 Pick. 475; *Daves v. Head*, 3 Pick. 128. The subject is now regulated by statute (Pub. Stat. chap. 138), and the same principle is adopted. The fourth section of this chapter is as follows: "To this end his estate shall not be transmitted to the foreign executor or administrator until all the creditors who are citizens of this commonwealth have received the just proportion that would be due to them if the whole estate of the deceased, wherever found, that is applicable to the payment of common creditors, were divided among all the creditors in proportion to their respective debts, without preferring any one species of debt to another; and no creditor who is not a citizen of this commonwealth shall be paid out of the assets found here, until all those who are citizens have received their just proportion as provided in the preceding section."

In the present case, the holders of benefit certificates do not seem to us to be common creditors of the defendant corporation, and the bill, in the present case, was not brought by a single creditor to collect a debt. It was brought by a holder of a certificate for the common benefit of himself and other holders of certificates who, in a sense, are the beneficiaries of the benefit and reserve funds. The holders of certificates have been contributors to these funds which were intended to be used for the payment of benefits to all such holders. It has become impracticable for the corporation to carry out the purposes for which it was organized. The claims of the certificate holders have, in general, not matured; but, as an equitable method of determining the amount due them from these funds, the claims have been made up, both in Indiana and here, by taking the sum of all the assessments paid by each certificate holder in good standing in the order, and deducting from it all amounts received by him for sick or disability benefits. As these funds were intended to constitute a general fund for the benefit of all holders of benefit certificates who were members of the order, we think it equitable that, so far as practicable, they should be administered as a general fund for the benefit of all certificate holders. It becomes then a question of the best practicable means of doing this. It would be extremely difficult to apply the rule established by Pub. Stat., chap. 138, § 4, to the present case, if there are funds and local branches in all, or nearly all, the states of the United States. Some branches in one or more of the states, under the laws of the order, may have sent their

reserve funds to the supreme sitting before the institution of any proceedings in court, and the proportion between the amount of the funds and the amount of the claims of the certificate holders in any one state must differ from that in every other. It might be almost impossible to determine, in any state, what would be the ratio between the aggregate of the funds, wherever found, and the aggregate of all the claims of all the certificate holders, wherever they reside. If the courts of each state should distribute all the funds found within the state exclusively among the certificate holders resident in that state, there, necessarily, must be great inequality in the distribution. There is no statute which compels the court to proceed in any particular manner, in the case at bar. It has been said, in argument, by the counsel for Mr. Failey, that by granting his petition the certificate holders resident in Massachusetts will probably receive more than under the decree made by the superior court. If this were certain, then, if that decree were carried into effect, it might be equitable that the certificate holders who have shared in the benefits of that decree should also be permitted to prove their claims before the court in Indiana, in order to obtain another dividend, so that they may receive, in the whole, the same proportionate dividend as other members. But this is not certain, and if it were, it ought not to affect the general principles governing the distribution, although, under some circumstances, it might affect the mode of distribution; and, if the larger part of the funds is in the hands of the receiver in Indiana, that fact deserves to be considered. If all members who are holders of benefit certificates ought to share proportionately in the whole fund, there ought not to be a decree that the fund here should be distributed among the members of the local branches existing here, if thereby such members would obtain more than their just proportion of the whole sum. If the money being transmitted to the receiver in Indiana were in danger of being misappropriated or misapplied, or if the difficulties attending the transmission of the money and the proof of claims there by the certificate holders who are members of the local branches in this commonwealth were so great as to make such proceedings impracticable, we have no doubt of the power of the court here to order a distribution of their proportionate shares among the certificate holders who are inhabitants of Massachusetts, or among those certificate holders who are shown to have contributed to the funds in the hands of the receiver here, whether inhabitants or not. From the necessity of the case, the court here must have some discretion, and must reasonably protect the rights of the citizens of the commonwealth in the administration of the trust. But in the administration of such a trust, when the property of the trust is found in many different states, comity requires that we should do all that safely can be done to insure, as far as practicable, a speedy, equitable distribution of the whole property among those entitled to it. One difficulty in this case, as we infer from papers submitted to us, which are not strictly a part of the record be-

fore us, may be that by the decree of the court here the general creditors of the local branches are not permitted to prove their claims against the benefit or reserve fund, but only against the general fund, which has been found to be the property, severally, of the different local branches; and this general fund has been ordered to be repaid to the branches, severally, from which it has been received, provided they have so far maintained their organization as to empower some person to receive the same. We infer that such general creditors are permitted, in Indiana, to prove their debts against the whole fund in the hands of the receiver appointed there, *pari passu* with the holders of certificates. We are not informed whether such debts are large, nor what is the amount of the general fund in the hands of the receiver there. If this difference in the administration is not such as considerably to affect the debts of the certificate holders, we do not think it is sufficient to affect our decision. We infer that the court in Indiana and the court here have adopted the same principles in determining what holders of certificates are entitled to prove claims, and in what manner the amount of the claims is to be made out. If the court in Indiana will substantially administer the whole benefit and reserve funds equally and ratably among all the benefit certificate holders who are members of the order,—as, if the allegations of the petitioners are true, it has undertaken to do,—we think, on the facts stated in the petitions, that it should receive the aid of the courts here in doing this. The receiver here should be allowed his charges and expenses, and all expenses of the suit here should be paid, and he should be protected against all suits and claims; but the balance of the reserve and benefit funds should, if the allegations of the petitions be found to be true, be transmitted to the receiver in Indiana provided it appears by the decree of that court that it will admit the proof of claims against the reserve and benefit funds made in the court here, when regularly certified by the court here, subject to such revision by the court in Indiana as justice may seem to the court to require, and will distribute the whole fund in its control so that the benefit certificate members of the branches in Massachusetts shall receive the same proportionate dividend as the benefit certificate members or branches in Indiana and in other states who are admitted to share in the fund. If the time is not extended so as to admit such an allowance of the proof of these claims in the Indiana court on an equality with others when the money is in fact ready to be transmitted, then the petitions should be dismissed. See *National Trust Co. of New York v. Miller*, 38 N. J. Eq. 158; *Parsons v. Charter Oak L. Ins. Co.* 31 Fed. Rep. 305; *Fry v. Charter Oak L. Ins. Co.* Id. 197; *Jennings v. Philadelphia & R. R. Co.* 23 Fed. Rep. 569.

The petitioners, including Mr. Failey, have a right to be heard, on their petitions, and are not strictly to be regarded as either plaintiffs or defendants, but as persons alleging an interest in the property in the custody of

the court, and intervening in the cause. The case is remanded to the superior court, with instructions to hear the petitions, and to proceed therein in accordance with this opinion.

So ordered

ARKANSAS SUPREME COURT.

J. D. VAN WINKLE, *Appt.*,

v.

W. T. SATTERFIELD.

(....Ark.....)

1. A clerk or salesman employed by the year in a retail store, without any agreement for Sunday labor, cannot be discharged for refusal to attend the store during certain hours on Sunday to protect the goods while people are passing through it to a post-office in the rear, although he had, before making the present contract, been in the habit of giving such Sunday services while employed in the store.
2. An employer has the burden of proof to show that a servant wrongfully discharged might have obtained similar employment to reduce damages for breach of the contract.

(March 31, 1894.)

APPEAL by defendant from a judgment of the Circuit Court for Washington County in favor of plaintiff in an action brought to recover damages for an alleged breach of contract of employment. *Affirmed.*

The facts are stated in the opinion.

Messrs. B. R. Davidson and W. S. Pol-lard, for appellant:

Satterfield, according to his testimony, after his discharge made little effort to obtain employment.

Idleness is in itself a breach of social duty and of moral obligation. But if he continue idle, for the purpose of charging another, he superadds a fraud which the law would rather punish than countenance.

Walworth v. Pool, 9 Ark. 394.

It is well settled that where a servant is employed for a particular term, at stipulated wages, and his employer discharges him without cause, before the expiration of the term, he may elect to treat the contract as continuing, keep himself in readiness to perform it on his part, and after the expiration of the term, sue his employer on the contract for the whole of the wages due him by its terms. This is only on the principle that readiness to perform, and tender of performance, is equivalent to performance of the contract on his part.

Gardenhire v. Smith, 39 Ark. 280.

If Satterfield had been wrongfully discharged, he had two remedies: First, he had a

NOTE.—The present case is somewhat unusual in respect to the right to discharge an employé for refusing to work on Sunday, although the law on that point could hardly be doubtful where the labor was itself unlawful.

As to what constitutes Sunday labor, see note to *Quarles v. State* (Ark.) 14 L. R. A. 193.

As to rescission of Sunday contract, see note to *Kelley v. Coagrove* (Iowa) 17 L. R. A. 779.

And as to constitutionality of Sunday laws, see note to *Judefind v. State* (Md.) 22 L. R. A. 721. 23 L. R. A.

right to hold himself in readiness to perform the obligations on his part; wait until the end of the term and sue for the amount due. If he had elected to do this, then his time was his employer's and it was his duty to reduce the amount of damages as much as possible by engaging in similar business at the best wages he could obtain.

Id. 287; *Walworth v. Pool*, *supra*. See also *Wood, Mast. & S.* pp. 289, 340, and notes.

In no case could he cease to try to engage in similar employment, go and engage in an independent business as he did when he became proprietor of a butcher shop, and charge his time up against his former employer, converting to his own use the time that he had sold to his employer.

Polk v. Daly, 14 Abb. Pr. N. S. 156.

If he had so desired to treat the contract as rescinded and at an end, his remedy was to sue on *quantum meruit* for the time he had served. *Gardenhire v. Smith*, 39 Ark. 288.

It is either rescinded or subsisting. If subsisting, his time belongs to his employer, and he has no right to put himself in a position where he cannot give it to his employer by engaging in similar employment, if it is his purpose to charge his employer for such time.

Wood, Mast. & S. p. 240, and notes.

The absolute refusal of Satterfield to perform the duties required of him, and which he had been discharging for over a year, certainly afforded good grounds for his discharge.

Spain v. Arnott, 2 Stark. 256.

This duty had to be performed by some one under the postal regulations of the United States, and plaintiff was only required to keep open just such hours as the postal regulations required. If this was unlawful then it was unlawful on account of a violation of the criminal statutes of the state, and we have the regulations of the general government requiring of its citizens that which the state declares a crime. Such is not the law.

Nelson v. State, 25 Tex. App. 599.

It cannot be contended that the act of opening the store was lawful, while the act of retaining an oversight over the property while the door was open was unlawful.

If Satterfield had knowledge of the services that were to be required, and these services rendered the contract void, he would be a participator. He could not take advantage and contract in this way and refuse to perform that which he well knew was contemplated by both parties.

Waters v. Richmond & D. R. Co. 110 N. C. 338; *Hendy v. St. Paul Globe Pub. Co.* 4 L. R. A. 466, 41 Minn. 188.

Battle, J., delivered the opinion of the court:

This action is based upon a written contract in the following words and figures:

"This contract, made and entered into, this first day of January, 1890, by and between J. D. Van Winkle, party of the first part, and W. T. Satterfield, party of the second part—

"Witnesseth: That, whereas, the said J. D. Van Winkle has this day employed the said W. T. Satterfield to work as salesman, and do all other duties connected with the said J. D. Van Winkle's book and stationery store, now situated in the postoffice building on the south side of the public square in the city of Fayetteville, Ark., for a special period of time, beginning with January 1st, 1890, and extending one year from that date, at a salary of \$60 per month, payable at the end of each month. And I, the said J. D. Van Winkle, do hereby grant the said W. T. Satterfield the privilege of continuing to work in the same capacity above stated, and for the same salary above stated, until January 1st, 1893, if he so desires. And I, the said W. T. Satterfield, do agree that, for the above considerations, I will well and truly perform all duties connected with the book and stationery store to the best of my ability, all things being subject to the direction or management of the said J. D. Van Winkle.

"J. D. Van Winkle.

"W. T. Satterfield."

Satterfield worked for Van Winkle, as a clerk and salesman in a book and stationery store, in the performance of his part of this contract, until the 10th of November, 1890, when Van Winkle discharged him. The following facts show how the discharge occurred: A postoffice was in the rear end of the store. The entrance to it was the front door of the store, which was kept open on Sundays from 8 to 9 A. M., from 12 to 1 P. M., and from 4 to 5 P. M., to enable citizens to get their mails. Satterfield was in the employ of Van Winkle before the written contract was entered into, and had been in the habit of remaining in the store, and watching the goods, while it was open on Sundays. Van Winkle undertook to make railings to protect the goods so that it would not be necessary for Satterfield to remain on Sundays. They were to be made so that they could be put up and taken down at will. In the event they had been made and used, it would have been necessary to put them up on Saturday nights, and carry them to the cellar on Monday mornings. Upon his undertaking to make them, Satterfield proposed to remain in the store while it was open on Sundays; saying that he preferred doing so to putting them up, and carrying them in and out of the store. They were not made, and Satterfield continued to watch the goods on Sundays, with few exceptions, until he was discharged on his refusal to do so any longer. At the time of his discharge he offered to perform his contract,—insisting, however, that it was no part of his duty to remain in the store on Sundays,—and notified Van Winkle, in writing, that he elected to work for him under his contract until the 1st of January, 1893, and thereby offered to do so. But Van Winkle refused to allow him to remain in his employment unless he would stay in the store on the Sabbath, and take care

of the goods, as he had been doing, which Satterfield declined to do, and he was thereupon discharged.

On the 7th of January, 1891, Satterfield commenced this action against Van Winkle, on their contract, to recover the damages caused by its breach. Van Winkle admitted the discharge, but denied that it was wrongful.

In April, 1891, the issues in the cause were tried by a jury. The foregoing facts were proved, and evidence tending to prove that Satterfield was out of employment, after he was discharged and before the trial, for fifty-two days, and that he was in business on his own account for the remainder of the time, was adduced. What the value of his labors in his own business—which were performed after his discharge—was, does not appear.

The jury returned a verdict in favor of the plaintiff for \$104. The court rendered judgment accordingly, and the defendant appealed.

Two questions are presented for our consideration: (1) Was the discharge wrongful? And (2) if so, what damages were recoverable?

1. Was Satterfield wrongfully discharged?

In general a contract to labor by the month or year does not bind the laborer to work on Sunday. The presumption is, men do not intend to violate the law, until the contrary appears. *Johnston v. Com.* 22 Pa. 109. Where an instrument of writing is susceptible of two conflicting constructions, one of which would render the contract unlawful, and the other lawful,—to carry this presumption into effect,—the latter should be adopted. *Gauss v. Orr*, 46 Ark. 129.

Necessity, which can be avoided by the exercise of reasonable precaution, cannot excuse or justify labors on the Sabbath which are forbidden by the statutes. *State v. Goff*, 20 Ark. 289.

The contract sued on did not require the parties to labor on Sunday. Satterfield only bound himself, by it, to discharge the duties of a salesman or clerk. The violation of the Sabbath was not among those duties. The work which the appellant demanded of him could not be lawfully done on the Sabbath. The evidence does not show that there was any necessity for it, or that it could not be avoided by means which would have subserved the purpose for which it was required. On the contrary, it does show that railings would have served the same purpose. Satterfield was, consequently, wrongfully discharged.

2. What damages are recoverable?

A servant who has been wrongfully discharged by his employer before the time for which he was hired has expired has these remedies: "First, he may consider the contract as rescinded, and recover on a *quantum meruit* what his services were worth, deducting what he had received for the time during which he had worked; second, he may wait until the end of the term, and then sue for the whole amount, less any sum which the defendant may have a right to recoup; third, he may sue at once for breach of the contract of employment." He, however, can adopt

only one. *Colburn v. Woodworth*, 81 Barb. 381; 2 Sedgw. Damages, 8th ed. § 665, and cases cited.

If he adopts the third remedy, he can recover the damages which he has sustained down to the day of the trial which is limited to a compensation for the injury suffered by the breach of the contract. The loss of the wages which his employer agreed to pay him constitutes the injury. What, therefore, he has suffered by reason of the loss of the wages, as a rule, is the amount of the damages he is entitled to recover. 2 Sedgw. Damages, 8th ed. § 666, and cases cited; 2 Sutherland, Damages, 2d ed. §§ 692-695, and cases cited; Wood, Mast. & S. 2d ed. p. 246.

It is the breach, and not the time of the discharge, or when the action was brought, that gives the damage. If the consequence for which the law renders the employer responsible develops so as to create an absolute injury at the time of the trial, he is entitled to compensation for such injury. He cannot recover the damages he might suffer after the trial for the obvious reason, they cannot be assessed in advance; for he might, after the recovery of the judgment, obtain employment from other persons, and receive for the residue of the term for which he was hired in the first instance as much as, or more than, he would have been entitled to under the broken contract, and he served his time out, or he might die before his term of service expires, and, in either event, recover more than the law allows, which simply intends to save him from actual loss by the employer's breach of the contract. *Gordon v. Brewster*, 7 Wis. 355; *Fowler v. Armour*, 24 Ala. 194; *Everson v. Powers*, 89 N. Y. 527, 43 Am. Rep. 319; *McDaniel v. Parks*, 19 Ark. 671; Wood, Mast. & S. p. 260; 2 Sutherland, Damages, § 693; 1 Sedgw. Damages, § 85.

When a servant is wrongfully discharged by his employer, it is his duty to use "reasonable efforts to avoid loss by securing employment elsewhere." It is not, however, his duty, if he was employed in any special service, as in this case, to engage in a business different from that in which he was employed. In estimating his damages, therefore, such sums as he, by reasonable diligence, might have earned in a similar business, making allowance for the expense of obtaining employment, should be deducted from the wages he might have earned under the broken contract. *Walworth v. Pool*, 9 Ark. 394; *Gillis v. Space*, 68 Barb. 177; *Costigan v. Mohawk & H. R. R. Co.* 2 Denio, 609, 43 Am. Dec. 758; Wood, Mast. & S. p. 250; 2 Sutherland, Damages, § 693.

The burden of proof is on the employer to show that the servant might have obtained similar employment, for the failure of the servant to obtain other employment does not affect the right of action but only goes in

reduction of damages, and if nothing else is shown "the servant is entitled to recover the contract price, upon proving the employer's violation of the contract, and his own willingness to perform." The fact that the servant might have obtained new employment does not constitute a defense. It is one of the facts to be considered in estimating the servant's loss. *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285; *Gillis v. Space*, *supra*; *Costigan v. Mohawk & H. R. R. Co.* 2 Denio, 659, 43 Am. Dec. 758; *Sutherland v. Wyer*, 67 Me. 64; 2 Sutherland, Damages, § 693; Wood, Mast. & S. p. 245.

To entitle the employer to reduce the damages recoverable by showing that the servant has performed work on his own account, he must prove that the work was incompatible with the performance of the service stipulated to be performed under the violated contract. *Gates v. School Dist. of Fort Smith*, 57 Ark. 370, 10 L. R. A. 186; 2 Sedgw. Damages, § 687.

In *Gardenhire v. Smith*, 39 Ark. 280, cited by appellant, the court held "that where a servant is employed for a particular term at stipulated wages, and his employer discharges him, without cause, before the expiration of the term, he may elect to treat the contract as continuing, keep himself in readiness to perform it on his part, and, after the expiration of the term," sue, and recover of "his employer, on the contract, . . . the whole of the wages due him by its terms," less what he had an opportunity to make by like service after his dismissal, or he may treat "his dismissal as a rescission of the contract," and sue immediately, and recover the value of his services to that time, as upon a *quantum meruit*. The court did not undertake to say, in that case, what relief he would be entitled to, in the event he elects to treat the contract as continuing, and sued upon it, for damages, before the expiration of his term of service. But it did in *McDaniel v. Parks*, 19 Ark. 671. In that case the servant was employed to oversee for the year 1854, was discharged without cause on the 22d of April, and sued on the 28th of August, in the same year, and recovered a reasonable sum for the whole of the term for which he was employed; there being no evidence as to the wages agreed to be paid, or that he received other employment during his term of service. In the report of the case it is not stated when the trial occurred, but it is manifest, from the instructions of the court to the jury, that it took place after the time for which he was hired had expired. The opinions in these two cases are in harmony with the views we have expressed.

Judgment affirmed.

Rehearing denied.

NEW YORK COURT OF APPEALS.

PEOPLE of the State of New York, *ex rel.*
George D. FORSYTH, *Dist. Atty., Resp't.*,

COURT OF SESSIONS OF MONROE
COUNTY, *Appt.*

(141 N. Y. 238.)

1. The power to suspend sentence after conviction is at common law inherent in a court of record, possessing jurisdiction in criminal cases.
2. A statute authorizing a court to suspend sentence in a criminal case after conviction does not encroach upon the constitutional powers of the executive to grant reprieves and pardons.
3. A court cannot preclude itself or its successor from passing the proper sentence whenever such a course appears to be proper by an order suspending sentence during good behavior.

(February 27, 1894.)

APPEAL by defendant from an order of the General Term of the Supreme Court, Fifth Department, affirming an order of the Special Term for Monroe County granting a mandamus directing defendant to pass sentence on John Attridge, who had pleaded guilty to larceny in the second degree. *Reversed.*

The facts are stated in the opinion.

Mr. H. B. Hallock, for appellant:

The court of sessions had power to suspend sentence upon Attridge during his good behavior.

The court of sessions is a court of superior jurisdiction (*People v. Bradner*, 107 N. Y. 1; *Re Jennings*, 10 Hun, 310), possessing common-law powers.

People v. Willett, 102 N. Y. 251; *People v. Bradner*, *supra*.

The power to suspend sentence is a common-law power and is inherent in the court. It has been practiced from the earliest days of the history of jurisprudence in England down to the present time in all countries having the common law.

People v. Mueller (Ill.) 4 Crim. L. Mag. 730, citing Forsyth, Trial by Jury, 193; Washburn's Manual, 256; Hale, P. C. 19, § 2; 1 Chitty, Crim. L. 617, 1st ed. 758; Hawk. P. C. bk. 2, chap. 51, § 8.

The first constitution of the state of New York, adopted in 1777, made the common law of England the law of this state, so far as applicable.

1 N. Y. Const. art. 35; 1 Rev. Stat. 8th ed. 44; *Fuller v. State*, 1 Blackf. 66.

The great weight of authority in this and

other states upholds the power of the court to suspend sentence.

People v. Mueller (Ill.) 4 Crim. L. Mag. 725; *Miller's Case*, 9 Cow. 730; *People v. Graess*, 31 Hun, 332; *People v. Harrington*, 15 Abb. N. C. 161; *People v. Whipple*, 9 Cow. 715; Abbott, Trial Briefs, § 861; *Carnal v. People*, 1 Park. Crim. Rep. 262; 2 Hale, P. C. p. 412; 1 Chitty, Crim. L. 758; 1 Hale, P. C. pp. 368, 370; 4 Bl. Com. chap. 31; Bishop, Crim. Proc. § 1124. See also *Com. v. Dowdican*, 115 Mass. 136; *State v. Addy*, 43 N. J. L. 114, 39 Am. Rep. 547; *Weaver v. People*, 33 Mich. 297; *Com. v. Chase, Thatcher*, Crim. Cas. 269; *Fruits v. State*, 2 Sneed, 232; *Allen v. State, Mart. & Y.* 294; *People v. Reilly*, 53 Mich. 260; *Com. v. Malden*, 145 Mass. 205; *People v. Blackburn*, 6 Utah, 347; *Gibson v. State*, 63 Miss. 241; *State v. Hatley*, 110 N. C. 522; *Sylvester v. State*, 65 N. H. 198.

The practice of suspending sentence has existed and been exercised in the courts of this state ever since the organization of the state government.

Reed's Case, 1 City Hall Rec. 4; *Perkins' Case*, Id. 7; *Johnson's Case*, Id. 21; *Taylor's Case*, Id. 28; *Mitchell's Case*, Id. 41; *Rez v. Ryan*, Cox, Crim. Cas. 109.

The claim that the suspension of sentence in criminal cases is unconstitutional because the pardoning power is vested in the governor is not tenable.

In England the power of pardoning offenses is lodged in the crown, and in general the pardoning power of the king extends to any offense against either the common law or the statute law. 17 Am. & Eng. Encyclop. Law, pp. 318, 319, and cases there cited.

In this state the pardoning power was by the first constitution, Rev. Stat. 8th ed. art. 18, § 41, vested in the governor.

By the second constitution of the state, Rev. Stat. 8th ed. art. 3, § 5, this provision was retained with a single exception,—that the governor was authorized to grant reprieves or pardons in murder cases.

Mr. George D. Forsyth, *Dist. Atty.*, with **Mr. Fred C. Hanford**, *Asst. Dist. Atty.*, for the People:

The court of sessions has no power to suspend sentence and any attempt to exercise that power is a nullity.

People v. Brown, 54 Mich. 15.

The authorities also hold against this power.

People v. Reilly, 53 Mich. 262, dissenting opinion; *People v. Morrisette*, 20 How. Pr. 118; *United States v. Wilson*, 46 Fed. Rep. 748; *People v. Blackburn*, 6 Utah, 347.

See note discussing this power and concluding that it must be conceded, on a careful review of the authorities, that the right by any court, to make such a suspension of sentence,

NOTE.—The above case very greatly strengthens the authorities in favor of the inherent power of a court to suspend execution of sentence upon a convicted person. Nevertheless there are also strong authorities on the other side. See *State v. Voss* (Iowa) 8 L. R. A. 707 (a case of contempt), and authorities cited on both sides of the question 23 L. R. A.

tion in note to *People v. Cummings* (Mich.) 14 L. R. A. 285.

Somewhat akin to this subject is the question of staying execution in a capital case pending appeal, as to which see the *Indiana case of Parker v. State*, post, 359.

does not exist in the absence of statutory authority.

People v. Cummings (Mich.) 14 L. R. A. 285.

A suspension of sentence upon a convicted defendant is in fact a conditional pardon, which the constitution only gives the governor, and while it has been a custom for many years to suspend judgment indefinitely, there is not any well-settled law giving a court that power.

The pardoning power is vested solely in the governor.

A pardon is an act of grace proceeding from the powers entrusted with the execution of the law which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed.

United States v. Wilson, 32 U. S. 7 Pet. 150, 8 L. ed. 640; *Bouvier*, Law Dict. 150.

A suspension of sentence is a quasi pardon.

People v. Brown, *People v. Reilly*, *People v. Morrisette*, *supra*; *United States v. Wilson*, 48 Fed. Rep. 748; *People v. Blackburn*, *supra*.

Article 4, section 5, of the State Constitution provides that the governor "shall have the power to grant reprieves, commutations, and pardons after conviction."

Such powers as are especially conferred by the constitution on the governor, or any other specified officer the legislature cannot require or authorize to be performed by any other officer or authority.

Cooley, Const. Lim. 115, note 2. See also 4 Crim. L. Mag. 468; *United States v. Klein*, 80 U.S. 13 Wall. 128, 20 L. ed. 519; *Haley v. Clark*, 26 Ala. 442; *State v. Sloss*, 25 Mo. 292, 69 Am. Dec. 467; *State v. Todd*, 26 Mo. 175; *State v. Nichols*, 26 Ark. 74, 7 Am. Rep. 600.

O'Brien, J., delivered the opinion of the court:

The question presented by this appeal is novel and important. The supreme court has by mandamus commanded the court of sessions to proceed to judgment in a criminal case, and to pass sentence upon the defendant after conviction. The power of the court to grant the writ under the circumstances disclosed by the record is denied. On the 4th of March, 1892, John Attridge was convicted in the court of sessions of Monroe county, composed of the county judge and two justices of sessions, upon his own plea of guilty of the crime of grand larceny, in the second degree. The defendant was a clerk in a mercantile firm, and the offense consisted in the appropriation to his own use of a sum of money which belonged to his employers, and which came to his possession, or under his charge, by virtue of his employment. There were supposed to be certain mitigating circumstances connected with the transaction, growing out of his youth, previous good character, and otherwise, that were presented to the court through a petition signed by numerous respectable citizens, who prayed that his sentence be suspended. Three days after the conviction he was brought before the court, and the county judge presiding sentenced him to imprisonment. The two justices of sessions dissented, and announced, as the judgment of the court, that sentence

be suspended. The defendant was remanded to the custody of the sheriff, but discharged soon after from the commitment upon habeas corpus granted by a justice of the supreme court holding a court of oyer and terminer, on the ground that the sentence pronounced by the county judge, not having been concurred in by a majority of the court, was illegal. He was, however, remanded to the custody of the sheriff, to the end that the court of sessions might pronounce a legal sentence in the case. He was again brought before that court on the 14th of March, and the judgment thereupon given that sentence be suspended during good behavior. The county judge dissented, and the defendant was thereupon discharged from custody. On the 27th of June following, the supreme court at special term, upon the application of the district attorney, granted a peremptory writ of mandamus commanding the court of sessions to proceed to judgment, and to sentence the defendant to the punishment prescribed by law. The order granting the writ has been affirmed at the general term.

The precise question involved, therefore, is the power of a court of record, possessing jurisdiction in criminal cases, to suspend judgment after conviction. The court of sessions is a court possessing superior criminal jurisdiction and common-law powers. *People v. Bradner*, 107 N. Y. 1. It possesses all the powers formerly exercised by superior courts of criminal jurisdiction in England, except so far as these powers have been changed or abrogated by statute. There can, I think, be no doubt that the power to suspend sentence after conviction was inherent to all such courts at common law. The practice had its origin in the hardships resulting from peculiar rules of criminal procedure, when the court had no power to grant a new trial, either upon the same or additional evidence, and the verdict was not reviewable upon the facts by any higher court. The power, as thus exercised, is described in this language by Lord Hale: "Sometimes the judge reprieves before judgment, as where he is not satisfied with the verdict, or the evidence is uncertain, or the indictment is insufficient, or doubtful whether within clergy; also, when favorable or extenuating circumstances appear, and when youths are convicted of their first offense. And these arbitrary reprieves may be granted or taken off by the justices of gaol delivery, although their sessions be adjourned or finished; and this, by reason of common usage." 2 Hale, P. C. chap. 58, p. 412. This power belonged, of common right, to every tribunal invested with authority to award execution in a criminal case. 1 Chitty, Crim. Law, 1st ed. 617, 758.

Without attempting to collate all the authorities on the subject, it is sufficient to say that the power to suspend sentence at common law is asserted by writers of acknowledged authority on criminal jurisprudence, by the uniform practice of the courts, and numerous adjudged cases. 2 Hawk. P. C. chap. 51, § 8; 1 Bishop, Crim. Proc. § 1124; 4 Bl. Com. chap. 31; *People v. Graves*, 81 Hun, 832; *People v. Harrington*, 15 Abb. N. C.

161; *People v. Whipple*, 9 Cow. 715; *Carnal v. People*, 1 Park. Crim. Rep. 262, 266; *Com. v. Dowdican*, 115 Mass. 186; *State v. Addy*, 43 N. J. L. 114, 89 Am. Rep. 547; *Weaver v. People*, 88 Mich. 297; *People v. Reilly*, 53 Mich. 260; *Com. v. Maloney*, 145 Mass. 205; *Sylvester v. State*, 65 N. H. 193.

The courts below were of the opinion that section 12 of the Penal Code deprives the court, in all cases, of any discretion with respect to the imposition of the punishment prescribed by law. The language of that section is as follows: "The several sections of this Code which declare certain crimes to be punishable as therein mentioned, devolve a duty upon the court authorized to pass sentence to impose the punishment prescribed." This provision was not intended to, and did not, abrogate any power over the judgment which the courts possessed before. The provision is declaratory of the law as it always existed, for it was always the duty of the court to impose the punishment upon conviction; but this duty was never supposed to be inconsistent with the power to suspend the judgment till the next term of the court or indefinitely. Since the granting of the writ in this case, the above section of the Penal Code has been amended by chapter 279 of the Laws of 1893 by adding to it these words: "But such court may, in its discretion, suspend sentence, during the good behavior of the person convicted, where the maximum term of imprisonment prescribed by law does not exceed ten years, and such person has never before been convicted of a felony." It is admitted by the learned district attorney that this amendment, though passed since the writ in this case was directed by the order, is applicable to this case, as the defendant in the indictment has not yet been sentenced, and, if brought before the court for that purpose, pursuant to the command of the writ, sentence may be suspended if the enactment is valid. He meets this difficulty, however, by strenuously insisting that the amendment encroaches upon the power of the governor to grant reprieves and pardons, which is exclusively vested in him under the state constitution. Const. art. 4, § 5. There can be no doubt that, if the amendment distributes any part of the pardoning power conferred upon the executive to some other department of the government, the legislation is in conflict with the constitution, and invalid. The power to suspend sentence and the power to grant reprieves and pardons, as understood when the constitution was adopted are totally distinct and different in their origin and nature. The former was always a part of the judicial power; the latter was always a part of the executive power. The suspension of the sentence simply postpones the judgment of the court temporarily or indefinitely, but the conviction and liability following it, and all civil disabilities, remain and become operative when judgment is rendered. A pardon reaches both the punishment prescribed for the offense and the guilt of the offender. It releases the punishment, and blots out of existence the guilt, so that in the eye of the law, the offender is

as innocent as if he had never committed the offense. It removes the penalties and disabilities, and restores him to all his civil rights. It makes him, as it were, a new man, and gives him a new credit and capacity. *Ex parte Garland*, 71 U. S. 4 Wall. 333, 18 L. ed. 366; *United States v. Klein*, 80 U. S. 13 Wall. 128, 20 L. ed. 519; *Knote v. United States*, 95 U. S. 149, 24 L. ed. 442.

The framers of the federal and state constitutions were perfectly familiar with the principles governing the power to grant pardons, and it was conferred by these instruments upon the executive with full knowledge of the law upon the subject, and the words of the constitution were used to express the authority formerly exercised by the English crown, or by its representatives in the colonies. *Ex parte Wells*, 59 U. S. 18 How. 307, 15 L. ed. 421. As this power was understood, it did not comprehend any part of the judicial functions to suspend sentence, and it was never intended that the authority to grant reprieves and pardons should abrogate, or in any degree restrict, the exercise of that power in regard to its own judgments, that criminal courts had so long maintained. The two powers, so distinct and different in their nature and character, where still left separate and distinct, the one to be exercised by the executive, and the other by the judicial, department. We therefore conclude that a statute which, in terms, authorizes courts of criminal jurisdiction to suspend sentence in certain cases after conviction,—a power inherent in such courts at common law, which was understood when the constitution was adopted to be an ordinary judicial function, and which, ever since its adoption, has been exercised by the courts,—is a valid exercise of legislative power under the constitution. It does not encroach, in any just sense, upon the powers of the executive, as they have been understood and practiced from the earliest times. The power to suspend the judgment during good behavior, if understood as expressing a condition, upon the compliance with which the offender would be absolutely relieved from all punishment, and freed from the power of the court to pass sentence, is open to more doubt. The legislature cannot authorize the courts to abdicate their own powers and duties, or to tie their own hands in such a way that, after sentence has been suspended, they cannot, when deemed proper and in the interest of justice, inflict the proper punishment in the exercise of a sound discretion. Nor can the free and untrammelled exercise of this power or the right to pass sentence according to the discretion of the court be made dependent upon compliance with some condition that would require the court to try a question of fact before it could render the judgment which the law prescribes. The statute must not be understood as conferring any new power. The court may suspend sentence as before, but it can do nothing to preclude itself or its successor from passing the proper sentence whenever such a course appears to be proper. This, we think, is all that the statute intends, and that was the

only effect of the judgment. It is a power which the court should possess in furtherance of justice, to be used wisely and discreetly; and it is perhaps creditable to the administration of justice in such cases that, while

the power has always existed, no complaint has been heard of its abuse.

The order of the General and Special Terms should be reversed, and the mandamus denied.
All concur.

INDIANA SUPREME COURT.

John PARKER *et al.*, Appts.,

v.

STATE of Indiana.

(.....Ind.)

Granting a stay of execution by an appellate court pending an appeal in a capital case is not a reprieve within the meaning of a constitutional provision giving to the governor the power to grant reprieves; and a statute authorizing such stay merely declares the inherent power of the court, independent of any statutory provision.

(November 9, 1898.)

APPPLICATION to set aside a stay of execution pending an appeal by defendants from a judgment of the Marion County Criminal Court convicting defendants of murder in the first degree and sentencing them to suffer the death penalty. *Application overruled.*

The facts sufficiently appear in the opinion.

Messrs. Kealing & Hugg and R. W. McBride for appellant.

Mr. A. G. Smith for appellee.

Coffey, J., delivered the opinion of the court:

The appellants in this case were indicted, tried, and convicted in the Marion criminal court upon a charge of murder in the first degree, and were sentenced to suffer death on the 3d day of November, 1893. From this judgment they appealed to this court, and on the 28th day of September, applied for a stay of execution upon the ground that the time intervening between the date of filing the transcript in this court and the date fixed for the execution was not sufficient to enable their counsel to properly examine and argue the legal questions in the case, and was not sufficient to enable the court to properly consider and decide the legal questions arising upon the assignment of errors in the cause. After due consideration of the petition and the record in the case, the court found that it was impossible to properly consider and decide the errors assigned upon the record prior to the 3d day of November, 1893, and thereupon entered an order staying the execution of the sentence passed upon the appellants until the 5th day of January, 1894.

The attorney-general of the state files a petition to vacate that order upon the alleged ground that it is in violation of article 3, section 1, and article 5, section 17, of the Consti-

tution of the state, and that this court in staying the execution of the sentence of the appellants, attempted to and did exercise the constitutional powers and duty of the governor of the state; that the power to grant reprieves and stay of execution in criminal cases is vested in the governor, and not in the courts.

Section 1888, Rev. Stat. 1881, provides: "An appeal to the supreme court from a judgment of conviction does not stay the execution of sentence, except where the punishment is to be death or the judgment is for a fine or a fine and costs only, in which cases the execution of sentence may be stayed by order of the supreme court, or a judge thereof."

Section 1874 provides: "When the execution of the sentence is respited to another day by the governor or where the same is suspended by order of the supreme court pending an appeal thereto, the sheriff must note the same on the warrant, and the defendant must be detained in custody until the day to which the respite is granted, or the execution suspended by the supreme court, at which time the sheriff, unless the judgment is reversed or the defendant pardoned, must execute the sentence between the hours specified in the judgment and return the warrant, with the respite or order of the supreme court."

It is not denied that this court had the power, under the statutes, to make the order in question, provided they are valid enactments, but it is said that they are in conflict with the sections of the constitution above referred to, and for this reason they are void.

Section 1, article 3, of the Constitution provides: "The powers of the government are divided into three separate departments: the legislative, the executive, including the administrative, and the judicial, and no person charged with official duties under one of these departments shall exercise any of the functions of another, except as in this constitution expressly provided."

Under this provision of our state constitution it has often been held by this court that the three departments of the state government are not merely equal, but they are exclusive in respect to the duties assigned to each. They are absolutely independent of each other. They are equal, co-ordinate and independent. This division of power was intended to prevent the concentration of power in one person or class of persons. *Lafayette, M. & B. R. Co. v. Geiger*, 34 Ind. 185; *State v. Denny*, 118 Ind. 382, 4 L. R. A. 79; *Evansville v. State*, 118 Ind. 426, 4 L. R. A. 93; *State v. Denny*, 118 Ind. 449, 4 L. R. A. 65; *State v. Noble*,

NOTE.—In connection with the above decision that a stay of execution pending appeal is not a reprieve, see the decision in *People v. Court of 23 L. R. A.*

Sessions of Monroe County (N. Y.), ante, 854, to the effect that a suspension of sentence by the court in which trial is had is not a reprieve.

118 Ind. 350, 4 L. R. A. 101; *Hovey v. State*, 127 Ind. 588, 11 L. R. A. 763.

Because these several departments of the government are separate and independent, and because the incumbent of each is prohibited from performing any of the functions belonging to another department, it has been held that a legislature cannot pass a valid act relieving persons from penalties incurred by violation of penal statutes, nor can it pass a valid act compelling the refunding of money collected on a judgment; in short, that it is not in the power of one department of the government to perform any of the functions belonging to another. *State v. Sloss*, 25 Mo. 291, 69 Am. Dec. 487; *Haley v. Clark*, 26 Ala. 439.

Section 17, article 5, of the Constitution, provides that the governor of the state shall have power to grant reprieves, commutations, and pardons, after conviction, for all offenses except treason and cases of impeachment, subject to such regulations as may be provided by law, so that if the granting of a stay of execution by the supreme court in a capital case pending before it on appeal is the granting of a reprieve, within the meaning of this provision of the constitution, it must follow that the statutes above set out are void as being in conflict with the constitution of the state.

In solving the question as to whether the granting of a stay of execution by this court in a capital case, pending before it on appeal, is a reprieve within the meaning of that word as it appears in the constitution, we must keep in mind the fact that the same constitution creates the three several departments of the state government and that it was the acknowledged purpose of the framers of that instrument to make these departments independent of each other. To hold that the stay of execution by the supreme court in a case like this is a reprieve within the meaning of section 17, article 5, of the Constitution, is to annihilate one section of that instrument with another, for if the court is compelled to appeal to the executive for a stay of execution in order to enable it to hear and determine a case, it is not independent. We are not at liberty to suppose that the convention which framed the constitution intended such a result as this. It intended that the constitution should constitute a harmonious whole, and it is our duty to so construe it if it is possible to do so. Under the construction contended for, if one convicted of murder and sentenced to suffer the death penalty should appeal to this court, and by the exercise of all the diligence possible should not be able to file his transcript earlier than the day before the time fixed for his execution, leaving no time to investigate his case, if the chief executive should not be accessible, or, if accessible, he should refuse to grant a reprieve, the result would be the execution of the appellant and an investigation of his case afterwards. If, upon investigation, we should reach the conclusion that he had been illegally convicted, the most that could be done would be to reverse the judgment and to that extent vindicate his memory. This is not the justice contemplated by the law. If we adopt this construction, in the case supposed, the power of this court to administer justice between the

appellant and the state would not depend upon its own will, but upon the will of the governor, the incumbent of another independent department of the government. Without cogent reasons, such a construction should not be adopted.

In construing the constitution upon the subject now under immediate consideration, it is to be constantly borne in mind not only that the judiciary is an independent department of the state government, but also that it derives none of its judicial power from either of the other departments. It is true that the general assembly may create courts, under the constitution, but it cannot confer on them judicial power, for it possesses none to confer. When created, such power is conferred by the constitution, and not by the act creating the court. *Elliott, Appellate Procedure*, § 1; *State v. Noble*, 118 Ind. 850, 4 L. R. A. 101; *Shugart v. Miles*, 125 Ind. 445; *Hawkins v. State*, Id. 570; *Missouri River Teleg. Co. v. First Nat. Bank of Stour City*, 74 Ill. 217.

The supreme court in this state is a court created by the constitution, and as such it possesses the inherent power to do all acts necessary to enable it to effectually exercise the jurisdiction conferred upon it. The authority to review and revise necessarily includes the power to enforce the law and administer justice. Independent of any statutory provision, it has the power to so frame its judgments and orders as to secure justice to litigants within its jurisdiction, since the right of appeal carries with it the right to a judgment awarding justice according to the law of the land. *Elliott, Appellate Procedure*, § 21; *Piqua Bank v. Knoup*, 6 Ohio St. 842; *Buchanan v. Milligan*, 108 Ind. 433; *Shannon v. Hay*, 106 Ind. 589; *Cottrell v. Nizon*, 109 Ind. 878; *Roberts v. Lindley*, 121 Ind. 56; *Louisville, N. O. & C. R. Co. v. Etzler*, 119 Ind. 89; *Brown v. Jones*, 113 Ind. 46.

We are of the opinion that this court possesses the power to stay proceedings in a case like this, when necessary to enable it to investigate and properly decide the questions presented by the record, independent of any statutory provision upon the subject. The statutes above set out are simply declaratory of a power which existed before their enactment. No more solemn duty can be imposed upon the courts than the duty of protecting and the duty of taking human life. When human life is to be taken under the judgment of a court, the act cannot be justified except by the strict observance of the forms of the law of the commonwealth. In a matter so grave, the court having the power should never refuse to stay proceedings when necessary to enable it to inquire whether the execution of a citizen was justified under the law, and as to whether the forms of the law had been observed, the proceeding resulting in his conviction.

In our opinion, the sections of the Statute of 1881, above set out, are not in conflict with the constitution of the state, and are valid enactments. We are aware that a different conclusion was reached by this court in the case of *Butler v. State*, 97 Ind. 373, but we cannot give our assent to the conclusion reached in that case. The error in that case consists in

assuming that the granting of stay of execution by this court in case pending before it is a reprieve within the meaning of section 17, article 5, of the Constitution of the state. A conclusion based upon an erroneous premise is seldom, if ever, correct. In so far as that case conflicts with the conclusion reached here, it is modified.

From what we have said, it follows that application to set aside the order staying proceedings in this case should be overruled.

CHICAGO, ST. LOUIS & PITTSBURGH
R. CO., *Appl.*,

v.

Wright W. CHAMPION.

(.....Ind.....)

1. Judicial notice will not be taken of the effect which will be produced by releasing upon a grade the brake from a car propelled only by a previously acquired momentum.

2. Evidence of an experiment as to the action of a car propelled by previously acquired momentum when suddenly released from the brake on a descending grade is admissible in an action for the mashing of an employé's hand by the alleged sudden starting forward of a car under such circumstances, when the experiment was made at the same place that the accident occurred with a similar car at the same speed.

(*McDride, J., dissents.*)

(December 23, 1892.)

APPEAL by defendant from a judgment of the Superior Court for Marion County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. S. O. Pickens and Charles W. Moores for appellant.

Messrs. George W. Cooper and McCullough & Harlan for appellee.

Miller, Ch. J., delivered the opinion of the court:

The complaint charges that the appellee was an employé of the appellant, and that on the 24th day of January, 1888, while in the discharge of his duties as such employé, in making a coupling between two cars in appellant's yard, he had his hand crushed. The right of recovery for this injury is based upon the alleged negligence of the appellant in employing and keeping in its employ, as a fellow servant with the appellee, one Theodore Leonard, a yard brakeman, who, it is alleged, was inexperienced, incompetent, unskillful, and negligent, and that the appellant, at the time of his employment and during the time he was in the service of appellant, had knowledge of such incompetence; that, while appellee was performing his work in appellant's yard, ap-

pellee undertook to couple a car which Leonard was riding down upon a siding to a car which was standing upon the siding; and that when he was in the act of making the coupling, and when the moving car was within from six to eight inches of the other car, Leonard negligently loosed the brake on the moving car which caused it to spring or jump forward, and catch and mash the plaintiff's hand between the drawbars. The complaint was answered by a general denial. The questions discussed by counsel in their briefs arise upon the action of the court in overruling the motion for a new trial.

It is earnestly insisted that the verdict of the jury is not sustained by the evidence. Counsel for the appellant, in effect, admit that there was some evidence to sustain every material averment of the complaint, but say, with reference to the evidence of the plaintiff that upon the release of the brakes on the moving car it immediately sprang or jumped forward, that "this is a manifest absurdity." The evidence shows, without dispute, that the car which was "kicked" by the locomotive upon the siding was a loaded gondola coal car, weighing from sixty to sixty-five thousand pounds, and moving, with the brakes set, at a rate of three or four miles an hour. The grade upon which the car was moving was a descending grade of six inches to the hundred feet, without any perceptible break in the grade. At the time the brake was released the cars were from six to eight inches apart. The evidence being in conflict upon the question of whether or not a car would or could, under these circumstances, spring or jump forward, we could not disturb the judgment rendered upon the verdict of the jury unless we could know judicially that it stated that which was physically an impossibility. The natural laws of which courts take judicial notice are such as are of uniform occurrence, and invariable in their action. 12 Am. & Eng. Encyclop. Law, 196. Knowledge of facts is usually taken by courts for the purpose of dispensing with formal proof in matters collateral to the point in issue, and seldom, if ever, for the purpose of contradicting and controlling the effect of evidence given upon the trial of a cause. A matter which could legitimately be the subject of inquiry in a court could not well be said to be so well established, and to have acquired such notoriety, as to come within the judicial knowledge of the court. This power of judicial notice is to be exercised with caution. "Every reasonable doubt upon the subject should be resolved promptly in the negative." *Brown v. Peper*, 91 U. S. 37, 23 L. ed. 200. We might, and ordinarily would, take notice that a car moving upon a smooth and level track, propelled only by a previously acquired momentum, would not, upon the sudden removal of the friction caused by brakes, accelerate its motion; but, as against evidence introduced to the contrary, we should presume that some undisclosed and exceptional cause had intervened to prevent the application of the general rule. Also, while we might judicially know that the tendency of an inclined grade would be to accelerate the motion of a car moving down the incline, yet we must also know that the law of friction operates against

NOTE.—For experiments in the presence of the jury, see *Leonard v. Southern Pac. Co. (Or.)* 15 L. R. A. 221, and *note*.
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the acceleration of its motion, and at some degree of inclination the friction would equal and neutralize the motion caused by the descending grade. To determine the effect of these causes upon the motion of a car in a given case, is not a matter of which a court can take judicial knowledge, but must be determined by the jury from the evidence introduced on the trial. We cannot, in this case, as a matter of judicial knowledge, determine that the evidence introduced upon the trial that in this particular instance the car did spring or jump forward was not true.

During the trial the appellant placed a witness upon the stand, and proposed to show that shortly before the trial a test was made upon the siding on which the accident took place, and at about the same place on the siding, by letting a gondola car of the same kind as the one in use at the time of the injury down upon the siding; that Mr. Leonard, the same brakeman who was on the car at the time of the accident, was on the car, which was running at the rate of about three miles an hour, with the brakes set, and that, when within 8 or 10 or 12 inches of the car to which it was to be coupled, the brake was let off by Mr. Leonard; that the experiment was made on a cold day, and the car was kicked back by an engine from about the same place where it was kicked at the time of the accident; that when the brake was so let off the car did not show an increase of speed. The court excluded this evidence, and this ruling was assigned as a cause for a new trial. In *Lake Erie & W. R. Co. v. Mugg*, 183 Ind. 168, we held that an experiment made by a witness would not be admissible unless it was shown to have been made under essentially the same conditions that existed in the case on trial. In that case, evidence that a boot froze to a rail was excluded because it did not appear that the conditions of the two boots were the same, as to warmth and moisture. In *Smith v. State*, 2 Ohio St. 511, the prosecuting witness testified as to the identity of the defendant. The witness was in a room in which a candle was burning, and looking through a window, outside of which he testified to having seen the defendant. Evidence of experiments made at the same window were introduced in support of his testimony. The defendant offered to show that experiments at other windows had been made, in looking from a room in which a candle was burning, through a window, at a person on the outside, under circumstances as near as possible to those narrated by the witness for the state. The court excluded the evidence, and on appeal the judgment of conviction was reversed. The court held that the evidence should have been received, and gone to the jury, for what it was worth, notwithstanding that the experiment was made at a different window. In many other cases, evidence of experiments have been received in evidence,—usually, however, in connection with the testimony of experts. Of this class, we cite *Fidd v. Cutter*, 127 Mass. 522; *Com. v. Piper*, 120 Mass. 185; *Lincoln v. Taunton Copper Mfg. Co.* 9 Allen, 181; *Sullivan v. Com.* 93 Pa. 285. Evidence of this kind should be received with caution, and only be admitted

28 L. R. A.

where it is obvious to the court, from the nature of the experiments, that the jury will be enlightened, rather than confused. In many instances, a slight change in the conditions under which the experiment is made will so distort the result as to wholly destroy its value as evidence, and make it harmful, rather than helpful. In other cases, a principle may be established, by experiments made under circumstances quite different from the one under investigation, that will have an important and beneficial bearing upon the investigation. In the offer to prove in this case, many circumstances were included that were wholly unimportant, such as the fact that the same brakeman was on the car, and handled the brakes, in both instances. The important fact sought to be established by the experiment was whether or not a car moving at a slow rate of speed down a slight incline, with the brakes set, would, when the brakes were suddenly loosed, jump or spring forward. If it would do so in one instance, it would, under ordinary conditions, repeat it every time the experiment was tried; for it would be the result of the operation of the laws of motion. The rate at which the car was moving, the suddenness with which the brakes were loosened, the degree of the inclination of the track, might affect the celerity of the movement, but would not affect the nature of the movement. If the question for investigation was the distance which it would jump, or the celerity of the movement, all these things might be important; but in determining whether it would or would not jump they are comparatively unimportant. In our opinion, the circumstances under which the experiment was made were sufficiently similar to the facts surrounding the happening of the accident to make it admissible in evidence, for what it was worth, and for this error the judgment must be reversed.

Some other questions are discussed in the briefs of counsel, but we are satisfied that they are not such as are likely to arise upon a second trial of the cause, and we will not extend this opinion for their consideration.

Judgment reversed, with costs.

McBride, J., dissenting:

I doubt the soundness of a rule that will admit in evidence the details of an experiment, and its results, to overcome affirmative evidence that a certain thing did occur, in any case where, from the nature of things, it cannot be certain that the circumstances and conditions were in each instance precisely the same. Indeed, the principal opinion shows the danger of the rule it affirms. Apparently slight and unimportant differences in the conditions or changes in the method may cause radical and extreme changes in results. If there can be a case where all of the conditions can with certainty be exactly reproduced, such evidence might with safety be admitted. In all other cases, it would be attended with too much of doubt and uncertainty. I cannot concur in so much of the opinion as holds that evidence of the experiment and its results was admissible.

MASSACHUSETTS SUPREME JUDICIAL COURT.

John ROTHROCK

v.

DWELLING-HOUSE INSURANCE COMPANY.

(.....Mass.....)

Service on the auditor of state in Arkansas, in an action against a foreign insurance company which has not complied with the statute requiring as a condition of doing business that the auditor or some agent be appointed to receive service, is not authorized by the fact that certain persons have solicited insurance for the company within the state and forwarded applications to its office in another state, although they may be subject to penalties under the statute.

(May 18, 1894.)

REPORT by the Superior Court for Suffolk County for the opinion of the Supreme Judicial Court of an action brought to enforce a judgment which had been recovered by plaintiff against defendant in the courts of the state of Arkansas. *Judgment for defendant.*

The facts are stated in the opinion.

Mr. William H. Preble for plaintiff.

Messrs. Hutchins & Wheeler for defendant.

Knowlton, J., delivered the opinion of the court:

It appears by the agreed statement of facts that the judgment on which this action is brought was rendered in Arkansas, without service of process on the defendant, and that the defendant had no notice or knowledge of the suit until long afterwards. The defendant was incorporated in Massachusetts, and had no place of business in Arkansas, except as certain persons solicited insurance for it there, and sent the applications to the office of the defendant in Chicago, Ill., where policies were issued. In an action upon a foreign judgment it is proper to inquire into the jurisdiction of the court in which the judgment was rendered to ascertain whether the defendant appeared, and, if not, whether legal service was made upon him. *Gilman v. Gilman*, 128 Mass. 28, 80 Am. Rep. 646; *Wright v. Andrews*, 130 Mass. 149.

In the present case service was made in the original action on the auditor of the state of Arkansas, and the only question is whether such service was authorized and was sufficient under the statute of that state. The language of the statute is as follows: "Sec. 3834. No insurance company not of this state, nor its agents, shall do business in this state until it has filed with the auditor of this state a written stipulation duly authenticated by the company, agreeing that any legal process affecting the company served on the auditor or the party designated by him, or the agent specified by said company to receive service of process for the company, shall have the same effect as if

served personally on the company within this state. And if such company should cease to maintain such agent in this state so designated, such process may thereafter be served on the auditor; but so long as any liability of the stipulating company to any resident of this state continues, such stipulation cannot be revoked or modified, except that a new one may be substituted so as to require or dispense with service at the office of said company within this state, and that such service, according to this stipulation, shall be sufficient personal service on the company. The term "process" includes any writ, summons, subpoena, or order whereby any action, suit, or proceedings shall be commenced, or which shall issue in or upon any action, suit, or proceedings. § 3835. Any person or persons or corporation receiving premiums or forwarding applications or in any way transacting business for any insurance company or association not of this state without having received authority agreeably to the provisions of this act, shall forfeit and pay to the school fund of the state the sum of \$500 for each month or fraction thereof during which such illegal business was transacted, and any company not of this state doing business without authority shall forfeit a like sum for every month thereof and be prohibited from doing business in this state until such fines are fully paid." Ark. Stat. 1884.

The defendant has filed no stipulation, as required by this statute. The persons forwarding applications, and the corporation itself, were therefore liable to fines, and the corporation was also prohibited from doing business until the fine should be paid. There is no provision for service on the auditor when no stipulation is filed, and in such cases the policy holders are left to pursue their remedies on their policies in jurisdictions, where they can get a valid service, while the corporation and its agents are punished for their violation of the law. In section 3835 business done without filing the stipulation is called illegal, and we see nothing to indicate that the object of the statute is to make the business regular, or to authorize a service upon the auditor when no stipulation is filed. We do not consider the decision of the county court in Arkansas in the original action an exposition of the statute which is authoritative and binding upon us, and we are not inclined to follow the case of *Ehrman v. Teutonia Ins. Co.*, 1 Fed. Rep. 471, 1 McCrary, 128, in which it is held that the defendant was estopped to deny the jurisdiction. That case differed from this, inasmuch as the defendant there had notice of the suit, and appeared and sought to set up a want of jurisdiction, although perhaps this difference is not very material. We do not doubt the doctrine that a corporation doing business in a foreign state thereby subjects itself to the statutes of that state. *Reyer v. Odd Fellows F. Arci. Asso.*, 157 Mass. 367; *Lafayette Ins. Co. v. French*, 59 U. S. 18 How. 408, 15 L. ed. 458; *Baltimore & O. R. Co. v. Harris*, 79 U. S. 12 Wall. 81, 20 L. ed. 858.

But it seems to us that the question before us is not whether the defendant would be estopped from setting up its failure to comply

NOTE.—For the subject of service on representatives of foreign corporations including service on state officers appointed for that purpose, see note to *Foster v. Charles Betcher Lumber Co.*, (S. Dak. 28 L. R. A. 490, 28 L. R. A.

with the law to relieve itself from liability under its contract, but whether the plaintiff presents a case which comes within the terms of the statute on which the jurisdiction of the court must be founded. Unless the statute applies to a case like this, the service was improperly made, and it is as if there had been no service. In our opinion, unless the stipulation is filed, a foreign insurance company has no right to do business in the state; and, if it violates the law in that respect, no service can be made upon the auditor, and no jurisdiction

can be obtained on which to found a judgment against it. The remedy provided is by a punishment of the corporation and of such others as have disregarded the requirements of the statute. Suits may be brought upon the contracts in any state where jurisdiction can be obtained. *Hartford Live Stock Ins. Co. v. Matthews*, 102 Mass. 221; *Lamb v. Bowser*, 7 Biss. 315, 372, Fed. Cas. Nos. 8,008, 8,009; *Union Mut. L. Ins. Co. v. McMillen*, 24 Ohio St. 67. *Judgment for the defendant.*

WASHINGTON SUPREME COURT.

BOOTH & HANFORD ABSTRACT CO.,

Appt.

Byron PHELPS, County Treasurer, *Respt.*

(.....Wash.....)

A set of abstract books is personal property for purpose of taxation. although the information therein contained is largely in the form of abbreviations and cipher peculiar to that set of books, which is understood by only five persons, especially where there are certain maps connected with the business which have some general value.

(March 30, 1894.)

APPEAL by complainant from a judgment of the Superior Court for King County dismissing a proceeding brought to enjoin defendant from enforcing a tax which had been levied on plaintiff's abstract books. *Affirmed.*

The facts sufficiently appear in the opinion. *Messrs. Relfe & Brinker* for appellant.

Messrs. John F. Miller, Pros. Atty., and A. G. McBride for respondent.

Scott, J., delivered the opinion of the court:

This was a suit to enjoin the selling of a certain set of abstract books belonging to appellant, for state and county taxes. At the close of appellant's case the court granted a motion for nonsuit, from which judgment this appeal was taken.

The constitution provides that "the legislature shall provide by law a uniform and equal rate of assessment and taxation on all property in the state, according to its value in money." Article 7, § 2. An act of the legislature (Sess. Laws 1889-90, p. 580, § 1) provides that "all real and personal property in this state, and all personal property of persons residing therein, the property of corporations now existing, or

hereafter created, except such as is hereinafter expressly excepted, is subject to taxation." And the only question involved in this case is whether a set of abstract books is included within the term "personal property," for the purposes of taxation. The proof shows that the information contained in the books is largely in the form of abbreviations and cipher peculiar to that particular set of books, and only five persons understood them, as far as was known to the manager and secretary of the company; that no information could be derived from the books, except by an expert in that line of business; and that it would be necessary for him to understand such abbreviations and cipher. It is contended that the books were of no value to the public, or to any one who did not understand them; that while the books, originally, in blank form, were of some value, the fact that they contained such writings had destroyed this value, even; and that they are not assessable for the purpose of taxation. There was some proof, however, to show that certain maps connected with the business had a general value, to the extent of, perhaps, a hundred dollars. We are of the opinion that the property was subject to taxation. The fact that it requires the services of an expert to obtain the necessary information from the books may detract from their value, in a general sense, but would not deprive them of all taxable value. If the property was assessed at too high a figure, it would be no ground for issuing a writ of injunction. Another remedy is provided therefor. There is a conflict in the authorities as to whether abstract books are subject to taxation. We think the better rule is that they are subject thereto (see *Leon Loan & Abstract Co. v. Equalization Board of Leon* (Iowa) 17 L. R. A. 199), and that the peculiar circumstances of this case do not except it from said rule.

Affirmed.

Dunbar, Ch. J., and Anders, Hoyt, and Stiles, JJ., concur.

NOTE.—For a case similar to that here reported and which is cited as a precedent, see *Leon Loan & Abstract Co. v. Equalization Board of Leon* (Iowa) 17 L. R. A. 199.

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END OF CASES IN BOOK 23.

RÉSUMÉ OF THE DECISIONS PUBLISHED IN THIS BOOK.

SHOWING the Changes, Progress, and Development of the Law during the Fourth Quarter of the Judicial Year Beginning with Oct. 1, 1898, Classified as Follows:

- I. PUBLIC, OFFICIAL, AND STATUTORY MATTERS.
- II. CONTRACTUAL AND COMMERCIAL RELATIONS.
- III. CORPORATIONS AND ASSOCIATIONS.
- IV. DOMESTIC RELATIONS; PERSONAL CAPACITY.
- V. FIDUCIARIES AND REPRESENTATIVES.
- VI. TORTS; NEGLIGENCE; INJURIES; NUISANCES.
- VII. PROPERTY RIGHTS; LIENS; GIFTS.
- VIII. CIVIL REMEDIES; RULES AND PRINCIPLES.
- IX. CRIMINAL LAW AND PRACTICE.

I. PUBLIC, OFFICIAL, AND STATUTORY MATTERS.

An *ex post facto* law is not made by changing a statute so as merely to remove the minimum limit of punishment for a crime. (N. Y.) 830.

Unconstitutional discriminations.

A discriminating statute in respect to the licensing of racecourses between those towns and cities which already have racecourses and those which do not is held to be unconstitutional as denying equal privileges, immunities, and franchises, and as a special law concerning the internal affairs of towns and cities. (N. J.) 525.

The constitutionality of statutes imposing absolute liability irrespective of negligence is presented in respect to stock killed on railroads in a Colorado case, which holds the act unconstitutional as to penalties imposed which are not based on any prohibited act or violation of duty. (Colo.) 812.

It is presented also in an Iowa case which holds that the liability is not absolute under a statute creating liability for importation of cattle with Texas fever. (Iowa) 73.

Restricting contracts.

The constitutionality of statutes restricting contracts between master and servant is involved in another very important case in which the Arkansas court holds that the constitutional right of individuals to contract does not extend that limit to corporations, and that the right of the employees to contract does not enlarge the right of the corporation. (Ark.) 264.

Statutes.

The conclusiveness of an enrolled bill on file in the office of the secretary of state is declared, in a Washington case, reviewing the authorities at length. (Wash.) 340.

A question of profound importance in constitutional law is answered by a bare majority of the judges of the supreme judicial court of Massachusetts denying the constitutionality of a statute granting to women the right to vote in town and city elections, which should take effect on its acceptance by a majority vote of the people of the state; and denying its validity also as a local option act to take effect in each town or city when accepted by a majority of the voters therein. (Mass.) 113.

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Legislature.

A legislative controversy in New Jersey results in a decision that the holdover senators cannot be claimed to constitute the senate as a perpetual body to the exclusion of the newly elected members whose title they have not passed upon, and further that the judiciary can pass on the constitutionality of a body claimed to be the senate as against a rival body. (N. J.) 354.

Mandamus to governor.

Mandamus to compel official action by the governor is denied in all cases in a Missouri decision. (Mo.) 194.

National guard.

The power of the governor to disband a company of the national guard before their period of enlistment expires is affirmed in a Kansas case. (Kan.) 510.

Officers.

The common-law rule that resignation of an officer does not take effect until acceptance is held in Ohio to be changed, at least to the extent of making an unaccepted resignation sufficient to permit the appointment or election of a successor. (Ohio) 681.

Per diem fees of an officer are held not to be salary within a constitutional provision as to change of salary during term of office. (Ohio) 609.

Questions of conflict between the constitution of Michigan and that of the United States are raised in respect to a deprivation of office without due process of law, but the holding is that an office is not property, and that due process does not require a judicial proceeding. (Mich.) 699.

Voters.

Residence at a soldiers' home is held insufficient to change the legal residence of a voter, under the Michigan constitution. (Mich.) 215.

Naturalization.

The unusual case of an attempt to set aside an order of naturalization is presented in a case where the application was made by a private person and was denied. (N. Y.) 835.

State business.

The South Carolina Dispensary Act, giving the state the monopoly of the sale of intoxicating liquors, is held unconstitutional. (S. C.) 410.

Public charity.

The nature of a "purely public charity" is considered in a case which denies that a home open only to free masons is of that character. (Pa.) 545.

Public funds.

The deposit of the state educational fund in banks is held to be a loan prohibited by the Nebraska constitution. (Neb.) 67.

Municipal corporations.

The lease of a town hall to an opera company is held, in a somewhat peculiar case, not to make the town liable for the defective condition of the sidewalk in front of it, where the sidewalk was in a village which was responsible for the streets. (Vt.) 488.

The somewhat vexed question as to what constitutes a municipal indebtedness within the meaning of a constitutional limitation is discussed in a case which holds that a contract for annual rental creates such indebtedness although the rental could be paid from the lawful revenue of the city. (Ky.) 402.

The jurisdiction of municipalities over navigable rivers which bound them is a question presented in a North Carolina case, which holds that low-water mark is the boundary of the municipality. (N. C.) 520.

Trees in street.

An ordinance for the destruction of trees beside a street is held void where the trees are neither an obstruction nor a nuisance. (N. J.) 685.

Abatement of nuisance.

The power of a board of health to abate a nuisance is reviewed in a case which holds that a summary proceeding to abate a nuisance, without hearing the parties, is invalid, unless the nuisance in fact exists, and that fact can be contested in the courts. (N. Y.) 481.

Due process of law as to abatement of a nuisance does not require a hearing of the owner of the property, where the determination is subject to review in the courts. (N. Y.) 481.

Nuisances maintained by municipal corpora-

tions are held to be subject to injunction. (Ga.) 801.

Taxation.

The exemption of state property from taxation under the statutes of Illinois is held to exist in respect to land used by a court for judicial purposes. (Ill.) 807.

Abstract books kept in cipher and abbreviations are held personal property for the purpose of taxation. (Wash.) 864.

Deduction of debts from credits to be taxed is clearly distinguished in an Indiana case from an exemption from taxation and held to be constitutional. (Ind.) 278.

The taxation of nonresidents on funds invested in business under a New York statute is held to be without deduction for any debts and to apply to foreign corporations. (N. Y.) 95.

Personal property in the hands of an assignee for creditors is held not to be subject to taxation, because of the peculiar position of such property as really in the custody of a court, although the statute requires trust property to be taxed. (Ohio) 628.

The fact that the profits of a commercial business, such as a general bookstore, carried on by the American Sunday School Union, are devoted to its charitable purposes, is held not to exempt property embarked in such business from taxation. (Pa.) 698.

Eminent domain.

A statutory remedy for a constitutional right to damages in a condemnation case cannot be made exclusive, where the owner of the property is given no power to initiate such proceedings or to enforce payment after the damages are assessed. (Mo.) 638.

Vacating road.

The discontinuance of a road is held not to be a taking or damaging of the property of an abutting owner within the meaning of the constitutional provision as to compensation. (Cal.) 888.

The question of special damages as distinguished from the inconvenience of each member of the public is presented in a case which holds that discontinuing part of a street creates no legal damage to an abutting owner on another part of the street, whose route to and from his premises is made thereby less direct. (Mich.) 892.

II. CONTRACTUAL AND COMMERCIAL RELATIONS.

Injunction against violation of an agreement to abstain from business was upheld in Rhode Island, where the agreement was made on sale of business. (R. I.) 689.

A contract for planting trees on another's ground, with a right to share in the crops for ten years, is upheld. (Mich.) 449.

Death of party.

The death of a party to a contract is held not to relieve from liability in a case where the contract was to take a quantity of water for a period of years. (Mass.) 707.

Employment.

Refusal to perform Sunday labor not called for by the contract is held no ground for discharge of an employé. (Ark.) 858.

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Implied contract.

A contract to leave property to an adopted child is implied in a case where the proceedings for adoption, though supposed valid during the lifetime of the adopting parent, were under a statute which was unconstitutional for defect of title. (Mich.) 196.

Water supply.

The doctrine that a water company cannot be held liable to an individual for damages resulting from failure to furnish a water supply, under a contract with a municipality, is again declared in a Missouri case. (Mo.) 146.

Mercantile agency.

The effect of the fraud of an agent of a mercantile agency in sending a false report is

considered, where the agreement of the agency stipulates against responsibility for negligence of agents and against any guaranty of the correctness of the information. (C. C. App. 2d C.) 637.

Blank bond.

The signer of a blank bond is held not bound when the blank is filled up with terms which are not authorized unless the bond is in the hands of a holder as to whom the signer has become estopped to deny the authority to fill it up in that form. (N. Y.) 601.

Blanks in note.

Filling blanks in a promissory note was held to constitute a material alteration. (Mass.) 599.

Deed.

The implied undertaking of the grantee in a deed-poll to perform a condition therein expressed is upheld in an Ohio case, as to the condition that a grantee should maintain fences. (Ohio) 896.

Carrier's contract.

The effect of a notice on the back of a ticket referred to on the face is very carefully discussed in a federal case respecting a steamship ticket, and such notice is held sufficient to limit the amount of liability for baggage, but not to change the essential nature of the carrier's liability. (C. C. App. 2d C.) 746.

A person boarding a freight train with a ticket is held to be a passenger, although passengers are not allowed on that train; and the company is held liable for exposing him to danger by driving him off while the train is in motion. (W. Va.) 777.

As to negligence of carrier, see *infra*, VI.

Checks.

The effect of a check in a state where it constitutes an assignment of the fund is limited in this respect to a case in which it is presented before any other appropriation of the deposit. (Ill.) 611.

An absolute order by one bank on another is held to be a check as distinguished from an ordinary bill of exchange. (Md.) 178.

Banks.

See also *infra*, III.

A case in respect to banks holds a bank liable for acts of its cashier in drawing checks to fictitious payees or indorsing names of customers without authority. (N. Y.) 584.

The effect of an indorsement of a check "for deposit" is discussed in an important case which distinguishes other cases of a similar indorsement. (Md.) 164.

The effect of indorsement for collection is presented in other cases. (Md.) 161, 178.

The right of a bank to apply a partner's deposit to an overdraft of the firm is denied in a North Carolina case, although it is held that a counterclaim might be set up by the bank in such case. (N. C.) 111.

The liability of a banker who without compensation loans his customer's money on certificates of stock which by forgery have been raised in amount is presented in a New York case which holds that the banker was not negligent. (N. Y.) 90.

Forged paper.

See also last case, *supra*.

The effect of payment of forged paper is considered under the Pennsylvania statute providing for recovery of such payments, and the act held applicable only to cases of due care. (Pa.) 615.

Insurance.

A voluntary assumption of parental relations by educating a girl to whom one is under no legal obligations is held sufficient to give her an insurable interest in his life. (Pa.) 571.

Insurable interest in property is held to exist in the case of a contract creditor. (Ala.) 177.

A threshing machine is held not to be in use within the meaning of a policy thereon, when not in use where it is left standing near a house at which it is intended to be used, not having been in use for about two weeks. (Minn.) 576.

The construction of the words "vacant and unoccupied" in an insurance policy is held not to require both conditions to be met with reference to the use of the building; what constitutes occupancy is considered in several particulars. (Iowa) 99.

The severability of insurance is upheld under a clause making the "entire policy void" in case of any breach of condition. (Mo.) 719.

See also *infra*, V.

Assignment.

The rule against assignment of unearned fees or commissions of officers is applied to an executor. (N. Y.) 97.

The assignability of income, under a trust in personal property for support during life, is upheld in a Wisconsin case. (Wis.) 824.

Lease.

Leasing the lower story of a building is held not to create any implied covenant for necessary repairs to the upper portion, of which the lessor retains possession. (Miss.) 155.

The privilege of a lessee to purchase the premises is upheld, against various objections, in an Illinois case. (Ill.) 555.

III. CORPORATIONS AND ASSOCIATIONS.

As to service of process against, see *infra*, VIII.

The increasing tendency to regard corporations the same as natural persons in respect to business transactions is illustrated in a decision by the New York court of appeals reversing that of the general term, that a corporation like a natural person may be prevented by absence or illness from making application to reduce a tax or assessment. (N. Y.) 785.

The right of a minority stockholder to ob-

tain an injunction against the action of the majority is held to be beyond the jurisdiction of equity, unless the proposed action is illegal, fraudulent, or *ultra vires*, although the majority stockholders own a majority of the stock of another company with which the contract is proposed. (Md.) 294.

The right of corporations to prefer debts to officers is denied in Alabama. (Ala.) 618. (See 22 L. R. A. 802).

The gratuitous promise by a national bank

to accept a draft to be drawn upon a depositor is held to be invalid and in excess of power. (C. C. W. D. Cal.) 836.

Successors.

A right of action against a railroad company for land taken under parol agreement to pay therefor continues as against a subsequent company formed by purchasers on foreclosure and a later corporation into which it is merged by consolidation. (Ind.) 231.

Labor union.

The right of a labor union to a trade-mark, which has been denied by the courts in several states, is provided for by statute in Illinois. (Ill.) 821.

Lloyds association.

The right of a guaranty and accident Lloyds association consisting of nonresidents to do business in Georgia is upheld as against statutes excluding corporations. (Ga.) 86.

Benefit society.

An important case decided by a bare majority of the Missouri court holds that members of a mutual benefit society are personally liable for assessments, notwithstanding an express condition for forfeiture in case of nonpayment. (Mo.) 435.

Masons.

An injunction to prevent the suspension of a worshipful master by the grand master of the state lodge of masons is denied in a Connecticut case, on the ground that no property interest was involved and also that the remedies furnished by the laws of the order must be first exhausted. (Conn.) 227.

Partnership.

The good-will of a partnership business after death of one of the partners is held, in a Nebraska case, to belong to the survivor. (Neb.) 795.

IV. DOMESTIC RELATIONS; PERSONAL CAPACITY.

The right to raise the question of the disability of coverture in respect to a deed by a married woman is denied to a creditor. (Pa.) 479.

Wife's liability.

A wife is held not liable for harboring a vicious dog on her own premises where her husband lives with her, under Alabama statutes. The decision is almost directly opposed to the New York case in 17 L. R. A. 521. (Ala.) 622.

Divorce.

The effect of appearance by a nonresident to give jurisdiction of divorce is held, in a Minnesota case, to make the divorce valid as between the parties on collateral attack. (Minn.) 287.

A cause of action for divorce in favor of the husband on the ground of the wife's adultery is held not to be barred by failure to set it up

as a defense to her suit for separate maintenance. (Mass.) 187.

Adoption.

The law as to the adoption of children, which has considerably developed in recent years, is considered in an Illinois case, in which adoption in Pennsylvania is upheld, even as to the descent of real property in Illinois. (Ill.) 665.

Civil death.

The subject of civil death is touched in an Arkansas case which denies that sentence to death in another state will prevent the maintenance of a civil suit by the convict. (Ark.) 802.

Incompetent persons.

Notice to an incompetent person is held to be absolutely necessary in order to make the appointment of a committee lawful. (W. Va.) 737.

V. FIDUCIARIES AND REPRESENTATIVES.

The powers of an insurance adjuster to waive proofs of loss is upheld in an Iowa case. (Iowa.) 181.

A compromise by an assignee for creditors was upheld where it was made in good faith. (N. C.) 578.

VI. TORTS; NEGLIGENCE; INJURIES; NUISANCES.

The legality of a combination of dealers to prevent sales by wholesalers to persons who are not members of the combination is denied in an important Indiana case which disapproves of the Minnesota decision in 21 L. R. A. 337. (Ind.) 588.

For criminal conspiracies, see *infra*, IX.

Fire.

The test of liability for damage by the spread of fire is considered in a Minnesota case, which holds that it depends on negligence or misconduct, and that the degree of care is merely that which is reasonable or ordinary, although it must be proportionate to the danger. (Minn.) 513.

Respondent superior.

The doctrine of *respondent superior* is held 23 L. R. A.

inapplicable to a charitable institution such as a hospital maintained by a railroad company for its employes; and such company is held not liable for negligence of physicians or attendants in such hospital. (C. C. App. 8th C.) 581.

So a reform school which is a state charity is held not subject to an action for damages for negligent or malicious injuries to an inmate by servants or employes. (Ky.) 200.

Imputed negligence.

The imputing of the negligence of a driver to a person riding with him, although it has been rejected in respect to an infant by the Michigan courts, is upheld in respect to a person of the age of discretion who voluntarily rides with another in a private carriage. (Mich.) 693.

Innkeepers.

An unusual case as to the liability of an innkeeper for the death of a guest from exposure when driven out of the inn while sick holds the innkeeper liable if the death might have been reasonably anticipated from the exposure. (Pa.) 574.

Injury by railroad construction.

The right to recover damages for injuries to property in constructing a railroad on a right of way conveyed by private grant is discussed in respect to various particulars in a West Virginia case, regarding the question as unchanged by the fact that the land was conveyed without condemnation proceedings. (W. Va.) 874.

Negligence of railroad companies.

The distinction between willful negligence and ordinary negligence is discussed in a case of injury to a person in an archway on manufacturing premises when struck by a car. (Ind.) 552.

Blowing a whistle on a locomotive is held to be actionable, if done maliciously, negligently, or wantonly, although at a place where the signal is required by statute. (N. J.) 283.

The liability of a railroad company for the escape of steam from an engine which frightens a horse is held to depend on the necessity of the escape of the steam and of a failure to exercise the care of a prudent and reasonable man. (Neb.) 504.

The wrongful obstruction of a street by railroad trains is considered as affecting the liability of the company for injuries sustained by the shying of a horse driven past the rear of the train. (C. C. App. 8th C.) 654.

The claim of an implied license to walk over a railroad trestle where there was no room to pass a train is held contrary to public policy. (Wis.) 203.

No negligence is shown on the part of a railroad company by the mere fact that a child, trespassing on the track, was struck by a train, where the track was straight and clear. (Or.) 715.

Negligence of a railroad company in respect to cars standing at a crossing, with a slight opening, was held to exist in respect to a child attempting to pass through, following the example of adults. (Mo.) 250.

Injury to servant.

That a railroad company's failure to main-

tain a statutory fence renders it liable for resulting injuries to employés on a train is decided in a federal case arising in Missouri. (C. C. App. 8th C.) 768.

The rule as to inspection of cars received from another road is held inapplicable to a manufacturing company when cars are run upon its premises. (Pa.) 448.

Injury to passenger.

Negligence in leaving a train in motion is held not to apply to a woman with a child in her arms who is on the step of the car which starts before she has alighted. (La.) 152.

Another case presents the question of negligence and contributory negligence in the case of injury to a passenger struck by a trolley pole while riding on the foot-board of a street-car. (R. L.) 208.

A railroad company is held liable for the negligence of a mail agent in throwing a mail sack on the station platform to the injury of a passenger thereon, where the company knew of his negligent practice in thus throwing mail sacks. (Minn.) 442.

The liability of a railroad company for the rude act of a stranger in pushing a door against another person while hurrying to a train is denied. (Pa.) 606.

Insanity of a passenger resulting from a railroad accident, which caused no bodily injury, is held to be no ground of action against the carrier. (C. C. App. 5th C.) 774.

Injury to an intoxicated passenger who fell off from the steps of a car, down which he had gone after refusing to go in on the conductor's request, is held against dissent not to make the carrier liable. (W. Va.) 758.

Elevators.

The validity of a rule excluding newsboys from passenger elevators in a building is upheld in a case where a newsboy had notice of the rule, although newsboys were allowed to enter the building in the exercise of their business. (Md.) 244.

Nuisance.

The law of nuisance as applied to a dam in a city is clearly presented in a case which holds that when the dam is a nuisance to public health it must be abated, although it was built when the water was clean and pure. (N. Y.) 485.

For constitutional questions; see *supra*, L.

VII. PROPERTY RIGHTS; LIENS; GIFTS.

Waters.

A case as to surface waters decides that the owner of a swamp, which is the natural place of drainage both of surface waters and streams, cannot complain of a change in the manner of deposit by storm sewers constructed by a municipal corporation. (Minn.) 88.

Contingent interest in proceeds of future sale.

A somewhat peculiar case as to the nature of the property interest of a former landowner in West Virginia to the surplus proceeds on a future sale of the land is presented in which such contingent right is held to be property which his creditors can reach. (W. Va.) 82.

Descent.

A statute providing that bastards may trans-

mit an inheritance "on the part of or to the mother," is held not to extend to her collateral kindred. (Ky.) 753.

Transfers of insolvent estates.

The rule of comity by which insolvency proceedings in another country are recognized is upheld in a Pennsylvania case against an attempt by a foreign creditor to obtain a preference by garnishment. (Pa.) 83.

The question of the effect of an assignment for creditors made in another state is very clearly defined in a New York case, which holds that an assignment, though voluntarily made, if under a statute which provides for a discharge of the debtor as to all creditors who participate in the dividends, is to be held an

insolvency transfer *in invitum* which has no extra-territorial effect against subsequent attachment. (N. Y.) 47.

The effect of a receivership in another state to transfer title to property is considered in a Wisconsin case. (Wis.) 52.

Levy.

A contingent remainder depending on survivorship is held not to be attachable as an estate, but subject to transfer by deed of trust, where the statute allows "any interest or claim to real property" to be disposed of. (Va.) 642.

The liability of growing crops to levy is affirmed in respect to annual crops which are the product of industry and care. (Kan.) 258.

Administration.

Administration of the wife's succession in Louisiana is denied to a creditor having judgment on a community debt. (La.) 808.

Entireties.

The effect of a divorce on a tenancy by the entireties is held to make a sale of the land under execution against the husband valid as against the wife's rights. (Tenn.) 806.

Homestead.

The right to a family homestead on dissolution of the marriage is held to be in the owner of the legal title if the decree is silent on that question. (N. Dak.) 239.

Tenancy in crops.

The nature of tenancy in crops under a contract is considered in a Michigan case. (Mich.) 449.

Estoppel by deed; recording.

A case of unusual interest in respect to the passing of after-acquired title by estoppel and the effect of reliance on records of title limits the effect of the estoppel to the grantor, where he has conveyed after obtaining title to one who relies on the records. This involves also the decision that a deed by one who has no title is not within the chain of title, and that when searching the records one need not search, as against his grantor, back of the date of conveyance to the grantor. (Mo.) 561.

Docket of judgment.

Docketing a judgment against Edward Davis is held not to be constructive notice of a judgment against E. A. Davis or Edward A. Davis. (Wis.) 818.

Chattel mortgage.

The right to take possession and sell mortgaged chattels is held to be absolute under a mortgage authorizing this to be done whenever the mortgagee shall choose. (Iowa) 780.

Gift.

The constructive delivery of a gift *corpus mortis* by the delivery of a key is denied, where the box to which the key belonged was not present but was in a locked closet to which a third person had the key. (N. J.) 184.

VIII. CIVIL REMEDIES; RULES AND PRINCIPLES.

Privilege of legislators.

The privilege of members of the legislature, under the Minnesota constitution, from arrest except in cases of treason, felony, and breach of the peace, does not extend to the service of summons in a civil action. (Minn.) 632.

Voluntary payment for others.

Although a stranger who pays the debt of another has no right of action therefor at law, he is held entitled in equity to compel the debtor to ratify the payment or be allowed to enforce it as an equitable assignee. (W. Va.) 120.

Limitation of time for foreclosure.

The period of limitation for foreclosure of mortgages is governed in Ohio by the statute as to specialties and not that as to actions for real property. (Ohio) 842.

Damages.

An interesting case as to the amount of recovery for wrongful refusal of a bank to pay a check denies an allowance for arrest and imprisonment for giving an alleged fraudulent check and the publication of that fact. (Neb.) 190.

Evidence.

The sufficiency of evidence, and more particularly its effect on appeal, to show that a deed was meant for a mortgage, is discussed in a very valuable manner in a North Dakota case. (N. Dak.) 58.

Evidence of experiments is considered in a case which allowed proof of an experiment under similar conditions to show the action of a car. (Ind.) 861.

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Process against corporations.

The question who is a managing agent of a foreign corporation for the purpose of serving process is discussed at length in a South Dakota case, which holds that an agent at a particular place may constitute a managing agent, although there are other similar agents in other places in the same state. (S. Dak.) 490.

Service on a state auditor of process against a foreign insurance company is denied effect under the circumstances of the case. (Mass.) 863.

Signatures to petition.

A transfer of signatures from one petition to another which is identical is held insufficient to allow them to be counted as part of the signatures to the latter. (Cal.) 838.

Res judicata.

The doctrine of *res judicata* has a somewhat unusual application in a Washington case in which the denial of an injunction against consummation of the sale of school lands, on the ground of a remedy at law, is held conclusive as to the right of a plaintiff to bring an action at law against the purchaser of the lands for the value of the improvements. (Wash.) 103.

A judgment of the state court against a receiver appointed by a federal court is held conclusive of the existence and amount of the claim, but its enforcement is controlled by the federal court. (C. C. App. 5th C.) 517.

See also *infra*, as to foreign garnishment.

Receiverships.

The right of an insolvent corporation to

make application for the appointment of a receiver in the interest of its creditors in order to prevent injury to them by suits of small creditors is denied in a very important Missouri case, although trustees in mortgages on the corporation's property are made parties and appeared consenting to the appointment of the receiver. (Mo.) 534.

Another case of attempted appointment of a receiver on application of the directors of an insolvent corporation itself holds such appointment to be utterly void. (Miss.) 581.

Foreign receivers.

The doctrine of comity as applied to foreign receivers is shown in a Massachusetts case, which orders the payment to the receiver of the foreign corporation of all the assets collected by a local receiver after payment of expenses. (Mass.) 846.

See also under VI, as to transfer in other states.

Garnishment.

The *situs* of a credit for the purpose of garnishment is questioned in an Ohio case, in which a statute fixing the *situs* at the residence of the debtor is held valid as between citizens of the state, although the principal defendant is served only by publication, being a nonresident of the county, although it is intimated that this would not be true of a creditor who did not reside in the state. (Ohio) 445.

The question of the garnishment of a debt due to a nonresident is presented again in Nebraska cases with somewhat unusual incidents under a statute making it unlawful to defeat

exempt wages by garnishment or otherwise, and a judgment in another state in garnishment is held invalid as against such exemption. (Neb.) 210, 650.

Set-off.

A very valuable collection of cases on set-off is included in this volume.

The question of the right of a creditor to set off against the assignee of a chose in action not due at the time of the assignment a claim which had previously matured is raised in a Michigan case which declares that such set-off cannot be made against the assignee of an executory contract. (Mich.) 806.

A note for the purchase price of chattels is held not a good set-off for creditors on his claim of damages for wrongful replevying of the chattels. (Md.) 652.

Set-off against negotiable paper held as collateral security is allowed in an Alabama case. (Ala.) 825.

The right of set-off by or against the receiver of an insolvent bank is held to extend to debts of sureties and to claims not matured at the time of the receiver's appointment. (N. C.) 322.

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Set-off between dividends payable by a receiver and a claim against the stockholders is allowed in a Massachusetts case. (Mass.) 313.

Set-off against assigned judgments is allowed in an Iowa case. (Iowa) 835.

As to levy see under VI, *supra*.

IX. CRIMINAL LAW AND PRACTICE.

Contempt.

Contempt by newspaper publication charging corruption of the court is discussed at great length, in a Colorado case. (Colo.) 787.

Conspiracy against trade.

Among recent decisions as to unlawful trade conspiracies is the decision that a combination of coal dealers to fix prices is unlawful. (N. Y.) 221.

Unlawful combinations are discussed also in a Pennsylvania case which holds that a combination of employers is lawful to meet a combination of employes, which has been authorized by statute. (Pa.) 185.

Suspending sentence.

The power of a court to suspend sentence in a criminal case after conviction, as to which decisions are in conflict, is declared by the New York court of appeals to be inherent at common law, and a statute authorizing such suspension is held not to infringe on the executive power to grant reprieves and pardons. (N. Y.) 836.

Stay.

Akin to this is an Indiana decision that a stay of execution on appeal is not a "reprieve." (Ind.) 859.

Verdict.

The question of the effect of rejecting a ver-

dict for manslaughter in the first degree, because there are no degrees of manslaughter, where the jury subsequently brings in a verdict of murder in the first degree, is the occasion of an interesting discussion as to the time when a verdict becomes complete. (Fla.) 723.

Reformatories.

Sentence of infants to a state reformatory for a term not fixed by the court is upheld under an Illinois statute, on the theory that the sentence is for the maximum term fixed by statute for that crime, subject only to deductions as provided in the act. (Ill.) 189.

It is held also that the constitutional provision for penalties proportioned to the offense is not violated by such a sentence in case of minors, instead of giving them, as in case of an adult, the right to have a jury fix the term of imprisonment within the statutory limits. (Ill.) 189.

Commitment to a reform school, under the Kansas statute, on a charge of burglary, is held to be in the nature of a conviction, when made without consent of the child and against his parents' objections. (Kan.) 603.

In Michigan a peculiar statute authorizing the discharge of a person convicted of drunkenness on a recognizance conditioned to take what is called the "Jag Cure" is held unconstitutional. (Mich.) 144.

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3. A common-law remedy is not taken away by a statutory remedy for the same right, unless the statute expressly denies it, or is so clearly repugnant to the exercise of it as to imply a negative. *Id.*

4. A statutory remedy for a constitutional right to damages in a condemnation case cannot be made exclusive, where the owner of the property is given no power to initiate such proceeding or to enforce payment after the damages are assessed. *Hickman v. Kansas City* (Mo.) 658

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2. A wife is not liable for harboring a vicious dog on her own premises where her husband lives with her, although the statutes secure to married women their separate estates and relieve the husband from liability for his wife's torts "in the commission of which he does not participate," since the dog cannot be kept without his consent and participation, and must be charged to his account as the head of the family. *Id.*

3. Absolute liability for damages caused by importation of cattle infected with Texas fever, without allowing it to be shown that defendant had no notice and could not have ascertained the condition of the cattle by the exercise of reasonable care, is not created under Iowa Acts 21st Gen. Assem. chap. 158, §§ 2, 8, substituted for Iowa Code, §§ 4058, 4059, prohibiting the importation of such cattle, and making a violation of the law a misdemeanor, with a right of action to persons injured for the damages sustained. *Furley v. Chicago, M. & St. P. R. Co.* (Iowa) 73

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the court is not restricted to the particular points or reasons considered by the general term as the basis of its decision, but may uphold it on other grounds presented by an assignment of errors in the general term, if the conclusion was correct. *Id.*

6. Where all parties intended to treat the case as though the court had dismissed the action or granted a nonsuit on the ground that plaintiff had failed to "prove a sufficient case for the jury," it will be so treated by the supreme court under the Colorado practice. *Wadsworth v. Union P. R. Co.* (Colo.) 812

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14. Committing to jail one of the witnesses for defendant in the presence of the jury, on account of alleged false evidence, is within the discretion of the judge, for which no legal error can be assigned. *People v. Hayes* (N. Y.) 880

15. A verdict ignoring the instructions of the court to limit the recovery to the amount required to repair the building, and giving the whole amount of insurance thereof, will be set aside. *Limborg v. German F. Ins. Co.* (Iowa) 99

Review of facts.

16. The same strict rule must be applied by the appellate court as by the court below in respect to the sufficiency of parol evidence to

show that a deed was intended for a mortgage. *Jasper v. Hazen* (N. D.) 58

17. Although the court is required upon appeal to review questions of fact under N. D. Laws 1891, chap. 120, § 25, in cases tried by the court or referee, when exceptions to the findings are duly taken and returned, it will not try the case *de novo*, but the findings below are presumed to be correct; and a finding based upon parol evidence will not be disturbed unless the error be made clearly to appear. *Id.*

18. A finding that the sanitary code of a board of health was subscribed by the secretary will not be disturbed on appeal, where there is no proof that the original, which has been destroyed, was not signed, and a copy of the code as published purports to be signed by the secretary, and is attested by his signature as published. *Yonkers Bd. of Health v. Coppitt* (N. Y.) 485

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APPRENTICE.

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Apprentice; effect of death on contract of. 707

ASSESSMENT. See INSURANCE, 2, NOTES AND BRIEFS; PUBLIC IMPROVEMENTS.

ASSIGNMENT. See also BANKS, 4; EXECUTORS AND ADMINISTRATORS, 8; SET-OFF AND COUNTERCLAIM, 1, 8-5, 9.

1. One who pays the debt of another on a promise by the creditor to assign it is the equitable assignee of the debt, although no assignment in writing is made. *Crumlish v. Central Improv. Co.* (W. Va.) 120

2. An assignment to a resident of another state, of a claim against a person whose wages are exempt, in order that the assignee may, by garnishment of the wages in another state, evade the statute of exemption at the residence of the employé, will render the assignor liable to him for the amount of wages thus appropriated without his consent by the garnishment in another state. *O'Connor v. Walter* (Neb.) 650

3. An assignment may be made of the income arising out of personal property held in trust for the support of a person during life, where there is no statute restricting it and no restriction on the assignment in the will creating the trust,—especially where the assignment is to the wife of the assignor, on her agreement to maintain and educate their children. *Lamberton v. Perdes* (Wis.) 824

4. An assignment by an executor before his accounting, of his commissions, is void as contrary to public policy, since when the hope of compensation is gone a strong incentive to diligence and zeal is wanting, and the temptation to be content with a lax or perfunctory administration of the trust becomes more persuasive. *Re Worthington* (N. Y.) 97

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NOTES AND BRIEFS.

See also CONFLICT OF LAWS; INSOLVENCY; SET-OFF AND COUNTERCLAIM.

Assignment; of salary or fees. 97

ASSOCIATIONS.

The remedies afforded by the constitution, laws, and regulations of the order must be exhausted before a worshipful master and presiding officer of a local lodge of ancient, free, and accepted masons, can invoke the aid of the courts against the grand master of the grand lodge of the state to prevent suspension. *Mead v. Stirling* (Conn.) 227

ASSUMPSIT. See also ASSIGNMENT, 1.

A stranger paying the debt of another without request cannot sustain an action at law against such other, unless he has in some way ratified such payment. *Crumlish v. Central Improv. Co.* (W. Va.) 120

ASYLUM. See DEFINITIONS, 1.

ATTACHMENT. See also CONFLICT OF LAWS, 3-5.

A mere possibility, such as the right to a fee in real property in case of surviving another person, is not attachable under a statute authorizing the attachment of "estate or debts." *Young v. Young* (Va.) 642

ATTORNEYS.

NOTES AND BRIEFS.

Attorney; effect of death on contract with. 707

ATTORNEYS' FEES. See CONSTITUTIONAL LAW, 20.

AUDITOR OF STATE. See WRIT AND PROCESS, 4.

BAGGAGE. See CARRIERS, 1.

BAILMENT. See also BANKS, 1.

1. A banker who loaned money for a customer without any compensation for the service is liable for failure to exercise the skill and knowledge of a banker engaged in that business,—especially where he had promised to give careful attention thereto. *Isham v. Post* (N. Y.) 90

2. Taking stock as collateral without verification of its validity at the company's office, especially if there is nothing in the appearance of the certificate to excite suspicion, is not negligence on the part of a banker in making a loan for a customer. *Id.*

3. A banker making a loan for a customer on collateral securities is not, for the purpose of avoiding loss on the collaterals, bound to make inquiry as to the solvency of the borrower, if he was reputed to be responsible when the loan was made, and nothing indicated the slightest reason for refusing the loan. *Id.*

NOTES AND BRIEFS.

Bailment; duty of bailee as to care. 90

BANKRUPTCY. See CONFLICT OF LAWS, 7, NOTES AND BRIEFS.**BANKS.** See also BAILMENT, 2, 3; CHECKS; CONTRACTS, 1; DAMAGES, 2; ESTOPPEL, 4; PAYMENT, 20; PUBLIC MONIES.

1. A banker is not chargeable with negligence in loaning a customer's money on raised collateral, if the forgery was such as to deceive any reasonable scrutiny of a fairly prudent banker knowing the signatures, but not suspecting fraud in the body of the instrument. *Isham v. Post* (N. Y.) 90

2. Money deposited in a bank on open account subject to check, and not received as a special deposit, is in substance and legal effect a loan. *State, O'rea First Nat. Bank, v. Bartley* (Neb.) 67

3. The deposit of a partner cannot be applied to an overdraft of the firm, although the bank, in an action by the partner, might set up such overdraft as a counterclaim. *Adams v. Winston First Nat. Bank* (N. C.) 111

4. A check, although it constitutes an assignment of a fund on deposit, as between the drawer and drawee, does not charge the bank in favor of the payee, if the deposit is otherwise lawfully appropriated before the presentment of the check, or any good equivalent thereto. *Bank of Antigo v. Union Trust Co.* (Ill.) 611

5. Checks drawn by the cashier of a bank in its name upon another bank in which it has a deposit, for the purpose of speculating in stocks without the knowledge of the officers of the bank, the names of the payees being actual customers of the bank, but such customers having no knowledge of the checks or connection with the transaction, are subject to the same rule as if fictitious names were selected and used; and the payment by the drawee bank of such checks, upon indorsements made by such cashier, is good as against the bank of which he is an officer. *Phillips v. Mercantile Nat. Bank* (N. Y.) 584

6. A national bank is not bound by the promise, without consideration, of its cashier, to pay a draft drawn or to be drawn upon a depositor, since the power so to contract is not embraced within those given by U. S. Rev. Stat. § 5136, subd. 7, empowering it to exercise all incidental powers necessary to carry on the business of banking by discounting and negotiating notes, drafts, bills, and other evidences of debt, receiving deposits, buying and selling exchange, coin, and bullion, loaning money on personal security, and issuing and circulating notes. *Flannagan v. California Nat. Bank* (C. C. S. D. Cal.) 836

7. On indorsement "for deposit" of a check which is credited as cash by the bank which receives it, and thereafter by indorsement in the same form is transferred to another bank which in good faith credits it as cash and pays the proceeds to the former bank, which afterwards makes an assignment for creditors, the title to the check must be held to be in the bank which holds it and has paid for it. *Ditch v. Western Nat. Bank* (Md.) 164

8. An indorsement "for collection" will not pass the title to commercial paper to the bank 23 L. R. A.

in which it is deposited. *Tyson v. Western Nat. Bank* (Md.) 161

9. A third person can acquire from the bank no title to commercial paper deposited with an indorsement "for collection." *Id.*

10. The collection of paper deposited with a bank indorsed "for collection" after the bank has ceased to do business because of insolvency will not vest the title to the paper in the bank. *Id.*

11. Entering the amount of commercial paper deposited with a bank "for collection" as cash in the pass book of the depositor and to his credit on the books of the bank will not pass to the bank the title to the paper, if it was not to be an absolute credit, but was to be charged back if not collected. *Id.*

12. Failure of the bank on which a check is drawn and with which it is deposited "for collection and credit," to notify the drawer of its neglect to transfer the credit, will discharge him from further liability in case he is injured thereby. *Exchange Bank v. Sutton Bank* (Md.) 173

13. The completion of a transfer of credit to the payee of a check indorsed "for collection and credit" by the assignee for creditors of an insolvent bank, which just before assignment had charged the check to the maker, but had not given credit to the payee, will not constitute a payment of the demand for which the check was given. *Id.*

14. The fact that when a bank received a check upon itself "for collection and credit" to another account it was hopelessly insolvent, and the same day placed its assets in the hands of trustees for creditors, shows that its failure to notify the drawer of its neglect to transfer the credit worked no injury to him which would discharge him from liability for the debt for which the check was given. *Id.*

15. Recovery by the payor of a forged check will not be permitted under Pa. Act 1849, § 10, providing for recovery of money paid on forged signatures, if the check was paid and apparently dismissed from further attention until five days later, when the payee, after parting with the funds, started an investigation which disclosed the forgery. *Iron City Nat. Bank v. Fort Pitt Nat. Bank* (Pa.) 615

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Banks; indorsement of check "for deposit." 164

Nature of drafts by one bank on another. 173

Indorsement "for collection." 161

Liability of bank as accommodation indorser. 836

Application by bank of individual partner's deposit on firm debt. 111

Payment of forged paper. 616

Payment of forged check. 584

BASTARDY. See DESCENT AND DISTRIBUTION, L.

BENEFIT SOCIETIES. See also INSURANCE, 2, NOTES AND BRIEFS.

The legal title to the 20 per cent of assessment received by local branches of the Order of Iron Hall, which they are allowed to retain as a reserve fund, which by the law of the order is declared to be the property of the Supreme Sitting and subject to its control at all times, and which is to be called for in annual installments after the period of six years and six months,—is, like the other 80 per cent, which is paid over immediately, in the Supreme Sitting, although the possession is for the time retained by the branches. *Buswell v. Supreme Sitting of Order of Iron Hall* (Mass.) 846

BILLS AND NOTES. See also ALTERATION OF INSTRUMENTS; BANKS, 6-11; MORTGAGE, 2; SET-OFF AND COUNTERCLAIM, 2-4, 6.

1. A payor of forged paper is not exempted from the consequences of his act by Pa. Act 1849, § 10, providing for the recovery of money paid on forged signatures, if the result of a recovery would be that his own negligence would occasion loss to the payee. That Act only applies in case of due care on his part, and where his recovery will not cause loss to the payee. *Iron City Nat. Bank v. Fort Pitt Nat. Bank* (Pa.) 615

2. In the absence of notice of the assignment, payment to the payee of a note, assigned without indorsement, will be a complete protection against the assignee, although the note was not produced or delivered up at the time of the payment. *Vann v. Marbury* (Ala.) 825

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Set-off as to commercial paper in the hands of insolvent's assignee or receiver. 819

Set-off against assignee of commercial paper. 825

BLANKS. See also ALTERATION OF INSTRUMENTS; BONDS.**NOTES AND BRIEFS.**

Blanks; in notes; power to fill. 599

Unauthorized filling of blank bond. 602

BOARD OF HEALTH. See CERTIORARI; HEALTH; NUISANCES, 5.**BONDS.** See also APPEAL AND ERROR, 7.

The signer of a blank bond which is filled up thereafter with terms different from those authorized by him is not bound thereby, unless he has become estopped as to the holder of the bond to deny that he authorized it to be filled up in that form. *Richards v. Day* (N. Y.) 601

NOTES AND BRIEFS.

Bonds; liability of surety. 802

BOUNDARY.

The jurisdiction of a municipality bounded by a navigable river does not extend beyond 23 L. R. A.

low-water mark, in the absence of anything in the charter extending the limit of its jurisdiction expressly or by fair implication. *State v. Eason* (N. C.) 520

NOTES AND BRIEFS.

Boundary; of municipality on navigable stream. 520

CARRIERS. See also CONFLICT OF LAWS, 1; EVIDENCE, 2.

1. A regulation limiting the amount of liability for injuries to baggage of a passenger may be made by notice on the back of a steamship contract ticket, where attention is directed thereto by the words "See back," conspicuously printed on the face of the ticket, since the carrier's liability as to baggage, not being exactly defined, may be made definite and certain by reasonable restrictions. *Potter v. The Majestic* (C. C. App. 2d C.) 746

2. A condition restricting the liability of a steamship company to a passenger by exempting it from liability for injuries to person or baggage for perils of the sea and negligence in navigation, among other things, is so material a restriction of a carrier's liability that it cannot be made by notice on the back of a steamship contract ticket, although the words "See back" are conspicuously placed on the face of the ticket. *Id.*

3. A person having a ticket for passage upon a railroad, who boards a freight train which does not carry passengers, believing the ticket good on that train, is to be treated as a passenger, and is not a trespasser. *Boggers v. Cheenpeaks & O. R. Co.* (W. Va.) 777

4. The unusual, rude, and hasty act of a stranger in rushing through a door while hurrying to take a train, thereby violently striking a person on the other side, does not render the carrier liable. *Graeff v. Philadelphia & R. Co.* (Pa.) 606

5. A door, such as is in common use, does not show negligence of a railroad company because it is not all made of glass above the middle, so persons on opposite sides can see each other, nor because a screw-eye 4 feet 10 inches from the bottom projects $\frac{1}{2}$ of an inch beyond the surface and causes injury to a person against whom it is violently pushed by another hurrying to a train. *Id.*

6. A railroad company is liable for the negligence of a mail agent in throwing a mail sack upon a station platform causing the injury of a person thereon, although the company has no right to interfere with the discharge of his duties, if it had notice of his practice to throw sacks in this way. *Galloway v. Chicago, M. & St. P. R. Co.* (Minn.) 442

7. A woman with an infant in her arms on the steps of a car in the act of getting off is not guilty of contributory negligence in alighting after the car is in motion, where, by starting while she was on the steps, it compelled her to choose between the danger of stepping off and of being thrown off while trying to re-enter the car. *Odum v. St. Louis & W. R. Co.* (La.) 152

8. The carrier is not liable for injury to a passenger who had been drinking, and who,

after refusing to go inside the car on the conductor's request, goes down without his knowledge on the steps of the car and falls overboard, where the conductor does not know that he is so much under the influence of liquor as to be incapable of taking care of himself. *Fisher v. West Virginia & P. R. Co.* (W. Va.) 758

9. The conductor of a train, knowing that a passenger standing on the platform of a car is intoxicated, should call his attention to the rules of the company forbidding such exposure, and invite him to go inside of the car. *Id.*

10. A threat in violent and insulting language of the conductor, who has force at his command to execute such threat, to eject a person from the train by force if he does not jump off, is sufficient compulsion or show of force to excuse the person from the charge of contributory negligence in so jumping from the train. *Bogges v. Chesapeake & O. R. Co.* (W. Va.) 777

11. A passenger is not bound to anticipate the danger and be on the lookout for trolley poles while riding with permission on the footboard of a street car, unless he has knowledge of the proximity of such poles to the track. *Elliott v. Newport Street R. Co.* (R. I.) 208

12. A trolley-railway company should foresee the possible danger to which passengers on the footboards of its cars may be exposed by a slight movement of the body, when trolley poles are placed from 10 to 12 inches from the edge of the footboard. *Id.*

NOTES AND BRIEFS.

Carriers; notice to passenger of conditions on ticket:—steamship tickets; railroad tickets. 746

Failure to carry passengers, as a tort. 774

Expulsion of trespasser. 777

Exposure of person of passenger. 759

Negligence in riding on platform or footboard of street car. 208

Negligence in jumping from train. 152

CATTLE. See **ANIMALS**, 3.

CERTIORARI.

The decision of a board of health condemning an alleged nuisance is not reviewable by certiorari, where the board is not obliged to hear any party but may act upon its own inspection and knowledge. *People, Copcutt, v. Yonkers Bd. of Health* (N. Y.) 481

CHARITIES. See also **MASTER AND SERVANT**, 4, 5; **TAXES**, 2.

A home open only to free masons is not public so as to come within a constitutional provision exempting from taxation institutions of "purely public charity." *Philadelphia v. Masonic Home of Philadelphia* (Pa.) 545

NOTES AND BRIEFS.

See also **MASTER AND SERVANT**

Charities; nature of; when public. 546

CHATTEL MORTGAGE. See **MORTGAGE**, 3, 4.

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CHECKS. See also **BANKS**, 4, 5, 7, 12-15, **NOTES AND BRIEFS**.

An instrument must be treated as a check, which is headed by the name of a bank and a date, and over the signature of the cashier directs the payment to the order of a third person of a certain amount of cash, while at the bottom of the paper it is directed to a banking firm. *Exchange Bank v. Sutton Bank* (Md.) 173

CIGAR-MAKER'S UNION. See **TRADE-MARK**.

CIVIL DEATH.

One convicted of a capital offense and sentenced to death in one state is not thereby prevented from maintaining a civil action in another state. *Wilson v. King* (Ark.) 802

COAL DEALERS. See **CONSPIRACY**, 7.

COMMERCIAL AGENCY. See **MERCANTILE AGENCY**, **NOTES AND BRIEFS**.

COMPROMISE. See **INSOLVENCY**, 1, **NOTES AND BRIEFS**.

CONDITION. See **DEEDS**, **NOTES AND BRIEFS**.

CONFLICT OF LAWS. See also **CIVIL DEATH**; **RECOVERERS**, 6.

1. A contract for transportation from Liverpool to New York, made in England between a citizen of the United States and a British shipowner, is an English contract governed by the laws of England, in the absence of anything to show an intent that it is to be controlled by the laws of the United States. *Potter v. The Majestic* (C. C. App. 2d C.) 746

2. A contract made and to be performed in a certain state is to be tested by the law of that state. *Orumlish v. Central Improv. Co.* (W. Va.) 120

3. Attaching creditors, although nonresidents, who seek to question a preference in a prior assignment under an insolvent law of their own state, are entitled to the same protection and preference under attachment laws as if they were residents. *Barth v. Backus* (N. Y.) 47

4. The rule that a voluntary assignment for creditors is valid in other states when upheld by the law of the domicile of the owner does not apply to an assignment which, though voluntarily made, is made under a statute which provides for a discharge of the debts of all creditors who accept any dividends under the assignment or otherwise participate therein; but such an assignment is to be treated as a transfer *in invitum* under insolvency or bankruptcy laws. *Id.*

5. An attachment will be upheld as against a prior assignment for the benefit of creditors in another state, which is in fact a transfer *in invitum* under insolvent laws. *Id.*

6. A receiver of a foreign corporation, appointed in another state in proceedings to dissolve the corporation, has a right to a debt due

the corporation, as against an attempt at garnishment of the debt by a nonresident creditor of the corporation, who is a citizen of the state in which the corporation existed and in which the receiver was appointed. *Giltman v. Hudson River Boat & S. Mfg. Co.* (Wis.) 52

7. Citizens of a foreign state will not be aided by the courts to obtain by garnishment preference of their claims against a foreign debtor in disregard of proceedings in his own country for the sequestration of his estate and the appointment of a trustee thereof in bankruptcy. *Long v. Forrest* (Pa.) 83

NOTES AND BRIEFS.

See also RECEIVERS.

Conflict of laws; as to insolvency transfers. 48

Transfer of property out of state by insolvency proceedings or assignment for creditors; (I.) personal property; (a) voluntary assignments; (1) place of assignment; (2) extraterritorial effect generally; (3) as against attachments in general; (4) discrimination in favor of residents; (5) as to nonresident attachment creditors generally; (6) as to attachment creditors residing in the state where the assignment was made; (7) effect of assignee's possession; (b) assignment under insolvency statutes; (1) in general; (2) as to resident creditors; (3) as to residents of state where insolvency transfer was made; (4) as to other nonresidents; (5) effect of assignee's possession; (6) right of assignee to sue in other state; (c) bankruptcy transfers; (1) English decisions; (2) American decisions; (II.) real property; (III.) ships on high seas. 83

CONSPIRACY.

1. Greed of profit or malice toward others is an essential element of an unlawful conspiracy at common law to restrain trade. *Cote v. Murphy* (Pa.) 185

2. A combination of employers to resist an advance in wages determined upon by an association of employes, by refusing to sell to any persons who concede such advance is not an unlawful conspiracy since the passage of the Pennsylvania statute making it lawful for employes to combine to raise wages, and to persuade by all lawful means others from working for a less sum, since such combination is not to lower the price of wages as regulated by supply and demand, but to resist an artificial price made by a combination, which by statute is lawful. *Id.*

3. That one whose business is injured by a combination of employers to resist a demand of workmen for an increase of wages is not a workman nor a member of a workmen's union will not entitle him to recover his damages from the members of the combine, if the combination was lawful as to the workmen and he had undertaken to aid their cause. *Id.*

4. Sending notices to wholesalers that members of an employers' organization formed to resist a demand by workmen for an increase in wages will withdraw their patronage if sales are made to persons acquiescing in the workmen's demand is not such coercion or threat as will render the combination unlawful. *Id.*

5. A combination of retail lumber dealers to destroy the business of brokers and commission dealers who do not keep a lumber-yard with an assorted stock of lumber, by coercing wholesalers to refuse to make sales to such brokers or lose the business of the members of such combination, is unlawful and renders a member who procures action by the association to the injury of brokers liable to the latter for damages. *Jackson v. Stanfield* (Ind.) 588

6. A policy calculated to destroy or injure the business of another by threats or intimidation is unlawful, and creates a liability for damages to the person injured. *Id.*

7. An organization of coal dealers, intended to prevent competition in prices, in pursuance of which the price of coal is raised, is a conspiracy; condemned by N. Y. Pen. Code, § 165 making it a misdemeanor to conspire to commit any act injurious to trade or commerce, and raising the price of coal is a sufficient overt act. *People v. Sheldon* (N. Y.) 221

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Conspiracy; to affect prices. 224

To affect business of another. 135

CONSTITUTIONAL LAW. See also CRIMINAL LAW, 4; TAXES, 7.

1. A statute allowing women to vote in town and city elections cannot be made to take effect in any city or town upon its acceptance by a majority vote of the voters of such city or town, since it is a matter of general, and not local, concern, to which the principle of local option cannot properly apply. *Re Municipal Suffrage to Women* (Mass.) 113

2. A statute providing that it shall take effect upon its acceptance by a majority vote of the people of the state cannot be upheld under the constitution of Massachusetts, which makes the senate and house of representatives the legislative department of the government, and does not reserve to the people any direct power of supervision. *Id.*

3. Articles 5 and 8 of the Amendments to the United States Constitution have no application to the states. *People, Bradley, v. Illinois State Reformatory* (Ill.) 189

Self-executing provisions.

4. A constitutional provision that property shall not be damaged for public use without compensation is self-enforcing. *Hickman v. Kansas City* (Mo.) 658

5. No formal assignment of a city to the class to which it belongs is necessary to make operative a constitutional provision limiting the amount of indebtedness of the city according to its classification on population. *Beard v. Hopkinsville* (Ky.) 402

State business.

6. The state cannot embark in any trade which involves the purchase and sale of any article of commerce for profit, even in the absence of express provision in the Constitution against it. *McCullough v. Brown* (S. C.) 410

7. The police power of the state does not extend to the entire prohibition of the sale of intoxicating liquors by private individuals, and the giving of a monopoly of such business to the state, without any attempt to restrict or

discourage such sales. *McCullough v. Brown* (S. C.) 410

8. A statute prohibiting the sale of intoxicating liquors by any private individual and vesting in the state the exclusive right to manufacture and sell such liquors violates the provisions of S. C. Const. art. 1, §§ 1, 14, guaranteeing all men the right of "acquiring, possessing, and protecting property," and providing that no person shall be "despoiled or dispossessed of his property, immunities, or privileges . . . or deprived of his life, liberty, or estate, but by the judgment of his peers or the law of the land." *Id.*

Due process.

9. A statute attempting to make a corporation, on the discharge of an employé, pay the whole amount of his stipulated wages up to that date, although by his failure to perform his contract he has damaged the corporation, is unconstitutional as taking property from the corporation without due process of law. *Leep v. St. Louis, I. M. & S. R. Co.* (Ark.) 264

10. Due process of law is not afforded by a statute allowing a railroad company to be charged with liability for stock killed by trains irrespective of negligence, and the amount of recovery to be established without proof of the value of the stock. *Wadsworth v. Union P. R. Co.* (Colo.) 812

11. A hearing of a property owner before the condemnation of his land as a nuisance by a board of health is not necessary to constitute due process of law, where the question of nuisance remains open to trial in the courts, notwithstanding the decision of the board of health. *People, Copeutt, v. Yonkers Bd. of Health* (N. Y.) 481; *Yonkers Bd. of Health v. Copeutt* (N. Y.) 485

12. Due process of law in respect to the removal of an officer does not mean a trial by a constitutional judiciary, but is furnished by the governor's investigation authorized by a state constitution, although he is given the power not only to decide on the removal, but to present the charges and employ counsel in the investigation. *Attorney-General, Rich, v. Jochim* (Mich.) 699

13. A public office is not property within the provision of the Federal Constitution against deprivation of property without due process of law, and therefore that provision is not violated by a clause in a state constitution giving the governor power to remove officers for gross neglect or misfeasance. *Id.*

Ex post facto laws.

14. A change in a statute by leaving out the minimum limitation of the term of imprisonment for a crime, so that the punishment may be for a less, but cannot be for a greater, term than before, cannot be regarded as an *ex post facto* law. *People v. Hayes* (N. Y.) 880

Regulation of contracts.

15. The right of an individual to contract to labor, with a period of credit for payment of his wages, is included in the constitutional right to acquire and possess property. *Leep v. St. Louis, I. M. & S. R. Co.* (Ark.) 264

16. The legislature cannot interfere with the right of parties to contract on a subject which is purely and exclusively private, unaf-

ected by any public interest or duty to person, to society, or government, where the parties are capable of contracting. *Id.*

17. Statutes regulating contracts between corporations and their employés may be enacted under the reserved power to amend corporate charters. *Id.*

18. The restriction by statute of contracts between corporations and employés is not unconstitutional because interfering with the right of the employés to contract. *Id.*

19. Corporations may by statute be compelled on the discharge of an employé to pay the wages then earned, and without discount for prepayment, although by the terms of his contract the wages would not have been yet payable, if power to amend their charters has been reserved. *Id.*

20. A penalty for the benefit of an individual is not imposed by a provision in a statute to protect wages of laborers, giving a right to the recovery of the debt, costs, expenses, and an attorneys' fee, in case the act is violated. *Singer Mfg. Co. v. Fleming* (Neb.) 210

Discrimination; inequality.

21. A railroad company is denied the equal protection of the laws by a statute attempting to create an absolute liability for stock killed or injured by trains, and allowing the amount of recovery to be determined without proof of the actual value of the animals. *Wadsworth v. Union P. R. Co.* (Colo.) 813

22. A statute allowing licenses for race-courses in counties, towns, and cities in which such race-courses already exist, in the discretion of the local authorities, but requiring a three-fourths vote for a declaration that it is a public necessity, in order to license any new race-course, is unconstitutional as granting exclusive "privileges, immunities, and franchises." *State, Alexander, v. Elizabeth* (N. J. Sup.) 523

23. A statute giving the right to a trademark in a label adopted by "any person, association, or union of workmen," is not a local or special law granting special privileges, immunities, or franchises, since it is not limited to associations of any particular class of persons. *Cohn v. People* (Ill.) 821

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CONTEMPT.

1. Courts have not unlimited power to determine what shall be regarded as contempts, but, in the absence of valid statutory specifications, they must be governed by the common law. *People, Connor, v. Stapleton* (Colo.) 787

2. A statutory enumeration of acts which shall constitute contempts of court does not deprive the court of jurisdiction over other contempts. *Id.*

3. It is a contempt of court for a newspaper to charge that persons stigmatized as bootleggers and corruptionists have influence enough with the court to prevent the handing down of a decision in a case in which they had been convicted of crime, to charge the court from shielding them from punishment, and to state that it would be interesting to know what mysterious but powerful influence has retarded the machinery of justice so strikingly. *Id.*

4. Ratification by the publishers of an article constituting contempt of court, put into a newspaper by a reporter, will render them liable therefor. *Id.*

NOTES AND BRIEFS.

Contempt; in publication as to court. 789

CONTRACTS. See also CONSTITUTIONAL LAW, 15, 16; HOMESTEAD, 8; INJUNCTION, 1.

1. A contract may be implied and enforced in equity to leave to an adopted child as an heir the property of the adopting parent, where the proceedings for adoption were taken under a statute which was unconstitutional for defect in its title, but were supposed by the adopting parent as long as he lived to be valid. *Wright v. Wright* (Mich.) 196

2. The fact that an express contract contemplates another more formal contract with a corporation, in which the contractee is largely interested, does not affect its binding powers. *Drummond v. Crane* (Mass.) 707

3. A contract to take a supply of water for a term of years, though not specifying any building to which it should be supplied, does not require a personal taking of the water for the whole period, but is satisfied by a taking by other parties at the place contemplated by the parties to the contract. *Id.*

4. An explicit agreement to take and pay for a certain quantity of water per annum for ten years is not terminated by the death of the promisor, although he wanted the water, as the other party knew, for use in a mill held under a lease, and the lease was rightfully terminated by the lessor after his death,—especially where the contract was procured by the other party as a basis for making an investment in the waterworks. *Id.*

5. A contract to leave property to an adopted child as an heir is taken out of the statute of frauds by its complete performance on the part of the child. *Wright v. Wright* (Mich.) 196

6. The invalidity of a contract under the statute of frauds is no defense to a third person who wrongfully prevented the performance of the contract. *Jackson v. Stanfield* (Ind.) 588

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7. The privilege of purchasing given a lessee, in case the lessor makes a sale of the premises, is not invalid on the ground that it is wanting, in mutuality, since this privilege is part of the consideration for accepting the lease. *Hayes v. O'Brien* (Ill.) 555

8. An agreement in a lease, that the lessee shall have the privilege of purchasing the premises upon such terms and at the same price per acre as any other person or purchaser may have offered, although it does not bind the lessor to make any sale, is valid and binding in favor of the lessee if the lessor decides to sell, and is not incomplete or indefinite. *Id.*

9. A description of land as the portion of a specified farm east of the right of way of a certain railroad, which runs in a northerly and southerly direction, is sufficient to identify the land, where the range, township, and section on which the land is situated are given. *Id.*

10. The discounting of three notes amounting to more than \$11,000, under a promise to "use, say \$10,000 of the paper," does not constitute an entire transaction which will prevent a rescission of the contract as to one of the notes only, after learning of the insolvency of the maker. *Bank of Antigo v. Union Trust Co.* (Ill.) 611

11. The issuance of an injunction against violation of his agreement not to engage again individually in the business cannot be prevented on the ground that the contract tends to create a monopoly, by a manufacturer who for mutual advantage unites with other manufacturers of the same product in a combination of stocks, machinery, accounts, and goodwill, and the formation of a corporation to operate the combined business. *Oakdale Mfg. Co. v. Garst* (R. I.) 689

12. A contract will not be declared void for unreasonableness, which prevents the manufacturer of oleomargarine from again engaging in the business for five years upon his uniting with other manufacturers in the formation of a corporation for the production of that article. *Id.*

13. A contract by which one person is to plant and cultivate peach trees upon the land of another for a term of ten years, and to receive half of the proceeds during any two years of such term which he may select, is not invalid in respect to the interest given in such crops as a mortgage of a thing having no potential existence, since the contract is executed by the setting out and delivery of title to the trees, and the crops are the subject of sale or mortgage in the same manner as crops to be raised from seeds already planted. *Dickey v. Waldo* (Mich.) 440

14. A contract by which one person is to set out and cultivate for ten years peach trees upon the land of another, and to have half of the crops for any two years of such term which he may select, makes him a tenant in common with the owner of the land, of the peaches for the years which he may select. *Id.*

NOTES AND BRIEFS.

Statute of frauds as affecting sale or mortgage of crops, see EMBLEMENTS.

Contracts; validity of; to create monopoly.	639
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notes, bills, and checks; attorney; personal	
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CORPORATIONS. See also CONSTITUTIONAL LAW, 9, 17, 19; SET-OFF AND COUNTERCLAIM, 8; TAXES, 9, 11; WRIT AND PROCESS, 2-4.

1. A railroad company formed by consolidation of others, one of which was organized by purchasers of a railroad on foreclosure, is bound by the obligation of the original company to pay for land which it appropriated under a parol license and agreement to pay therefor. *Chicago & I. Coal R. Co. v. Hall* (Ind.) 281

2. Neither the president nor the other officers of a corporation are entitled to any compensation for official services on an implied promise, in the absence of any by-law or resolution of the directors allowing such compensation. *Crumlish v. Central Improv. Co.* (W. Va.) 120

3. The fact that the same persons constitute the majority stockholders in each of two companies does not enlarge the jurisdiction of equity to interfere with the management of one of those corporations in its relation with the other, at the suit of a minority stockholder. *Shaw v. Davis* (Md.) 294

4. A minority stockholder cannot invoke the jurisdiction of equity for himself and those who may subsequently join him, to prevent the majority stockholders from making a contract which is neither *ultra vires*, fraudulent, nor illegal. *Id.*

5. Corporations as well as natural persons are included within the provisions of the Wisconsin statute for a discharge of insolvent debtors. *Barth v. Backus* (N. Y.) 47

6. A corporation is insolvent within the rule as to preferring creditors, where its assets are insufficient to pay its debts and it has ceased to do business, or is in the act of taking a step which will practically incapacitate it for conducting the corporate enterprise with reasonable prospect of success, or its embarrassments are such that early suspension and failure must ensue. *Corey v. Wadsworth* (Ala.) 618

7. One of the governing body of an insolvent corporation cannot be made a preferred creditor for an unsecured debt. *Id.*

8. A foreign corporation will not be denied recognition by the courts of a state merely because composed exclusively of its own citizens. *Oakdale Mfg. Co. v. Garst* (R. I.) 639

9. A foreign corporation is subject to the laws of a state in which it does business, which prohibit garnishment or other proceedings to defeat the exemption of wages of a debtor on a contract to be performed in that state. *Singer Mfg. Co. v. Fleming* (Neb.) 210

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NOTES AND BRIEFS.

Service on foreign corporations, see GARNISHMENT; WRIT AND PROCESS.

Corporations; as persona. 785

Liability of a consolidated railroad company for the debts of its predecessor; in general; assumption of liability by contract; statutory liability; liens and priorities; pleading and practice. 231

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Preference of debts to officers. 618

COTENANCY. See CONTRACTS, 14.

COURTS. See also ACTION OR SUIT, 8; CONTEMPT, 1; STATUTES, 1.

1. The judicial department has jurisdiction to decide which of two rival bodies, each claimed to be the state senate, is the constitutional body. *Attorney-General, Werts, v. Rogers* (N. J. Sup.) 354

2. A suit to compel the execution or cancellation of deeds to land may be within the jurisdiction of a court outside of the county in which the land lies, if it has jurisdiction of the person of the defendant. *Hayes v. O'Brien* (Ill.) 555

3. The circuit court in Wisconsin, having general jurisdiction, is not precluded from taking jurisdiction of a suit against trustees under a will by the fact that the will has been proved in the county court and the estate finally settled in that court, except the execution of the trust, although the county court is expressly given jurisdiction of such suits. *Lamberton v. Pereles* (Wis.) 824

4. General expressions in every opinion are to be taken in connection with the case in which those expressions are used, and, if they go beyond the case, ought not to control the judgment in a subsequent suit when the very point is presented for decision. *Wadsworth v. Union P. R. Co.* (Colo.) 813

NOTES AND BRIEFS.

Courts; inquiry into conclusiveness of enrolled bill, see STATUTES.

COVENANT. See also LANDLORD AND TENANT.

1. An undertaking of a grantee in a deed poll to perform a condition therein expressed, such as to maintain fences, will run with the land and become obligatory upon subsequent purchasers. *Hickey v. Lake Shore & M. S. R. Co.* (Ohio) 396

2. The right of action against a grantee in a deed poll for breach of his implied undertaking to perform a condition contained in the deed, such as maintaining fences, is extinguished on his conveyances of the fee to another. *Id.*

CRIMINAL LAW. See also APPEAL AND ERROR, 2; CONSTITUTIONAL LAW, 14; HOUSE OF CORRECTION; TRIAL, 3-5.

1. A statute authorizing a court to suspend sentence in a criminal case after conviction does not encroach upon the constitutional powers of the executive to grant reprieves

and pardons. *People, Forsyth, v. Monroe County Ct. of Sess.* (N. Y.) 856

2. The power to suspend sentence after conviction is at common law inherent in a court of record possessing jurisdiction in criminal cases. *Id.*

3. A court cannot preclude itself or its successor from passing the proper sentence whenever such a course appears to be proper, by an order suspending sentence during good behavior. *Id.*

4. Mich. Laws 1898, Act No. 307, popularly known as the "Jag Cure Act," which authorizes a person convicted of drunkenness to be released on a recognizance conditioned that he will immediately take treatment for the cure of drunkenness of some corporation organized by law to make and file reports in reference thereto, and that he will obey all regulations prescribed by those administering such cure, with the further provision that he may be acquitted and discharged at the end of sixty days on proof that he has conformed to such conditions,—is unconstitutional as an attempt to permit unofficial persons to prescribe rules which shall acquit persons charged with crime, while these rules may be as variable as the corporations are numerous. *Senate of the Happy Home Club v. Alpena County* (Mich.) 144

5. A verdict of manslaughter in the first degree, which the court refuses to receive because there are no degrees of manslaughter, does not amount to an acquittal of the higher offense of murder, so as to prevent the jury, after retiring again, from rendering a verdict of murder in the first degree. *Grant v. State* (Fla.) 723

NOTES AND BRIEFS.

Criminal law; suspension of sentence. 856

Correction of verdict in criminal cases:—(I.) general rules; (II.) by the court; (a) general doctrine; (b) to assess punishment; (c) to find degree of offense; (III.) by the jury under the court's direction; (IV.) sealed verdicts; (V.) effect of discharge; (VI.) effect of recording; (VII.) special verdicts; (VIII.) English decisions. 723

CROPS. See CONTRACTS, 13, 14; EMBLEMENTS, NOTES AND BRIEFS; LEVY AND SEIZURE, 2.

CURTESY.

NOTES AND BRIEFS.

Curtsey; levy on estate by, see LEVY AND SEIZURE.

DAMAGES. See also ACTION OR SUIT, 5.

1. General damages are such as the jury may give when the judge cannot point out any measure by which they are to be ascertained except the opinion and judgment of a reasonable man. Special damages are such as by competent evidence are directly traceable to a failure to discharge a contract obligation or duty imposed by law. *Bank of Commerce v. Goose* (Neb.) 190

2. Damages for wrongful refusal of a bank 23 L. R. A.

to pay a check cannot include an allowance for injuries sustained by an arrest and imprisonment for giving an alleged fraudulent check and the publication of the fact, as these are not the natural result of the refusal to pay the check. *Id.*

3. The damages for loss of business caused by an illegal combination of other persons may include the profits which would have been made except for the unlawful interference. *Jackson v. Stanfield* (Ind.) 588

4. Expenses of travel to another place to purchase lumber are too remote to be included in damages for unlawfully preventing a person from procuring lumber from accustomed sources. *Id.*

5. The measure of damages recoverable on a contract by the promisee is not affected by the fact that it was for the benefit of a corporation of which he is a stockholder. *Drummond v. Crane* (Mass.) 707

6. A verdict for \$10,000 is not excessive for an injury to a woman's knee, although it seemed of itself a comparatively small one, where it caused a nervous shock which resulted in the development of heart disease and left her a helpless invalid. *Galloway v. Chicago, M. & St. P. R. Co.* (Minn.) 443

7. Some proof of the amount of damages is necessary in order to recover anything more than nominal damages for an actionable wrong. *Watts v. Norfolk & W. R. Co.* (W. Va.) 674

8. Entire damages, including those which will arise in the future, can be recovered for a nuisance only when the cause of injury is permanent and the recovery will confer a license for its continuance, but not where the injury is not permanent, but one which it may be presumed the defendant will remove rather than suffer the entire damages. *Id.*

9. Prospective damage by the impairment of plaintiff's capacity for earning a livelihood after his majority is a proper element in an action for personal injuries by a minor nine years old, although his petition contains no specific allegation in regard thereto, and there is no direct evidence on the subject. *Schmitz v. St. Louis, I. M. & S. R. Co.* (Mo.) 250

10. Mental anguish of a boy nine years old, consisting of grief and sorrow over the loss of his limb and becoming a cripple for life, is a proper element of damages in an action by him for injuries sustained by the alleged negligence of a railway company at a highway crossing. *Id.*

11. Insanity resulting from the shock and excitement caused by a railroad accident to a passenger who sustained no bodily injury will not make the railroad company liable. *Haile v. Texas & P. R. Co.* (C. C. App. 5th C.) 774

12. Damage for change of grade of a street includes the injury resulting from the raising of a portion of the street by a railroad company in obedience to the ordinance fixing the grade. *Hickman v. Kansas City* (Mo.) 658

13. The rule that benefits deducted in measuring damages in a condemnation case must be special and peculiar and cannot include general benefits shared in common with

other property in the neighborhood, instead of taking the difference between the value of the property before and after as the measure of damages,—applies as well to a case of damaging as to one of taking property. *Hickman v. Kansas City* (Mo.) 658

14. Damage occasioned by establishing a grade in a street, on first raising the grade above the natural surface, as well as damage by raising or lowering a grade previously established, must be compensated under a constitutional provision for compensation in case of property taken or damaged for public use. *Hickman v. Kansas City* (Mo.) 658

NOTES AND BRIEFS.

Damages; for mental suffering; in cases of tort. 774

Measure of, for dishonor of check. 190

DAMS. See NUISANCES, 1-3.

DEATH. See CONTRACTS, 4; INNKEEPERS.

DEEDS. See also COVENANT; ESTOPPEL, 1.

1. The word "divided," in a deed of one divided fourth of certain property, will not be rejected so as to make a deed of an undivided fourth, where the result would be to ignore the intention of the grantor by passing an after-acquired title. *Ford v. Unity Church Soc.* (Mo.) 561

2. A grantee by accepting a deed poll is deemed to have entered into an express undertaking to perform a condition contained in the deed, such as an obligation to maintain fences. *Hickey v. Lake Shore & M. S. R. Co.* (Ohio) 896

NOTES AND BRIEFS.

Deed; record of, see REAL PROPERTY.

Liability of grantee upon a condition of deed poll; doctrine against liability upon the covenant; contrary doctrine. 896

DEFENSE. See CONTRACTS, 6; HUSBAND AND WIFE.

DEFINITIONS. See also OFFICERS, 8.

1. The words "any asylum" at which persons are kept at public expense, within the meaning of the Michigan constitution providing that residence for voting purposes shall not be changed by staying in such institutions, includes a soldiers' home supported by the state. *Wolcott v. Holcomb* (Mich.) 215

2. The word "kindred," in a statute providing for the descent of property in the absence of kindred, means those who can lawfully inherit, and does not include illegitimate blood relatives, unless they are given the right by statute to inherit. *Croan v. Phelps* (Ky.) 758

DEPOSIT. See BANKS, NOTES AND BRIEFS.

DEPOSITIONS.

A deposition of a witness, taken by plaintiff and filed in the suit, is properly excluded on plaintiff's objection that the witness is present, upon defendant's offering it in evidence, under 23 L. R. A.

the implication contained in Mo. Rev. Stat. 1889, § 4461, which makes no provision for the reading of the deposition of a witness not a party to the suit who is present at the trial. *Schmitt v. St. Louis, I. M. & S. R. Co.* (Mo.) 250

DESCENT AND DISTRIBUTION.

See also DEFINITIONS, 2.

1. A statute providing that "bastards shall be capable of inheriting and transmitting an inheritance on the part of or to the mother" does not provide for the transmission of the estate through the mother to her collateral kindred. *Croan v. Phelps* (Ky.) 758

2. The rights of a person under an alleged contract to leave him as heir the property of the other party cannot be determined in proceedings, under Mich. Pub. Acts 1887, Act No. 278, to determine who are the legal heirs or legal representatives of such person. *Wright v. Wright* (Mich.) 196

3. Real property may descend to a child who, by adoption in another state, has become there the lawful heir of the owner of the property. *Van Matre v. Sankey* (Ill.) 665

NOTES AND BRIEFS.

Descent and distribution; in case of succession of wife. 803

Inheritance by, through, or from illegitimate persons:—on the part of the mother; marriages null; legalizing illegitimates by statute and recognition; inheritance by illegitimate from his mother; inheritance by illegitimate under will; inheritance by illegitimates from brothers and sisters; inheritance by illegitimates through mother or father; inheritance by brothers or sisters of mother or father of illegitimate; inheritance by mother from an illegitimate child; inheritance through illegitimate; inheritance by widow or husband of illegitimate; inheritance by legitimate from illegitimate child of the same mother. 753

DESCRIPTION. See CONTRACTS, 9.

DISPENSARY. See CONSTITUTIONAL LAW, 8.

DIVORCE. See HOMESTEAD; HUSBAND AND WIFE, NOTES AND BRIEFS; JUDGMENT, 16, 17, 19.

DOGS. See ANIMALS, 1, 2.

DOMICIL. See VOTERS AND ELECTIONS, 8.

DOWER.

NOTES AND BRIEFS.

Dower; levy on estate of, see LEVY AND SEIZURE.

DRAFTS. See BANKS, NOTES AND BRIEFS.

DRAINS. See WATERS, 2.

DRUNKENNESS. See CARRIERS, 8, 9; NEGLIGENCE, 1; RAILROADS, 8.

DUE PROCESS. See CONSTITUTIONAL LAW, 9-18.

ELECTION. See VOTERS AND ELECTIONS, NOTES AND BRIEFS.

ELEVATORS.

A newsboy who attempts to ride in a passenger elevator after he has notice of the rule that newsboys are not allowed to ride in it, although they are permitted to enter the building to ply their vocation, is a trespasser as to any use of the elevator, so as to defeat his right to recover for injuries received in such attempt. *Springer v. Byram* (Ind.) 244

EMBLEMENTS. See also LEVY AND SEIZURE, 2, NOTES AND BRIEFS.

NOTES AND BRIEFS.

Emblements; sale or mortgage of future crops:—(I.) how assignable; (a) sales; (b) statute of frauds; (c) mortgages; (d) upon sale of the land; (II.) general doctrine; (III.) necessity and effect of ratification; (IV.) necessity and effect of possession; (V.) potential interests; (VI.) equitable doctrine; (VII.) description; (a) general rules; (b) sufficient; (c) insufficient; (VIII.) parol evidence to identify; (IX.) notice; (a) general; (b) constructive; (X.) necessity and effect of recording; (XI.) to what crop or part of crop it extends; (XII.) title of a mortgage; (XIII.) effect of; (a) as against creditors; (b) as against purchasers; (c) as between husband and wife; (d) judgment against; (XIV.) severance of the property; (XV.) application of proceeds; (XVI.) to secure crop advances; (XVII.) crops raised upon shares; (XVIII.) upon whom binding; (XIX.) landlord and tenant; (XX.) conversion; (XXI.) special state doctrines and laws. 449

EMINENT DOMAIN. See also ACTION OR SUIT, 2, 4; DAMAGES, 12-14; HIGHWAYS, 8.

1. Damages to the residue of a tract of land, over which a railroad right of way is taken, arising from the construction of the road, are released so far as such damages could be taken into consideration in assessing the compensation for the right of way under proceedings for condemnation, although the land is granted to the company without such proceedings. *Watts v. Norfolk & W. R. Co.* (W. Va.) 674

2. Injury to a dwelling-house upon the residue of land obtained for a railroad right of way caused by the careful blasting of rock in the construction of the road is not the subject of action; but rock so deposited on the land must be removed within a reasonable time, else it will form the basis of an action. *Id.*

3. Injury to a private way from the construction of a railroad on land granted for that purpose by the owner of the way is not the subject of an action; but injury to a public road peculiarly affecting such landowner is. *Id.*

4. Injury to a private ferry owned by one from whom the right of way had been obtained, arising from construction of a railroad obstructing an approach to the ferry, cannot be the subject of an action by such owner against the company. *Id.*

5. A fill or bar unnecessarily made in a

stream by placing and throwing into it rock and other refuse material in constructing a railroad, to the injury of a millsite on the residue of the land over which the right of way is taken, constitutes a private nuisance and ground of action against the company. *Id.*

NOTES AND BRIEFS.

Eminent domain; effect of condemnation on subsequent injury to property. 675

ENTIRETIES. See ADVERSE POSSESSION.

EQUITY. See TRIAL, NOTES AND BRIEFS.

ESCAPE.

NOTES AND BRIEFS.

Escape; liability of sheriff for. 861

ESTOPPEL.

1. A deed may pass a subsequently acquired title by virtue of 1 Mo. Rev. Stat. 1855, p. 355, § 3, where it appears to convey the fee-simple absolute, although it is on consideration of love and affection alone. *Ford v. Unity Church Soc.* (Mo.) 561

2. A statutory provision that a subsequently acquired title of a grantor in a deed purporting to convey a fee-simple absolute shall immediately pass to the grantee, and "that such conveyance shall be valid as if such legal estate had been in the grantor at the time of the conveyance," is not effectual to defeat a bona fide purchase by a subsequent grantee from the same grantor in reliance on the records, which do not show any conveyance by the grantor after acquiring title to the property. *Id.*

3. A person is not estopped from claiming damages because of the change of grade of a street, because after a portion of the street had been raised by a railroad company in accordance with the ordinance fixing the grade he requested that the grading of the street might be finished. *Hickman v. Kansas City* (Mo.) 658

4. A bank is so far concluded by the acts of its cashier authorized to draw a check upon the bank's funds, in drawing checks payable to fictitious payees or to customers whose names are used for fictitious purposes and indorsed by him upon the checks, as to be estopped from denying the validity of such acts as against the bank upon which the checks are drawn and which has paid them in good faith. *Phillips v. Mercantile Nat. Bank* (N. Y.) 584

5. A creditor who fails to state his intent to apply an existing claim against his debtor on a contract between them when a guaranty is made of the debtor's contract including the payment of men to be employed by him, and when the guarantor requires a change in the contract to make it payable in installments, is estopped as against such guarantor, who takes an assignment of the contract, to set off against it his claim against the debtor. *Bratley v. Thompson Smith's Sons* (Mich.) 805

NOTES AND BRIEFS.

Estoppel; doctrine of, as affecting notice by record of deed before grantor has title. 561

EVIDENCE. See also **APPEAL AND ERROR**, 16.**Judicial notice.**

1. Judicial notice will not be taken of the effect which will be produced by releasing upon a grade the brake from a car propelled only by a previously acquired momentum. *Chicago, St. L. & P. R. Co. v. Champion* (Ind.) 861

Presumptions and burden of proof.

2. It is not prima facie the fault of a passenger where he is injured by riding on the footboard of a trolley car. *Elliott v. Newport Street R. Co.* (R. I.) 208

3. An employer has the burden of proof to show that a servant wrongfully discharged might have obtained similar employment to reduce damages for breach of the contract. *Van Winkle v. Satterfield* (Ark.) 853

4. The finding of the body of a child on a railroad track, where it had been struck by a train, raises no presumption of negligence on the part of the company, although the track was straight and clear, where there is nothing to show the circumstances of the accident, or how long the child had been on the track when struck. *Ward v. Southern P. Co.* (Or.) 715

Documentary.

5. A copy of the proceedings of a court of another state is admissible in Minnesota if authenticated according to the statute of the latter state, though not according to the act of congress. *Re Elliot's Appeal* (Minn.) 287

6. An authenticated copy of a judgment roll is evidence of all that is properly contained in it, and is evidence prima facie that the judgment was properly entered in the judgment book. *Id.*

Parol as to writings.

7. The statements in a written assignment of a judgment cannot, in the absence of fraud or mistake, be contradicted by parol in a proceeding by the judgment debtor to set off against it a cross-judgment held by him against the assignor. *Benson v. Haywood* (Iowa) 885

Experiments.

8. Evidence of an experiment as to the action of a car propelled by a previously acquired momentum when suddenly released from the brake on a descending grade is admissible in an action for the mashing of an employé's hand by the alleged sudden starting forward of a car under such circumstances, when the experiment was made at the same place that the accident occurred, with a similar car, and at the same speed. *Chicago, St. L. & P. Co. v. Champion* (Ind.) 861

Opinions.

9. Testimony of a depositor that he regarded a check as deposited for collection is incompetent as a conclusion, where the indorsement was "for deposit." *Ditch v. Western Nat. Bank* (Md.) 164

Declarations.

10. The privilege as to confidential communications from a wife to her husband in letters is lost when he, after they have been received, gives them to a third person. *People v. Hayes* (N. Y.) 890

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11. Disinterested bystanders may testify to statements of a party, made in their presence, although they were made to his physician, in respect to the manner in which his injuries were received. *Springer v. Byram* (Ind.) 244

12. Statements of the brother of an injured person, made in his presence in an ambulance immediately after the injury, as to the manner in which it was received, and that it was the fault of no other person, may be proved against the injured person in an action for such injuries. *Id.*

Relevancy.

13. In an action upon a policy of insurance, evidence as to a loss and adjustment under a policy held by a firm of which the plaintiff was a member, upon the contents of the building covered by the policy sued on, is admissible to show the connection of the two losses and the relation of the parties to the suit in the two transactions, upon the question whether an adjuster who adjusted the loss of the firm had authority to waive proofs of loss under the policy in question. *Slater v. Capital Ins. Co.* (Iowa) 181

14. Evidence of fraud in the creation of a debt is immaterial in a proceeding by garnishment, where the creditor and debtor are both foreigners, and the estate of the latter has been sequestered in his country and placed in the hands of a trustee. *Long v. Forrest* (Pa.) 33

15. Evidence that a banker charged with negligence in loaning money of a customer on raised certificates of stock loaned large sums of his own money on similar certificates to the same borrower is admissible on the question as to his negligence. *Isham v. Post* (N. Y.) 90

16. Evidence that the identical raised certificates of stock have been used as collateral for years, and accepted by skillful bankers and brokers without suspicion, is admissible on the question of negligence in loaning a customer's money upon such certificate. *Id.*

17. Evidence that for a few days after an accident on a railroad trestle, trains were run quite slowly, and afterwards the former alleged dangerous speed was resumed, is inadmissible on the question of negligence in the speed of the train. *Anderson v. Chicago, St. P. M. & O. R. Co.* (Wis.) 203

18. In an action by a child for injuries sustained at a railway crossing, in attempting to cross between cars standing on the crossing, evidence that plaintiff saw others cross before him, and that there was no flagman at the crossing, is admissible on the issue of defendant's negligence in starting the train without warning. *Schmitz v. St. Louis, I. M. & S. R. Co.* (Mo.) 250

19. Evidence that a newsboy had previously been refused permission to ride in an elevator is permissible in an action by him for injuries received on such elevator, claiming the rights of a passenger, where the rules of the establishment excluded newsboys from the elevator. *Springer v. Byram* (Ind.) 244

20. Parol evidence that a bond sued on was executed in blank and was filled up contrary to direction, may be given under a simple

denial of execution and delivery. *Richards v. Day* (N. Y.) 601

Weight and sufficiency.

21. To support a finding that a deed absolute on its face was intended as a mortgage only, the evidence must be clear, convincing, and satisfactory, and of such a character as will leave in the mind of the chancellor no hesitation or substantial doubt. *Jasper v. Hazen* (N. D.) 58

22. Evidence of the age, health, and habits of a person, is not sufficient to sustain a verdict based on his probable earnings, without anything to show his earning power or his business habits or past earnings. *McHugh v. Schlosser* (Pa.) 574

23. Evidence to establish negligence must be sufficient to show facts which will warrant a reasonable man in inferring negligence. *Omaha & R. V. R. Co. v. Clarke* (Neb.) 504

24. The fact that a letter containing notice of the assignment of a note, placed in the mail properly stamped and directed, was never returned to the sender, whose address appeared upon the envelope, is not sufficient to sustain the burden of showing the receipt of notice when met by the positive denial of the addressee, whose testimony is in no way discredited. *Vann v. Marbury* (Ala.) 326

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Evidence; confidential communications. 246

Sufficiency of, to show deed to be a mortgage. 68

EXECUTION. See also LEVY AND SEIZURE, 1.

A *ferri facias* is a lien under W. Va. Code, chap. 141, § 2, upon personal property not of such nature as to be leviable, owned by the debtor before its return day, if docketed as required in said section, without any further notice; but if not so docketed it is not a lien as against a bona fide purchaser, whether he purchased before or after the return day. *Wiant v. Hays* (W. Va.) 83

EXECUTORS AND ADMINISTRATORS. See also ASSIGNMENT, 4.

1. Proof that a deceased party executed a will which he afterwards destroyed will not defeat an application for an administrator, unless its contents can be proved with such degree of certainty that it may be established as a will. *Re Ellis's Appeal* (Minn.) 287

2. A judgment creditor of a matrimonial community cannot, after the wife's death and the husband's qualification as the natural tutor of his minor children, compel an administration of the wife's succession, his remedy being to proceed against the surviving husband and the community property. *Re Hooker's Succession* (La.) 808

3. An assignee of the commissions of an executor has no such vested title, legal or equitable, to any share or interest in the assets of the estate to be distributed upon the account, as confers upon him the right to be made a party to the proceedings, or to be heard upon a settlement and entry of the decree. *Re Worthington* (N. Y.) 97

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EXPERIMENTS. See EVIDENCE, 3.

EX POST FACTO. See CONSTITUTIONAL LAW, 14.

FENCE. See DEEDS, 2; RAILROADS, 2.

FERRY. See EMINENT DOMAIN, 4.

FIRES.

1. Reasonable or ordinary care is the measure of liability in respect to fire, as well as in other cases, although the care and caution required by this rule will be proportionate to the danger. *Day v. H. O. Akeley Lumber Co.* (Minn.) 518

2. Liability for fire used in manufacturing, which is communicated to and destroys property of another, depends on the manufacturer's negligence or misconduct. *Id.*

NOTES AND BRIEFS.

Fire; negligence in use of. 515

FORFEITURE. See LEVY AND SEIZURE, 1.

FORGERY. See BANKS, 14, 15; BILLS AND NOTES, 1.

FORMER JEOPARDY. See CRIMINAL LAW, 5.

FRAUD. See also EVIDENCE, 14.

A conveyance under parol trust to reconvey to the grantor's wife or other person named by him will not, as to the grantor's creditors, change the title before a reconveyance by the trustee. *Polley v. Johnson* (Kan.) 258

NOTES AND BRIEFS.

Fraud; basis of action for; by agent of mercantile agency. 687

FREEHOLD. See APPEAL AND ERROR, 1.

FREIGHT. See CARRIERS, 3.

GARNISHMENT. See also ASSIGNMENT, 2; CONFLICT OF LAWS, 6, 7; CORPORATIONS, 9; JUDGMENT, 5, 10.

1. The situs of a debtor's earnings for the purpose of determining his right to exemption from garnishment is in the state of his residence, where they are payable. *Singer Mfg. Co. v. Fleming* (Neb.) 210

2. The situs of a credit for the purpose of garnishment, as between citizens of the state of Ohio, is fixed by statute at the residence of the debtor. *Root v. Davis* (Ohio) 445

3. A debt of a nonresident of the county who resides in the state, due from a resident of the county, may be garnished under the Ohio statute, on the ground of his nonresidence, without any other service on the principal defendant than by publication. *Id.*

4. The liability of a mortgagee in possession after condition broken, to account for the surplus, is a credit of the mortgagor, and may be attached as such by the process of garnishment. *Id.*

5. As between an assignor of a claim and the debtor whose wages are garnished in another state by the assignee, the proceedings are not *res judicata*. *O'Connor v. Walter* (Neb.) 650

NOTES AND BRIEFS.

Garnishment; jurisdiction as to property beyond process. 445

Of nonresident. 210

Service on foreign corporation in garnishment cases. 500

GIFT.

There is no such delivery of securities contained in a box as is essential to a valid *donatio mortis causa*, by the delivery of the key of the box by the donor on her deathbed to a sister, saying, "I give you the box and all it contains," where the box was itself in another room, locked in a closet, the key to which was in the possession of their mother, with whom the donor lived, while the donee lived elsewhere and made no attempt to take possession of the box during the donor's life. *Keepers v. Fidelity Title & D. Co.* (N. J. Err. & App.) 184

NOTES AND BRIEFS.

Gifts; *causa mortis*; delivery of key. 185

GOODWILL. See also PARTNERSHIP, NOTES AND BRIEFS.

1. Where the legal representative of a deceased member of a partnership firm, as such, without words of limitation, joins in the sale of all the stock and fixtures of such firm to the surviving members thereof, such legal representative cannot maintain an action against such survivors for the goodwill of said firm, or for any portion thereof. *Lobeck v. Lee-Clarke-Andresen Hardware Co.* (Neb.) 795

2. Upon the dissolution of a partnership firm by the death of one of its members the surviving partners may carry on the same line of business, at the same place, that has been transacted by the firm, without liability to account to the legal representative of the deceased partner for the goodwill of said firm, in the absence of their own agreement to the contrary. *Id.*

GOVERNOR. See MANDAMUS; MILITIA, 2.

GUARANTEE AND ACCIDENT LLOYDS. See INSURANCE, 1

GUARANTY.

NOTES AND BRIEFS.

Guaranty; effect of death of party on. 707

HEALTH. See also CERTIORARI; INJUNCTION, 6; NUISANCES, 5.

1. On a division of the city of Yonkers into five wards, with a supervisor from each, by the amendment of 1892 to the city charter, the office of "the supervisor," who was a member of the board of health, disappeared, and the

ward supervisors did not become members of the board of health. *People, Copcutt, v. Yonkers Bd. of Health* (N. Y.) 481

2. Yonkers, although excepted by N. Y. Laws 1885, chap. 270, § 1, from the provisions of the act, so far as it relates to the composition of boards of health and appointment of members thereof, is not excepted from § 3, conferring general powers upon such boards. *Yonkers Bd. of Health v. Copcutt* (N. Y.) 485

NOTES AND BRIEFS.

Health; disobedience of order of board. 482

HIGHWAYS. See also DAMAGES, 14; ESTOPPEL, 8; RAILROADS, 13; TRIAL, 6.

1. An ordinance declaring that healthy growing trees on or near the edge of the roadway of a street constitute a nuisance and obstruction, and directing their removal, is void if they are neither obstructions nor nuisances to the street in fact. *State, Avis, v. Vineland* (N. J. Sup.) 685

2. It is not a valid excuse for the obstruction of a street by a railroad train, that the depot of the company is located at the corner of that and another street, and that trains coming from one direction and halted at the station will necessarily project to some extent into the street, as it is the company's duty so to locate its depot that trains can be stopped thereat without obstructing travel on the public thoroughfare. *Chicago & N. W. R. Co. v. Prescott* (C. C. App. 8th C.) 654

3. A railroad company which assumes to stop a train across a public street in a large town or city, without express authority for so doing, must be prepared to show, as against one who has sustained a special injury by the obstruction of the street, that there was some overweening necessity rendering the blockade justifiable,—especially where the street is heavily burdened with traffic. *Id.*

4. A license to lay a railroad track across a street in a large city or town does not carry with it the right to use the crossing for the purpose of standing trains of cars thereon for such period as suits the convenience of the railroad company, or to use the highway as a depot yard. *Id.*

5. The doctrine of voluntary assumption of a risk as distinguished from contributory negligence is generally applied in cases arising between employer and employé, as to the voluntary use of a tool or appliance known to be defective, and does not apply to the case of one passing along a highway partially obstructed by a railroad train projecting across it. *Id.*

6. It cannot be held as a matter of law that a person who travels over a defective street, with knowledge of the defects therein, or who drives by an obvious obstruction in a public thoroughfare, thereby assumes the risk of injury, and is precluded from recovering against one who is responsible for the defect or who has negligently caused the obstruction. He is not deprived of the right to recover unless in view of all the circumstances he fails to exercise that degree of care which persons under similar circumstances ordinarily exercise, and is guilty of contributory negligence. *Id.*

7. A town which leases to an opera company a hall which is situated in a village wherein the town has no responsibility for the streets is not, because of such private use of the hall, charged with liability for the defective condition of a sidewalk in front of the hall, since the sidewalk is a part of the public street, for which the village alone is responsible. *Buchanan v. Barre* (Vt.) 488

8. The discontinuance of a road is not a taking or damaging of the property of an abutting owner within the constitutional provision as to compensation for property taken or damaged for public use. *Leves Dist. No. 9 v. Farmer* (Cal.) 888

9. An order to vacate a highway is not subject to collateral attack on the ground that the petition asked for two disconnected objects, being the vacation of one road and the opening of another,—especially where it does not appear that the new road is in fact an alteration of the old one. *Id.*

10. The inconvenience caused to an abutting owner on a street by discontinuing another portion of the street, making travel to and from his premises less direct, is *damnum absque injuria* being the same in kind that all the public suffers, and cannot be regarded as damages within the provision of a statute providing for the payment of all damages consequent on the closing of streets. *Buhl v. Fort Street Union Depot Co.* (Mich.) 892

NOTES AND BRIEFS.

Highways; damage to abutting owner by first grading and improvement of street; liable for neglect or illegal act; the effect of statutes; constitutional provision giving damages for property injured or damaged; establishing grade on paper; what is regarded as establishing a grade; change from natural surface; building after establishment of grade; the Ohio doctrine. 658

Vacation of. 889, 892

HOMESTEAD.

1. Mere absence of a wife from the family homestead for three years without claiming any homestead interest in the property, while the husband remains in constant occupancy of the land and home, is not enough to show abandonment by the wife of her homestead rights. *Rosholt v. Mehus* (N. D.) 239

2. A family homestead will, on dissolution of the marriage, remain in possession of the party holding the legal title thereto, discharged from all homestead rights, if no other disposition is made of it by the decree. *Id.*

3. A contract by the owner of a homestead, under which a third person is to set out and cultivate peach trees in consideration of half of the crop for any two years during a term of ten years, the trees to become the property of such owner, is not invalid because not signed by his wife, as a conveyance of any homestead right or as an interruption of the possession of the homestead. *Dickey v. Waldo* (Mich.) 449

NOTES AND BRIEFS.

Homestead; effect of divorce on homestead rights; husband's claim to homestead where 23 L. R. A.

decree of divorce is silent; wife's claim to homestead where decree of divorce is silent; decree awarding homestead. 239

HOUSE OF CORRECTION.

1. A constitutional provision that "all penalties shall be proportioned to the nature of the offense" is not violated by committing infants to a reformatory, with a maximum sentence for the crime, subject to be reduced on recommendation of the board of managers; while an adult convicted of the same crime has a statutory right to have the term of his imprisonment, within the limits fixed by statute, determined by a jury. *People, Bradley, v. Illinois State Reformatory* (Ill.) 139

2. The maximum term of imprisonment for a crime is to be taken as that for which an infant is sentenced to a reformatory, where the statute provides that the court shall not fix the limit of duration of the term, but that it shall not exceed the maximum term provided by law for that crime, and that it may be terminated by the board of managers on certain conditions. *Id.*

3. A sentence to a state reformatory, of an infant charged with crime, must be regarded as a penalty and punishment for crime, where the statute authorizes sentence only after conviction of crime, and requires the sentence to be "to imprisonment." *Id.*

4. The commitment to a reform school of a boy under sixteen years of age, without his consent and against objection of his parents, on the sole charge of committing the specific crime of burglary, without previous conviction by a court of competent jurisdiction, cannot be made by a probate court, under Kan. Sess. Laws 1881, chap. 129, § 4, as such a proceeding would be in the nature of a conviction for a specific crime by a court without criminal jurisdiction. *Re Sanders* (Kan.) 603

NOTES AND BRIEFS.

House of correction; constitutionality of commitment to. 604

HUSBAND AND WIFE. See also ACTION OR SUIT, 7; ADVERSE POSSESSION; ANIMALS, 2; EXECUTORS AND ADMINISTRATORS, 2; HOMESTEAD, 2; JUDGMENT, 16, 19.

The insufficiency of a deed by a married woman of her real estate to convey title, because not duly acknowledged by her, cannot be asserted by a creditor who obtains judgment against her and sells the property thereunder four months after the delivery of the deed and of possession of the property, where she subsequently joins her husband in a proper acknowledgment of the deed. *Meads v. Clark* (Pa.) 479

NOTES AND BRIEFS.

Husband and wife; responsibility of married woman for use and safety of premises owned by her:—(I.) illegal use of premises; (II.) safety of premises. 622

Decree for separate maintenance as bar for divorce. 187

Effect of appearance by nonresident to give jurisdiction of divorce case; appearance generally; fraud and collusion. 287

IMPROVEMENTS.

The owner of improvements on school lands in Washington, who is entitled to compensation therefor on sale of the land, need not yield up possession before bringing an action to recover their value from the purchaser of the lands. *Wilkes v. Davies* (Wash.) 108

INCOMPETENT PERSONS.

1. A county court or its clerk cannot appoint a committee for a person as insane without notice to him. Such an appointment is void, and confers no authority. *Evans v. Johnson* (W. Va.) 737

2. The committee of an incompetent person cannot resign, unless authorized by statute to do so. *Id.*

NOTES AND BRIEFS.

Incompetent persons; constitutional right of notice of lunacy proceedings, see CONSTITUTIONAL LAW.

INDEBTEDNESS. See MUNICIPAL CORPORATIONS, NOTES AND BRIEFS.

INFANTS. See also RAILROADS, 9, 10.

NOTES AND BRIEFS.

Infants; constitutionality of commitment to reform school. 604

INJUNCTION. See also CONTRACTS, 11; PLEADING, 1, 2.

1. An injunction may be granted against enforcing an illegal agreement of dealers to injure the business of another person. *Jackson v. Stanfield* (Ind.) 588

2. An injunction against the leasing by a railroad company of another railroad without the court's leave is in excess of the power of the court, as the court cannot prescribe the terms of such a lease, and can, at the most, prevent only such a lease as is illegal, *ultra vires*, or fraudulent. *Shaw v. Davis* (Md.) 294

3. The fact that a person cannot be reinstated in his office in the masonic order by reversal of a judgment of suspension until after the term of his office has expired is not ground for an injunction against the suspension, the office not being one of profit. *Mead v. Stirling* (Conn.) 227

4. The fact that the grand master of a lodge, who is to try the question of misrepresentation as ground for the suspension of a worshipful master of a local lodge, is also the complainant, is not sufficient ground for an injunction from the courts to prevent the exercise of such quasi judicial authority. *Id.*

5. Wrongful acts for the prevention of which injunctions will be granted are those which affect property or its healthful and beneficial use, and never those which affect reputation merely. *Id.*

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6. The erection and creation of a nuisance dangerous to health may be restrained by injunction by a board of health, under the General Health Act of New York, as well as under the city charter of Yonkers. *Yonkers Bd. of Health v. Copcutt* (N. Y.) 485

7. A city invested by statute with plenary powers over streets, sewers, drainage, and sanitation, may be enjoined from creating and permanently maintaining a nuisance consisting of sewer manholes having perforated covers which emit poisonous gases in large quantities, in a public street contiguous to the dwelling of a citizen, at least where the dangerous character of the nuisance results, not from defects inherent in the general sewerage system, but from defective execution thereof in failing to adapt it to a steep grade in the particular street. *Atlanta v. Warnock* (Ga.) 301

8. An injunction is a proper remedy on behalf of taxpayers to prevent the use of public funds in a business under an unconstitutional statute. *McCullough v. Brown* (S. C.) 410

NOTES AND BRIEFS.

Injunction; against breach of contract. 639
Against a nuisance maintained by a municipal corporation; drainage generally; drainage into watercourse; docks and navigation; market-houses and buildings; railroads and other uses of streets; cemetery; public urinals. 801

INNKEEPERS.

An innkeeper is liable for the death of a person who while sick is driven out into a storm without adequate covering, and left for about half an hour in a stream of melting ice and snow, where he falls from inability to stand on his feet, and it was reasonable to suppose that death might follow such sudden exposure in his condition. *McHugh v. Schlosser* (Pa.) 574

INSANE PERSONS. See DAMAGES, 11; INCOMPETENT PERSONS.

INSOLVENCY. See also CONFLICT OF LAWS, 3-5; CORPORATIONS, 5-7; SET-OFF AND COUNTERCLAIM, 4, 5; TAXES, 4.

1. An assignee for creditors who, under the advice of his own counsel and after consultation with and by the consent of counsel employed by a creditor, compromises suits affecting the trust estate, is not chargeable by that creditor with lack of good faith and proper diligence which will render him liable for assets which upon the compromise the creditors suing are allowed to retain under attachment. *Loucheimer v. Weil* (N. C.) 578

2. A deed in trust for the benefit of creditors vests the title of personal property in the trustee, under Md. Code, art. 16, § 205, when the deed is recorded and the bond filed in the county in which the grantor resides; and such title is not affected by the fact that the bond is not filed in another county in which real estate of the grantor is located. *Fidelity & D. Co. v. Haines* (Md.) 653

NOTES AND BRIEFS.

See also CONFLICT OF LAWS; SET-OFF AND COUNTERCLAIM.

Insolvency; right of assignee of creditors to compromise claims; statutory provisions. 578

INSURANCE. See also EVIDENCE, 18; PLEADING, 8; TRIAL, 7.

1. Although there is no statutory authority for the Guarantee and Accident Lloyds, which is a voluntary association, unincorporated, to transact business without a license, a person who as its agent assists it in doing so is not guilty of any offense under Ga. act Oct. 24, 1887, to regulate the business of insurance, since that act applies only to incorporated companies. *Fort v. State* (Ga.) 86

2. A member of a mutual benefit society is personally liable for assessments regularly made during his membership, although there is no express promise on his part to pay them, where his certificate recites that it is in consideration, among other things, of his payment of such assessments, although it is made on the express condition of forfeiture of all his rights and that the contract shall be null and void if he fails to pay any assessment when due. *Elberbe v. Barney* (Mo.) 435

8. The assumption of parental relations, although without any legal obligation, by a man who sends a girl to school and pays her expenses, is sufficient to give her an insurable interest in his life, so as to sustain a policy which he procures and assigns to her. *Carzenter v. United States L. Ins. Co.* (Pa.) 571

4. A simple-contract creditor has an insurable interest in a building belonging to the estate of his deceased debtor, which may be subjected to his debt because the personal property is insufficient to pay the debts of the estate. *Creed v. Sun Fire Office* (Ala.) 177

5. A threshing-machine is not "in use" within the meaning of an insurance policy covering the property "while not in use," when, not having been used for about two weeks, it is hauled near a farmhouse and left standing there preparatory to its intended use a few days later, and where the fire was not caused by any hazard incident to its actual use or operation. *Minneapolis Threshing-Mach. Co. v. Firemen's Ins. Co.* (Minn.) 576

6. The words "vacant or unoccupied," in an insurance policy, must be construed with respect to the use and adaptability of the building insured. *Limburg v. German F. Ins. Co.* (Iowa) 99

7. Both conditions need not be shown in order to avoid a policy of insurance, under a clause making it void when "vacant or unoccupied." *Id.*

8. An old counter not intended to be moved, but left for sale in an insured building on removal of the tenant, who had used it for a cigar store and factory, and a few bottles and jugs of liquor stored there under an arrangement with him without the knowledge of the owner of the building, do not constitute an occupancy of the building where the owner is seeking another tenant. *Id.*

9. Altering or repairing a building does not constitute occupancy within the meaning of an insurance policy which provides that mechanics may be employed for a certain number of days in such work. *Id.*

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10. Partition of the property among the devisees of the insured effects a change in the "interest, title, or possession" within the meaning of a clause in an insurance policy avoiding the contract if such change occurs. *Trabue v. Dwelling-House Ins. Co.* (Mo.) 719

11. A clause making the "entire policy void in case of breach of condition in any respect" will not make the policy indivisible so as to preclude any recovery on it, although but one premium is paid, in case it is, for convenience, made to cover different kinds of property which are separately valued, and a condition is broken as to one kind. *Id.*

12. An insurance company cannot avoid a policy under a stipulation that it shall be void if the interest of the insured be other than the unconditional and sole ownership of the property, and because such interest was not truly stated, where true and full statements of such interest were made to its agent who knowingly and intentionally wrote down false answers. *Creed v. Sun Fire Office* (Ala.) 177

18. A waiver of proofs of loss under a policy upon a building, made by an adjuster sent by the same company to adjust a loss upon the contents of such building, under a policy held by a firm of which the holder of the former policy was a member, is binding upon the company, in the absence of notice to the insured of any limitation upon the authority of such adjuster. *Slater v. Capital Ins. Co.* (Iowa) 181

NOTES AND BRIEFS.

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Insurable interest in property.	179
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INTERVENTION. See ACTION OR SUIT, 6; RECEIVERS, 5.

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IRON HALL. See BENEVOLENT SOCIETIES.

JAG CURE. See CRIMINAL LAW, 4.

JUDGE. See PROHIBITION.

JUDGMENT. See also EVIDENCE, 7; GARNISHMENT, 5; SET-OFF AND COUNTERCLAIM, 9.

1. Collusion and agreement between the parties to an action for divorce, as to the judgment to be rendered, does not affect the jurisdiction or render the judgment entered void. *Re Ellis's Appeal* (Minn.) 287

2. A decision that the owner of improvements on school lands which have not been appraised as required by law cannot have an injunction against the consummation of the sale of the lands to the highest bidder until he has been paid for his improvements, because he has two other remedies, one of which is to sue the purchaser of the lands for the value of the improvements,—must be held conclusive, in a subsequent suit between the parties in interest, of the right of the owner of the improvements to bring an action for their value against such purchaser, the parties in the two suits being identical except for the omission in the latter suit of the officers against whom the injunction was sought, but who were not parties in interest. *Wilkes v. Davies* (Wash.) 108

3. A judgment against the former owner after a forfeiture of land under W. Va. Code 1868, chap. 31, § 34, for nonentry in the assessor's land books, is not a lien on the land, since the title is vested in the state upon a forfeiture by the mere force of the statutes. *Wiant v. Hays* (W. Va.) 83

4. The docket entry of a judgment against Edward Davis is not constructive notice that there is an incumbrance against either E. A. Davis or Edward A. Davis, and does not affect the rights of a person who has no notice of the actual identity of Edward Davis and the judgment debtor. *Davis v. Sleeps* (Wis.) 818

5. An order made by a justice of the peace upon a garnishee in a proceeding in attachment, after service of notice upon him and the rendition of judgment for the plaintiff, to pay the money owing by him to the defendant into court, presupposes a finding that the garnishee is so indebted, and cannot be collaterally attacked on the ground that the transcript fails to show that such finding had been made. *Root v. Davis* (Ohio) 445

6. The judgment of a state court against a receiver appointed by a federal court is conclusive as to the existence and amount of the claim, but the time and manner of its payment must be controlled by the court appointing the receiver. *Dillingham v. Hawk* (C. C. App. 5th C.) 517

Of other state.

7. A judgment of a sister state is entitled to the same faith and credit that it has in the state where rendered. *Crumlish v. Central Improv. Co.* (W. Va.) 120

8. And it can be reviewed only so far as the jurisdiction to render it is concerned. *Id.*

9. When rendered without service of process in any manner, and without appearance, it is void. *Id.*

10. A judgment in garnishment obtained in another state to defeat the exemption laws of the state in which the debtor resides is not valid in the state of his residence, in which such garnishment to defeat his exemption is made unlawful by statute. *Singer Mfg. Co. v. Fleming* (Neb.) 210

11. A determination upon a direct proceeding, by the court of last resort of the state, that the trial court had jurisdiction to enter a decree of adoption, must be given full faith

and credit in courts of another state, which will preclude impeachment for irregularities. *Van Matre v. Sankey* (Ill.) 665

12. The jurisdiction of proceedings for the adoption of a child in another state cannot be attacked collaterally on the ground that the adopting parent had only a temporary residence in that state, where this question was passed upon by the court in the adoption proceedings, and also on subsequent petition to set aside the decree of adoption. *Id.*

13. The character of a proceeding for the revocation of an adoption is not so summary as to prevent the decision from being conclusive upon the rights of the parties in the courts of another state, if all the parties interested were before the court, and with every material fact before it the court proceeded to adjudicate the questions raised upon their merits. *Id.*

14. The fact that a child adopted was not personally present in court or notified of the proceeding, where this is not required by statute, will not be ground for collateral attack on the decree of adoption, in another state. *Id.*

15. The jurisdiction of a court in another state to hear an appeal cannot be collaterally questioned, where it rendered a judgment of affirmance on the appeal. *Id.*

Of divorce.

16. The validity of a divorce cannot be collaterally attacked by parties who voluntarily appear and submit to the jurisdiction, on the ground that neither of the parties was subject to the jurisdiction of the court, although the divorce might not be effectual to protect them as against the state. *Re Ellis's Appeal* (Minn.) 287

17. That the wife was induced to bring an action for divorce by persuasion, ill treatment, and threats by the husband that he would continue such ill treatment unless she brought the action, does not affect the validity of the judgment, in a collateral proceeding. *Id.*

18. That an action was tried in a county other than that declared by statute the proper county for its trial does not go to the jurisdiction. *Id.*

19. A cause of action for divorce in favor of the husband on the ground of the wife's adultery is not barred by failure to set it up as a defense to a suit by the wife for a separate maintenance, in which she obtains a decree. *Watts v. Watts* (Mass.) 187

NOTES AND BRIEFS.

See also HUSBAND AND WIFE; SET-OFF AND COUNTERCLAIM.

Judgment; incorrect name in docket. 819

JUDICIAL SALE. See ADVERSE POSSESSION; EXECUTION.

JUSTICE OF THE PEACE.

Actions for penalties, which are excluded from the jurisdiction of a justice of the peace, do not include an action by a discharged employé for wages, in which he is entitled to recover, under the statute, for wages after his discharge up to the day of payment, as the ad-

ditional amount is in the nature of exemplary damages, rather than a statutory penalty. *Leep v. St. Louis, I. M. & S. R. Co.* (Ark.) 264

KINDRED. See DEFINITIONS, 2

LABOR UNION. See TRADEMARK.

LANDLORD AND TENANT. See also CONTRACTS, 7, 8.

1. An implied covenant of a lessor of the lower part of a building, to make such repairs on the upper portion, not leased, as may be necessary for the protection of the enjoyment of the lessees of the lower portion, cannot be raised by the fact that the lessee expressly covenants to make certain extraordinary repairs and alterations in the portion leased for the accommodation of his business. *Jones v. Millsaps* (Miss.) 155

2. The lessor of the lower story of a building, retaining the upper story in his own possession and use, is not bound by an implied covenant to make any repairs on the upper portion of the building, in the absence of deceit, misrepresentation, or fraud. *Id.*

NOTES AND BRIEFS.

Landlord and tenant; as to sale or mortgage of crops by, see EMBLEMENTS.

Effect of death on contract of. 707

Liability of landlord as to condition of part of premises not controlled by tenant; elevators; common entrance, passway, and yard, and access; halls and stairways; fire escapes; sidewalk; walls; falling articles; light and air; nuisances; roof used in common; water from roof; water, pipes, and plumbing controlled by landlord; water, pipes, and plumbing used by other tenants; water supply. 155

LEASE. See RAILROADS, 1.

LEGISLATIVE JOURNALS. See STATUTES, NOTES AND BRIEFS.

LEGISLATURE. See also COURTS, 1; QUO WARRANTO; WRIT AND PROCESS, 1.

The senate of New Jersey is not a permanent, continuous body, such that the old or hold-over members are entitled to pass upon the title of the newly elected members, but the latter are entitled to enter the body, since the constitution appoints a day on which "the two houses shall meet separately," imposing the duty of yearly organization, and also provides that the senate shall be composed of "one senator from each county," thus entitling each senator to a voice in all proceedings. *Attorney-General, Werts, v. Rogers* (N. J. Sup.) 854

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Legislature; organization of; *de facto*. 556
Power of, to make a statute contingent on approval by vote of the people. 118

LETTERS. See WITNESSES.
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LEVY AND SEIZURE. See also ATTACHMENT.

1. The right of the former owner of land forfeited for nonentry on the assessor's land books, to the excess of the proceeds after paying taxes, interest, and costs, which is accorded to him by W. Va. Const. art. 13, § 5, is personal property liable to the lien of a *fierti facias* and to recovery by his creditors if transferred in fraud of them, although it has a merely potential existence, since the law requires sale of the land and gives him a right to the surplus if any. *Wiant v. Hays* (W. Va.) 82

2. Annual crops which are the product of industry and care, sown by the owner of the soil, are, while growing and immature, personal property subject to attachment and sale for his debts. *Polley v. Johnson* (Kan.) 258

NOTES AND BRIEFS.

Levy; crops as personal property for the purpose of levy and sale; general doctrine; sufficiency of sheriff's possession; possession of the purchaser; crops held upon shares: (a) tenants in common; (b) husband and wife; (c) cropper's share; (d) landlord and tenant; (e) state decisions. 253

What expectant and contingent interests in real property are subject to attachment or levy on execution; general rule; interest of an heir in his ancestor's lands; reversions, remainders, and executory devises; right of dower; tenancy by curtesy initiate. 643

LICENSE. See also RAILROADS, 5, 6.

A license coupled with an interest is irrevocable. *Chicago & I. Coal R. Co. v. Hall* (Ind.) 231

NOTES AND BRIEFS.

See also NEGLIGENCE.

License; of racing. 525

LIENS. See EXECUTION; JUDGMENT, 3; LIMITATION OF ACTIONS, 8.

LIMITATION OF ACTIONS.

1. Neglect for more than twenty-five years to make an application for the setting aside of an order of naturalization is fatal to the application. *Es McCarran* (N. Y. C. P.) 835

2. A mortgage is a specialty within Ohio Rev. Stat. § 4980, limiting the time for an action upon a specialty to fifteen years, and an action for foreclosure is not for the recovery of real property within § 4977, giving twenty-one years for such actions. *Kerr v. Lydecker* (Ohio) 842

3. The statute of limitations has no application to bar a lien for purchase money reserved in a conveyance of land, though action on a note given for such purchase money be barred so as to defeat its collection out of other property of the debtor. *Evans v. Johnson* (W. Va.) 787

NOTES AND BRIEFS.

Limitation of actions; on mortgage. 842

LLOYDS. See INSURANCE, 1.

LOCAL OPTION. See CONSTITUTIONAL LAW, 1.

LUNATICS.

NOTES AND BRIEFS.

Lunatics; constitutional right to notice of lunacy proceedings, see CONSTITUTIONAL LAW.

MAILS. See EVIDENCE, 24.

MANDAMUS.

Mandamus will not lie to compel official action by the governor, whether the act is of the kind regarded as ministerial or otherwise, under constitutional provisions that the three departments of the government shall be distinct, and that neither branch can interfere with the duties of the others. *State, Robb, v. Stone* (Mo.) 194

MARRIED WOMEN. See HUSBAND AND WIFE, NOTES AND BRIEFS.

MASONS. See ASSOCIATIONS; CHARITIES; INJUNCTION, 3, 4.

MASTER AND SERVANT. See also CONSPIRACY, 2-4; CONSTITUTIONAL LAW, 15, 17-19; EVIDENCE, 8; JUSTICE OF THE PEACE.

1. Disobedience by a brakeman of the company's rules, which contributes to an injury received by him, will constitute contributory negligence, although his disobedience was with the knowledge and consent of the conductor of the train. *Atchison, T. & S. F. R. Co. v. Reesman* (C. C. App. 8th C.) 768

2. The rule applicable to railroad companies, requiring them to inspect cars of other companies used for transporting freight, before permitting their employes to handle them, is not applicable to companies or persons on whose sidings loaded cars are delivered for the purpose of permitting them to unload the freight. *McMullen v. Carnegie Bros. & Co.* (Pa.) 448

3. A clerk or salesman employed by the year in a retail store, without any agreement for Sunday labor, cannot be discharged for refusal to attend the store during certain hours on Sunday to protect the goods while people are passing through it to a postoffice in the rear, although he has, before making the present contract, been in the habit of giving such Sunday services while employed in the store. *Van Winkle v. Satterfield* (Ark.) 858

4. A railroad company is not liable for the malpractice of physicians or the carelessness of attendants at a hospital maintained as a charitable enterprise by contributions of the company and small sums deducted monthly from the wages of its employes. *Union P. R. Co. v. Artist* (C. C. App. 8th C.) 581

5. A reform school under the control and oversight of the legislature, which is an agency of the state and maintained by taxation and state aid, is not liable to an action for damages for negligent or malicious injuries to an inmate by its servants or employes. *Williamson v. Louisville Industrial School of Reform* (Ky.) 200

NOTES AND BRIEFS.

Master and servant; duty to furnish safe place for work. 768

Liability of charitable institution for negligence. 200

Wrongful discharge of servant. 833

MAXIMS.

1. Damnum absque injuria. *Buhl v. Fort Street Union Depot Co.* (Mich.) 392; *Hickman v. Kansas City* (Mo.) 658; *Levee Dist. No. 9 v. Farmer* (Cal.) 888

2. Omnia præsumuntur legitime facta donec probetur in contrarium. *People, Copcutt, v. Yonkers Bd. of Health* (N. Y.) 481

3. Qui facit per alium. *State, Robb, v. Stone* (Mo.) 194

4. Qui sentit commodum, sentire debet et onus. *Chicago & I. Coal R. Co. v. Hall* (Ind.) 231

5. Stare decisis et non quieta movere. *Anderson v. Chicago, St. P. M. & O. R. Co.* (Wis.) 203

NOTES AND BRIEFS.

Maxim; who shall bear loss as between innocent persons. 599

MENTAL ANGUISH. See DAMAGES, 10.

MERCANTILE AGENCY.

1. A mercantile agency is not liable for damages for a false report made by a subagent whose employment is contemplated by the contract of subscription, under which the agency merely agrees to transmit the information obtained by such subagent, where it has exercised due care in the selection of such subagent, since the latter is the agent of the subscriber. *Dun v. City Nat. Bank* (C. C. App. 2d C.) 687

2. A mercantile agency which agrees to transmit information to subscribers who may wish to contract with outside parties, under a condition that it is not to be responsible for loss by the negligence of subagents and in no manner guarantees the actual verity or correctness of the information given, is not liable to a subscribing bank for loss upon commercial paper bought by it in reliance upon information furnished by one of its subagents as to a party to such paper, although such agent, being connected in business with such party, knowingly gave false information, and such bank purchased the paper in reliance thereon. *Id.*

NOTES AND BRIEFS.

Mercantile agency; fraud by agent of. 687

MILITIA.

1. Military officers are within the provisions of the Kansas constitution forbidding the legislature to create any office the tenure of which is longer than four years. *Lewis v. Lovell* (Kan.) 510

2. The governor has power to disband and muster out any company of the national guard

at any time, under the Kansas constitution and Kan. Sess. Laws 1885, chap. 142, although the time of enlistment of the members has not expired. *Id.*

MONEY IN COURT. See TAXES, 13.

MONOPOLY. See CONTRACTS, 11, NOTES AND BRIEFS.

MORTGAGE. See also APPEAL AND ERROR, 16; EVIDENCE, 21; GARNISHMENT, 4; LIMITATION OF ACTIONS, 2.

1. A contingent remainder may be charged by a deed of trust under a statute authorizing "any interest or claim to real estate" to be disposed of by deed or will. *Young v. Young* (Va.) 642

2. The purchaser of land mortgaged to secure notes the character of which is not described in the mortgage, who pays his money upon payment to, and satisfaction of the mortgage by, the one whom the record shows to be owner of the mortgage, without notice of the rights of any assignee, and upon the assurance that the notes are still owned by the mortgagee, takes free from any claim of the assignee, although the notes are not produced or surrendered. *Vann v. Marbury* (Ala.) 825

3. A mortgagee of personal property in possession after condition broken is the legal owner entitled to retain the possession, subject to a liability to account for the surplus of its value after the satisfaction of his own claim. *Root v. Davis* (Ohio) 445

4. Taking possession of mortgaged chattels and selling them at once is authorized by a chattel mortgage which provides that the mortgagee may take possession and sell whenever he "shall choose to do so."—especially when the statute provides that the mortgagee is entitled to possession in the absence of stipulation to the contrary,—notwithstanding the fact that the mortgage is given to secure notes which are payable at different times in the future. *Robison v. Gray* (Iowa) 780

NOTES AND BRIEFS.

Mortgage; of future crops, see EMBLEMENTS.

See also LIMITATION OF ACTIONS.

Mortgage; effect of "danger," "safety," or "insecurity" clause in a chattel mortgage:—right to interfere with third persons; effect of taking possession; how far right is without control; effect of malice; facts which justify taking possession; selling; construction of different provisions and circumstances; other rights conferred. 780

MUNICIPAL CORPORATIONS. See also ACTION OR SUIT, 1; BOUNDARIES; CONSTITUTIONAL LAW, 1, 5; HIGHWAYS, 7; VOTERS AND ELECTIONS, 2; WATERS, 1-3.

1. The annual election for municipal officers is a general election within the meaning of a constitutional and statutory provision authorizing the submission of the question of re-organization, where the elections are classified 23 L. R. A.

only as general and special. *Peoples, Wells, v. Berkeley* (Cal.) 888

2. An ordinance prohibiting the throwing of fish or offal into a river is void for lack of jurisdiction, where the boundary of the municipality is the low-water line of the river. *Hate v. Eason* (N. C.) 520

3. A contract by a city to pay an annual rental for the use of water hydrants and electric lights is a contracting of indebtedness within the meaning of a constitutional limitation, when the city is already indebted beyond the prescribed limit, although the usual and legal income from taxation and otherwise would be sufficient to pay all the current expenses including such rental. *Beard v. Hopkinsville* (Ky.) 403

NOTES AND BRIEFS.

Municipal corporations; boundary of, on navigable waters, see BOUNDARY.

See also HIGHWAYS; INJUNCTION; TOWNS.

Municipal corporations; what constitutes an indebtedness within the meaning of constitutional and statutory restrictions of municipal indebtedness:—in general; must be voluntary; future indebtedness; future payments; current expenses and indebtedness payable out of current revenues; change of form of indebtedness; estimate of amount. 403

NAME. See also JUDGMENT, 4.

NOTES AND BRIEFS.

Name; effect of omitting initial. 819

NATIONAL BANKS. See BANKS, 6.

NATIONAL GUARD. See MILITIA.

NATURALIZATION. See ALIENS; LIMITATION OF ACTIONS, 1.

NEGLIGENCE. See also BAILMENT, 2; CARRIERS, 5, 7, 10; ELEVATORS; EVIDENCE, 15-18, 23; FIRE; HIGHWAYS, 5, 6; RAILROADS, 3, 4, 8-15.

1. If intoxication contributes to an injury as a proximate cause thereof, it is a complete bar to any action for any damages sustained in consequence of it. *Fisher v. West Virginia & P. R. Co.* (W. Va.) 758

2. The negligence of the driver of a private carriage is imputable to a woman of the age of discretion who voluntarily rides with him. *Mullen v. Owasco* (Mich.) 693

NOTES AND BRIEFS.

See also MASTER AND SERVANT.

Negligence; toward licensee or trespasser. 553

Liability for want of care to person who is negligent. 777

In respect to the use of fire. 515

Contributory, effect of. 153

NOTICE. See CARRIERS, 1, 2; EVIDENCE, 24; INSURANCE, 12; REAL PROPERTY.

NUISANCES. See also ACTION OR SUIT, 5; CONSTITUTIONAL LAW, 11; EMINENT DOMAIN, 5; HIGHWAYS, 1; INJUNCTION, 6, 7; MUNICIPAL CORPORATIONS, 2.

1. A dam erected in a floatable stream to furnish power to operate a mill useful to the public, under authority duly had from a county court, is not a public nuisance, though without sluice and though it obstruct navigation. *Watts v. Norfolk & W. R. Co.* (W. Va.) 674

2. The fact that a dam was made when the water of a stream was clean and pure will not prevent its abatement as a nuisance when, by the growth of a city and the consequent pollution of the water, it has become an inevitable menace to the public health. *Yonkers Bd. of Health v. Copeutt* (N. Y.) 485

3. A pond in a city is a public nuisance, where foul and malarious exhalations arise from the stagnant water and from the sides and bed as the water is drawn off, and are intensified by the accumulation of filth, which no police vigilance can keep out of the stream, and which the dam retains and holds. *Id.*

4. Whoever abates an alleged nuisance, and thus destroys or injures private property or interferes with private rights, whether he be a public officer or private person, unless he acts under the judgment or order of a court having jurisdiction, does it at his peril; and when his act is challenged in the regular judicial tribunals, to protect him it must appear that the thing abated was in fact a nuisance. *People, Copeutt, v. Yonkers Bd. of Health* (N. Y.) 481

5. Boards of health in summary proceedings, without hearing the owner of the property, cannot make that a nuisance which is not in fact a nuisance, and have no jurisdiction to make any order or ordinance to abate an alleged nuisance, unless it is in fact a nuisance. *Id.*

NOTES AND BRIEFS.

See also INJUNCTION.

Nuisance; abatement of 482, 485

OFFICERS. See also ACTION OR SUIT, 1; CONSTITUTIONAL LAW, 12, 18; MILITIA, 1.

1. A mayor's resignation of his office, to take effect on a certain day, which is more than thirty days before election, creates a vacancy at that date, within the meaning of Ohio Rev. Stat. § 1754, providing for the filling of vacancies which have occurred more than thirty days previous thereto, at a municipal election, although the resignation was not accepted until less than thirty days before the election. *Reiter v. State, Durrell* (Ohio) 681

2. The common-law rule that resignation of office does not take effect until acceptance is not in force in Ohio to its full extent; but in that state a resignation without acceptance creates a vacancy,—at least to the extent of giving jurisdiction to appoint or elect a successor, unless otherwise provided by statute. *Id.*

3. A notice by the governor to an officer of an investigation of grounds for his removal is not a judicial writ which must be in the name of the people, nor such an official act as needs
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authentication by the great seal,—especially when directed to the officer who is in charge of the seal. *Attorney-General, Rich, v. Jochim* (Mich.) 699

4. An express constitutional provision for the removal of officers by the governor for gross neglect is not nullified by the fact that the power of impeachment by the legislature does not extend to such cases. *Id.*

5. Gross neglect for which members of the board of canvassers may be removed from office may exist without willful misconduct, where they signed grossly incorrect returns, without examination, having turned over their preparation to an irresponsible clerk having no official relation to the canvass. *Id.*

6. Canvassing the returns of an election is a part of the duty of the secretary of state, for gross neglect of which he may be removed under the Michigan constitution, where he is one of three officers who *ex officio* constitute a board of canvassers. *Id.*

7. An office is held only during the pleasure of the appointing power, where the term as fixed by statute is longer than the constitution permits. *Lewis v. Levelling* (Kan.) 510

8. Compensation of a public officer, consisting of a *per diem* allowance for attendance during the entire session of any regular meeting of a board, is not "salary" within the constitutional restriction of any change of salary during the term of an officer. *Gobrecht v. Cincinnati* (Ohio) 609

NOTES AND BRIEFS.

Officers; validity of proceedings for removal. 700

Constitutional prohibition against change of salary during term as affecting fees. 609

Office; necessity of an acceptance to complete resignation; distinction between public and private interests; where acceptance is unnecessary; effect of statute law; what a sufficient acceptance; incompatible offices. 681

OPTION. See CONTRACTS, 7, 8.

PARDON. See CRIMINAL LAW, 1.

PARENT AND CHILD. See also CONTRACTS, 1; DESCENT AND DISTRIBUTION, 8; JUDGMENT, 11-14.

NOTES AND BRIEFS.

Parent and child; validity of adoption in other state. 667

PARTNERSHIP. See also BANKS, 8; GOODWILL.

NOTES AND BRIEFS.

Partnership; goodwill of business on dissolution. 796

PAYMENT. See also ACCORD AND SATISFACTION, NOTES AND BRIEFS; ASSIGNMENT, 1; ASSUMPT; BANKS, 13; BILLS AND NOTES, 2; MORTGAGE, 3; SUBROGATION, 1.

1. Payment of a debt by a stranger discharges the debt so far as the creditor is con-

cerned if he accepts it, and also as to the debt or if he ratifies it. *Crumlish v. Central Improv. Co.* (W. Va.) 120

2. A bank receiving a note for collection, which accepts in payment a check on the owner of the note, does so at its own risk, in case the check is not good. *Bank of Antigo v. Union Trust Co.* (Ill.) 611

PENALTIES. See CONSTITUTIONAL LAW, 20; JUSTICE OF THE PEACE.

PERJURY.

The trial of an indictment for perjury in a civil action is not outside the jurisdiction of the court because the civil action is not yet determined. *People v. Hayes* (N. Y.) 880

PETITION.

Signatures to a petition which are cut off and attached to another petition which is identical with the former cannot be counted in making the required number of signatures to the petition. *People, Wells, v. Berkeley* (Cal.) 888

PHYSICIANS. See MASTER AND SERVANT, 4.

PLEADING. See also APPEAL AND ERROR, 18; EVIDENCE, 20.

1. An allegation of irreparable injury, without stating the facts on which it is based, is not sufficient for an injunction. *Mead v. Stirling* (Conn.) 227

2. An allegation of irreparable injury to financial credit, without stating that plaintiff has any credit, or needs any credit, or is engaged in any occupation in connection with which credit would be convenient, is insufficient to obtain an injunction. *Id.*

3. Plaintiffs in a suit upon an insurance policy are shown to have an insurable interest by a plea showing that the building and lot insured belonged to the estate of a decedent, and that neither of the assured are his legal heirs; and a replication averring that one of the plaintiffs was the widow of the decedent and that he owned no other real estate, followed by the conclusion that she owned a dower and homestead interest; and further averring that the other plaintiff was a creditor of the decedent, stating the amount of her claim, the insufficiency of personal assets to pay the debts, and that there was no other real property belonging to the estate,—as such replication shows a remainder interest in the real estate liable for the debts. *Oreed v. Sun Fire Office* (Ala.) 177

POND. See NUISANCES, 8.

PRINCIPAL AND AGENT. See also ESTOPPEL, 4; INSURANCE, 18; MERCANTILE AGENCY, 1.

NOTES AND BRIEFS.

Principal and agent; notice of agent's authority. 181

Effect of death on contract of. 707

PRIVILEGE. See WRIT AND PROCESS, 1. 38 L. R. A.

PROHIBITION.

A writ of prohibition may be issued to prevent a judge from proceeding any further in a so-called suit for the appointment of a receiver, in which the application is made by the insolvent corporation for which the receiver is asked, and fails to state any lawful ground for such appointment. *State, Merriam, v. Ross* (Mo.) 534

PROXIMATE CAUSE.

The sudden shying of a horse driven past the rear end of a train projecting into and obstructing a highway cannot be regarded as the sole proximate cause of injury occasioned by the wagon coming into contact with the rear car and throwing the driver to the ground, but the obstruction directly contributes to the accident. *Chicago & N. W. R. Co. v. Prescott* (C. C. App. 8th C.) 654

NOTES AND BRIEFS.

Proximate cause; doctrine of. 245, 654

PUBLICATION. See GARNISHMENT, 8.

PUBLIC IMPROVEMENTS.

NOTES AND BRIEFS.

Public improvements; municipal assessment of state property;—general doctrine; distinction between assessment and taxation; liability to assessment; government property. 807

PUBLIC LANDS. See IMPROVEMENTS.

PUBLIC MONEY. See also INJUNCTION, 8.

A deposit in a bank of moneys belonging to the permanent educational funds of the state, under Neb. Laws 1891, chap. 50, subject to the treasurer's check and with an agreement for interest on the deposit, is in violation of Neb. Const. art. 8, § 9, prohibiting such funds to be "invested or loaned except on United States or state securities, or registered county bonds." *State, Orest First Nat. Bank, v. Barley* (Neb.) 67

QUO WARRANTO.

The president of the senate is an officer whose title can be tested by quo warranto, under a statute providing that remedy in case of the usurpation of any office or franchise within the state. *Attorney-General, Werts, v. Rogers* (N. J. Sup.) 354

NOTES AND BRIEFS.

Quo warranto; as to title of president of senate. 356

RAILROADS. See also ACTION OR SUIT, 2, 5; CORPORATIONS, 1; EMINENT DOMAIN, 1-4; HIGHWAYS, 2-5; INJUNCTION, 2; MASTER AND SERVANT, 1, 2; PROXIMATE CAUSE; RELEASE.

1. A railroad company chartered by the state cannot, without legislative authority, by lease or by any other contract or arrangement, turn over to another company its road and the

use of its franchises, and thereby exempt itself from responsibility for the conduct and management of the road. *Fisher v. West Virginia & P. R. Co.* (W. Va.) 758

3. A railroad company is liable to a brakeman on a train for its failure to maintain fences as required by statute, in consequence of which an animal gets upon the track, causing a derailment of the train and injury to the brakeman. *Atchison, T. & S. F. R. Co. v. Reesman* (C. C. App. 8th C.) 768

8. A railroad company is not liable for allowing the escape of steam from the valves of an engine, causing the frightening of a horse, unless the opening of the valves was unnecessary and was done under circumstances implying a lack of the care which a prudent and reasonable man would exercise under similar circumstances. *Omaha & R. V. R. Co. v. Clarke* (Neb.) 504

4. Blowing a whistle on a locomotive may constitute an actionable cause of injury by frightening a horse, although done at a place where the law requires the whistle to be blown, if it is done negligently, wantonly, and maliciously. *Bittle v. Camden & A. R. Co.* (N. J. Err. & App.) 283

5. The mere fact that persons have frequently trespassed upon a railroad track, and that the company has resorted to no means to stop such trespasses, does not amount to a permission or license to use the track as a foot-path. *Ward v. Southern P. Co.* (Or.) 715

6. An implied license to cross a railroad trestle so narrow that there is no room on it outside of a passing train, and over which at least twelve regular trains cross each day, besides special trains and switch engines, is contrary to public policy,—especially where the statutes prohibit walking on railroad tracks, except along public roads. *Anderson v. Chicago, St. P. M. & O. R. Co.* (Wis.) 208

7. A railroad company owes to a trespasser upon its track no legal duty to keep a lookout or guard him against danger. *Ward v. Southern P. Co.* (Or.) 715

8. One who, while intoxicated, walked out on a railroad trestle to a position of great peril, and was there killed by a train, cannot be held free from contributory negligence. *Anderson v. Chicago, St. P. M. & O. R. Co.* (Wis.) 208

9. Ignorance of danger by reason of his youth and inexperience may properly be considered on the question of the contributory negligence of a child in attempting to pass between cars standing on a street crossing. *Schmits v. St. Louis, I. M. & S. R. Co.* (Mo.) 250

10. A child who, by reason of his want of knowledge, is not guilty of negligence in attempting to follow the example of adults in passing between cars standing upon a street crossing, may recover damages if injured by the negligence of the company. *Id.*

11. In an action for personal injury sustained at a street crossing by the pushing of cars together while plaintiff was passing between them, the company's failure to ring the bell or sound the whistle before moving the cars, although not constituting a statutory 23 L. R. A.

cause of action, is properly considered in determining whether the company exercised due care in moving the cars. *Id.*

12. A railroad company which leaves a train standing for several minutes upon a much-used street crossing, with a slight space between the cars, as if to invite passage between them, is bound to use reasonable care, in closing up the opening, to avoid injury to one who is attempting to cross, although he has placed himself in such relation to the train that under other circumstances he would be regarded as a trespasser. *Id.*

13. One attempting to cross a railroad track at a street crossing situated at the end of the depot is not, as matter of law, guilty of contributory negligence because the rear end of a train occupies all but 14 feet of the width of the driveway, where other vehicles have safely passed through, and he is driving an old and gentle horse not in the habit of jumping or shying when in proximity to engines, and is invited by the flagman to make the crossing. *Chicago & N. W. R. Co. v. Prescott* (C. C. App. 8th C.) 654

14. Willfulness is not shown by mere failure to provide for the protection of a possible trespasser in an archway covering railway tracks, leading into a manufacturing establishment, into which a car is propelled at a negligent speed, so as to render the railway company liable for his death, notwithstanding his contributory negligence. *Parker v. Pennsylvania Co.* (Ind.) 552

15. The act of one who, unacquainted with the plans and uses of an archway covering railway tracks leading into a manufacturing establishment, attempts to pass through it without license, notwithstanding obvious dangers from the narrowness of the arch and the obstructed view of the track, will prevent recovery from the railroad company for mere negligence in propelling into the archway at a speed prohibited by the city ordinance a car by which he is killed. *Id.*

NOTES AND BRIEFS.

See also CONSTITUTIONAL LAW; CORPORATIONS.

Railroads; injury of person at crossing. 654

Negligence in working on trestle. 205

Liability for negligence of mail agent. 443

Liability as to fences. 768

REAL PROPERTY. See also ATTACHMENT; ESTOPPEL, 2; JUDGMENT, 4; MORTGAGE, 1.

A recorded deed made by one who has then no title to the land is not within the chain of title so as to be constructive notice to a subsequent purchaser to whom the same grantor conveys after obtaining title by a recorded deed. *Ford v. Unity Church Soc.* (Mo.) 561

NOTES AND BRIEFS.

Real property; effect of conveyance recorded before the grantor obtains title, as to notice; the doctrine of estoppel; the doctrine of notice from registration; comparison and limitation of the opposing principles. 561

RECEIVERS. See also CONFLICT OF LAWS, 6; JUDGMENT, 6; PROHIBITION; SET-OFF AND COUNTERCLAIM, 6-8.

1. In a suit by general creditors of a bank who have no judgments or specific liens, a chancellor's appointment of a receiver is not so unauthorized and void as to be subject to collateral attack for want of jurisdiction,—especially where the managers of the bank had abandoned it, and the chancellor had previously attempted on their application to appoint a receiver, and the constitution of the state has provided that a chancellor may grant relief in equity cases although the legal remedy may not have been exhausted, and that any mistake in respect to the question whether the case was one for equity or common law shall not render the judgment or decree subject to reversal or annulment. *Whitney v. Hanover Nat. Bank* (Miss.) 531

2. The appointment of a receiver of a national bank on the *ex parte* application of the directors is utterly void. *Id.*

3. A receiver cannot be appointed for a corporation on its own petition, on the ground merely that suits have been, or are about to be, brought against it by small creditors for the purpose of injuring the corporation and doing great harm to its creditors and impairing the value of the property of the corporation, which is alleged to be sufficient to pay all its debts ultimately, if handled under the order of the court, where no cause of action against any other party is alleged, although trustees in a mortgage on the property of the corporation are made parties and appear in the suit, and consent to the appointment of the receiver. *State, Merriam, v. Ross* (Mo.) 584

4. A receiver appointed by a court of competent jurisdiction, in a suit brought by him as a creditor for himself and other creditors similarly situated, is in a position to make a collateral attack on a void order by another court attempting to appoint a receiver. *Id.*

5. A receiver of a foreign corporation appointed at its domicile, to whom all the assets of the corporation have been assigned as fully as can be done in accordance with the decree of the appointing court, may be allowed to intervene and be heard in a proceeding in Massachusetts for the appointment of a receiver of the property of the corporation found within the latter state. *Buswell v. Supreme Sitting of Order of Iron Hall* (Mass.) 846

6. A receiver of the property in Massachusetts of a benefit society incorporated in Indiana may, by the exercise of comity, be ordered, after paying his charges and expenses and the expenses of the suit, to pay over the balance to a receiver in Indiana, where the courts of both states have adopted the same principles governing the distribution of the fund, and it appears by the decree of the Indiana court that it will admit the proof of claims against the funds made in the Massachusetts court when it regularly certifies them, subject to such revision in Indiana as justice may seem to the court to require, and will distribute the fund so that benefit certificate members in Massachusetts will receive the

same proportionate dividend as members in Indiana and other states. *Id.*

NOTES AND BRIEFS.

See also SET-OFF AND COUNTERCLAIM.

Receiver; recognition of, in other state. 846

Rights of, as to property outside of the jurisdiction in which he is appointed; as to attachment; after receiver gets possession; right of foreign receiver to sue; title to land. 52

RECORDS. See REAL PROPERTY.

REFORMATORIES. See HOUSE OF CORRECTION, 1-4; MASTER AND SERVANT, 5.

RELEASE.

A release of claims against a railroad company for specified personal injuries will not include a claim for damages not then known to either party, for negligent treatment of such injuries in a hospital maintained by such company, although the release was expressly made to cover all claims and demands whatsoever in law or in equity "by reason of any matter, cause, or thing whatever, whether the same arose upon contract or upon tort, from the beginning of the world to this day." *Union P. R. Co. v. Artist* (C. C. App. 8th C.) 581

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REPRIEVE. See APPEAL AND ERROR, 2; CRIMINAL LAW, 1.

RESCISSION. See CONTRACTS, 10.

RESIDENCE. See VOTERS AND ELECTIONS, 3.

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Subjects discussed and points decided. 865

SALARY. See OFFICERS, 8.

SALE.

A potential existence is sufficient to make personal property subject to sale. *Wiant v. Hays* (W. Va.) 82

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Sale; of future crops, see EMBLEMENTS.

SCHOOLS. See JUDGMENT, 2.

SECRETARY OF STATE. See OFFICERS, 6.

SENATE. See LEGISLATURE; QUO WARRANTO.

SET-OFF AND COUNTERCLAIM. See also ESTOPPEL, 5.

1. A creditor cannot set off against an assignee of an executory contract of the debtor

with the creditor, on which nothing was due at the time of the assignment, a claim which is matured in favor of the creditor against the debtor at that time, where the statute allows a demand against an assignor to be set off against his assignee only where it might have been set off against the assignor while it belonged to him, and provides, further, that a set-off can be allowed only in actions founded upon demands which could themselves be the subject of a set-off. *Bradley v. Thompson Smith's Sons* (Mich.) 805

2. Negotiable paper held as collateral security for a pre-existing debt is open in the hands of the holder to all defenses which could have been made against it in the hands of the original owner, whether there was notice of them or not. *Vann v. Marbury* (Ala.) 825

8. Unless payable to bearer or indorsed, negotiable paper, although assigned before maturity, will be subject in the hands of the assignee to all equities which accrue before notice is given of the assignment. *Id.*

4. A note given for the purchase price of chattels is not a good set-off against a demand by the maker's assignee for creditors upon the seller for damages for wrongfully replevying the chattels after they have passed into his possession. *Fidelity & D. Co. v. Haines* (Md.) 652

5. A counterclaim existing against the assignor cannot be interposed to a claim arising in favor of the assignee after an assignment for the benefit of creditors. *Id.*

6. A receiver of a national bank takes immature notes belonging to the bank subject to the right of the maker to set off against them his deposit account in the bank. *Adams v. Spokane Drug Co.* (C. C. D. Wash.) 884

7. The receiver of an insolvent bank in settlement with a creditor should deduct from his credit all those sums for which he is debtor, either as principal or surety, and whether or not his liability has matured; and in settlement with a debtor to the bank, the receiver should allow him credit for all sums which the bank owed him when the receiver was appointed, whether the debts were then due or not. *Davis v. Industrial Mfg. Co.* (N. C.) 822

8. Set-off may be allowed in equity, of the dividend payable out of the assets of a corporation in the hands of a receiver, to a stockholder who, after the receiver's appointment, made an assignment for the benefit of his creditors of whom the corporation was one, upon the corporation's claim against the stockholder; the equities of the other stockholders represented by the receiver being superior to those of the insolvent's remaining creditors represented by his assignee. *Merrill v. Cape Ann Granite Co.* (Mass.) 818

9. An assignment of a verdict to secure the attorney's compensation does not relieve the judgment to be entered thereon from liability to offset of a judgment then existing in favor of the judgment debtor against the assignor. *Benson v. Haywood* (Iowa) 835

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Set-off; against assignee of commercial paper, of claim against assignor:—paper indorsed before maturity; transfer after maturity; paper negotiable in bank or payable without defalcation; what necessary to defeat right of set-off; paper not negotiable; paper irregularly transferred; fraudulent transfers or transfers without value; contingent liability and claims not owned; equities which will justify set-off; assignment will not defeat perfected right; claims not in the same right; effect of agreement; effect of new note; effect of assignment without recourse; counter set-off; attempt to compel set-off by statute; special contracts. 825

Set-off; against judgment in the hands of an assignee:—assignment of verdict; how far subject to set-off of demand not in judgment; where cross judgments are in same action; notice; set-off of claims against one who never had title not available; assignees protected; fraudulent assignment or for the purpose of defeating set-off; insolvency as an equity; where assignee the real party; assignment without consideration; want of legal title; judgment on note; rights of holder of assigned judgment; waiver; set-off of contingent liability; assignment in accordance with prior agreement; set-off on motion; assignment to attorney may defeat his lien. 835

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State; right of, to carry on business. 412

STATUTE OF FRAUDS. See CONTRACTS, 5, 6.

STATUTES. See also CONSTITUTIONAL LAW, 2.

1. An enrolled bill on file in the office of the secretary of state must be accepted without question by the courts as having been regularly enacted by the legislature. *State, Reed, v. Jones* (Wash.) 340

2. The failure of a legislative journal to show that a bill was read on three different days, or the rule requiring it suspended, is not evidence that the necessary action was not taken, unless the constitution requires an entry of these facts to be made. *See Ellis's Appeal* (Minn.) 287

3. The title of an act, "For the Organization and Management of the State Reform School," is broad enough to include provisions for placing boys under the age of sixteen in such school by order of a court. *Re Sanders* (Kan.) 608

4. The punishment of imitators or counterfeiters of trademarks may be provided for under the title of "An Act to Protect Associations, Unions of Workingmen, and Persons, in Their Labels, Trademarks, and Forms of Advertising." *Cohn v. People* (Ill.) 821

5. The title "An Act to Provide Better Protection for the Earnings of Laborers," etc., is sufficient to cover provisions for a remedy in favor of the laborers in case the act is violated. *Singer Mfg. Co. v. Fleming* (Neb.) 210

6. A statute should be so construed as to make all its parts harmonize with each other, and render them consistent with its general scope and object. *State, Crete First Nat. Bank, v. Bartley* (Neb.) 67

7. The unconstitutionality of a section as to the transfer of incorrigible infants from a reformatory to a penitentiary does not make the whole statute as to the commitment of infants to reformatories necessarily void. *People, Bradley, v. Illinois State Reformatory* (Ill.) 189

8. Where the sections of a statute must be construed together as dependent, and not as independent, provisions, the invalidity of one part invalidates other parts. *Wadsworth v. Union P. R. Co.* (Colo.) 812

9. The invalidity of an act, so far as it provides for a penalty, will not affect a provision in the statute giving a right of action for compensation to a person injured by violation of the statute. *Singer Mfg. Co. v. Fleming* (Neb.) 210

10. In a statute as to contracts with employes, unconstitutional provisions as to natural persons may be eliminated, where the remainder of the statute relates to corporations and is valid. *Leop v. St. Louis, I. M. & S. R. Co.* (Ark.) 264

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11. A statute discriminating between towns and cities already having race-courses therein and those which have not, in respect to the licensing of such race-courses, is a special law regulating the internal affairs of towns and counties. *State, Alexander, v. Elizabeth* (N. J. Sup.) 525

12. A statute as to contracts with employes is general and uniform, where it applies to all corporations engaged in the business of operating or constructing railroads or railroad bridges. *Leop v. St. Louis, I. M. & S. R. Co.* (Ark.) 264

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Conclusiveness of enrolled bill:—the English rule; the effect of constitutional provisions; provisions as to quorum and recording votes; requirements as to special legislation; general expressions as to compliance with constitution; as to fact of passage; to contradict enrolled bill; how far journals may establish a law for which no enrolled bill is found; New York decisions; special circumstances; what evidence may be considered; evidence; collateral decisions; vacillation of judicial opinion. 840

STAY. See ACTION OR SUIT, 8.

STIPULATION. See TRIAL, 1, 2.

STREET RAILWAYS. See CARRIERS, 11, 12.

SUBROGATION.

1. A stranger who pays a debt without request by the debtor, when his payment is not ratified by the debtor, may bring a suit in equity praying relief in the alternative; that is, that if the debtor do not ratify such payment the debt may be enforced in his favor, as its equitable assignee, or, if so ratified, that he be decreed repayment of the amount paid for the use of the debtor. *Crumlish v. Central Improv. Co.* (W. Va.) 120

2. One who pays the debt of another voluntarily, without any constraint growing out of the necessity to protect his own interest or rights, cannot be subrogated to the rights of the debtor. *Bank of Antigo v. Union Trust Co.* (Ill.) 611

SUNDAY. See MASTER AND SERVANT, 3.

SUPERSEDEAS. See APPEAL AND ERROR, 7.

SUSPENSION OF SENTENCE. See CRIMINAL LAW, 1-3, NOTES AND BRIEFS.

TAXES. See also BAILMENT, 1; LEVY AND SEIZURE, 1.

1. A set of abstract books is personal property for the purpose of taxation, although the information therein contained is largely in the form of abbreviations and cipher peculiar to that set of books, which is understood by only five persons,—especially where there are certain maps connected with the business which have some general value. *Booth & H. Abstract Co. v. Phelps* (Wash.) 864

2. An institution of purely public charity, such as the American Sunday School Union, is not exempt from taxation on property used in carrying on a book store in which are sold, not only its own publications, but other standard works, in order to aid in making the business self-supporting, although the profits of the business are devoted to the purpose of the charity. *American Sunday School Union v. Taylor* (Pa.) 695

3. Land owned by the state and used by a court for judicial purposes, though not exempt from special assessment, under Ill. Const. art. 9, § 3, providing that the property of the state may be exempted from taxation by general law, and the Illinois General Revenue Law, § 2, exempting from taxation all property of every kind belonging to the state, cannot be assessed for such improvements, since Ill. Const. art. 4, § 26, provides that the state shall never be made defendant in any court of law or equity, and the calling of the state into court to defend a proceeding against its property is making it a defendant within the constitutional prohibition, and any judgment would be merely advisory without power to enforce it. *Mt. Vernon v. People* (Ill.) 807

4. Personal property held by the assignee of an insolvent, whose estate is being settled in the probate court, whether it is in the form of money, bills receivable, bonds, certificates of stock, or otherwise, is not subject to taxation in Ohio, although the statute provides that property held in trust must be listed by the trustee. *McNeill v. Hagerty* (Ohio) 628

5. Diligent inquiry required by statute for the owners of land sold for taxes before the expiration of the time for redemption is not shown by affidavits of diligent inquiry "in the county" where the land is situated. *Van Matre v. Sankey* (Ill.) 665

6. The deduction of debts from credits to be taxed is not an exemption within the meaning of constitutional and statutory provisions as to exemptions from taxation. *Florer v. Sheridan* (Ind.) 278

7. Deducting debts from the gross amount of credits on which a person is required to pay taxes does not violate a constitutional provision "for a uniform and equal rate of assessment for taxation," and authorizing the legislature to "prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting such only . . . as may be specially exempted by law," since the just value of credits is to be ascertained by subtracting from their gross amount the bona fide indebtedness of the taxpayer. *Id.*

8. A taxpayer's neglect for a series of years to place upon his personalty list credits from which he is entitled to deduct debts will not prevent him from claiming the deduction when notified to show cause why he should not be compelled to pay taxes upon the credits for those years as delinquent property. *Id.*

9. Foreign corporations are included within N. Y. Laws 1855, chap. 87, requiring assessment on all moneys invested in business by nonresidents. *People, Thurber-Whyland Co. v. Barker* (N. Y.) 95

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10. Debts cannot be deducted from funds invested by nonresidents, under N. Y. Laws 1855, chap. 87, providing for the taxation of funds invested in business by nonresidents, although it says they shall be assessed on funds invested "the same as if they were residents." *Id.*

11. A domestic corporation may be "prevented by absence or illness" from making complaint of a tax or assessment, under N. Y. Consolidation Act 1882, chap. 410, § 822, when all its officers and agents who have charge of the matter are prevented by absence or illness from making the complaint. *People, New York Hotel & R. Co. v. Barker* (N. Y.) 785

12. A proceeding for the sale of forfeited land by a commissioner of school lands under W. Va. Code 1887, chap. 105, is a judicial, and not merely an administrative proceeding, so that the court may determine the right to the surplus proceeds, on a petition filed in the suit. *Wiant v. Hays* (W. Va.) 82

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Constitutionality of provision for deduction of debts from credits or other property. 278

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TICKET. See CARRIERS, 1, 2.

TOWN.

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Town; liability of, for negligence. 488

TRADEMARKS. See also CONSTITUTIONAL LAW, 23.

A label on cigars, stating that they are made by a firstclass workman, a member of a certain union, "an organization opposed to inferior, rat-shop, coolie, prison, or filthy tenement-house workmanship," is neither immoral nor against public policy, since it attacks no other manufacturer of cigars, and cannot be denied protection as a trademark on that ground. *Cohn v. People* (Ill.) 821

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Trademark; protection of; of cigar-makers' union. 821

TREES. See CONTRACTS, 13, 14; HIGHWAYS, 1; HOMESTEAD, 3.

TRESPASS. See ELEVATORS; NEGLIGENCE, NOTES AND BRIEFS; RAILROADS, 7.

TRIAL. See also CRIMINAL LAW, 5.

1. It is not error to refuse to strike out evidence admitted under an agreement of the parties. *Long v. Forrest* (Pa.) 33

2. Under a stipulation that the evidence of

a witness taken upon a former trial, on the part of defendant, might be read subject to all legal objections, the defendant, who offers a portion of the direct examination in evidence, may be compelled to read it all, as the legal objections intended by the stipulation were those to be made only by the party against whom the evidence, either direct or on cross-examination, was offered. *People v. Hayes* (N. Y.) 830

3. The constitutional right of trial by jury does not extend in a criminal case to the determination of the term of imprisonment by the jury. *People, Bradley, v. Illinois State Reformatory* (Ill.) 189

4. A verdict does not become complete and final until recorded and affirmed by the jury. *Grant v. State* (Fla.) 728

5. There is no covert insinuation against the accused in a charge to the jury that he is not bound to go on the stand, but can say, "Prove your case against me. It is my judgment that the situation is such that I am not bound to take the witness stand; and the law gives me that right and the law gives me that privilege,"—where the judge also charges that no presumption can be taken against defendant for failure to take the witness stand. *People v. Hayes* (N. Y.) 830

6. The issue as to whether a street was rightfully obstructed by a railroad train should be submitted to the jury, if the circumstances attending the blockade are such that reasonable persons might entertain different views as to whether the action of the company was justifiable. *Chicago & N. W. R. Co. v. Prescott* (C. C. App. 8th C.) 654

7. Upon the trial of an action upon an insurance policy, instructions that authority from the defendant to a certain adjuster to adjust and settle the loss of a firm of which the plaintiff was a member would not give him authority to bind the defendant as to the loss of the plaintiff under the policy in question, and that the fact that authority was given him to settle the firm loss is proper to be considered as a circumstance to show the relation existing between defendant and such adjuster, and that from that and from other facts and circumstances shown by the evidence the jury must say whether such adjuster was authorized to adjust and settle plaintiff's loss or not,—are not conflicting or erroneous as regards defendant. *Slater v. Capital Ins. Co.* (Iowa) 181

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Verdict; correction of, see CRIMINAL LAW.

VOTERS AND ELECTIONS. See also MUNICIPAL CORPORATIONS, 1.

1. Inspectors of election have no right to reject a ballot offered by a registered voter who tenders the oath prescribed by statute, where the statute says that if the person challenged "shall take such oath his vote shall be received." *Wolcott v. Holcomb* (Mich.) 215

2. A constitutional requirement of a majority of the electors voting at a general election on the question of the reorganization of a municipality is not satisfied by a majority of those who vote on that question, if they are less than a majority of all who vote at the election. *People, Wells, v. Berkeley* (Cal.) 888

3. The residence of an elector is not changed by reason of his presence and support in a soldiers' home which is maintained by the state for disabled and dependent soldiers, under a constitutional provision that "no elector shall be deemed to have gained or lost a residence by reason of being employed in the service of the United States or in this state, nor while a student at any seminary of learning, nor while kept at any almshouse or any asylum at public expense, nor while confined in any public prison." *Wolcott v. Holcomb* (Mich.) 215

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Acquiring residence as a voter while attending school or public institution; inmates of soldiers' homes or occupants of government posts; inmates of almshouses and hospitals; students. 215

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WATERS. See also CONTRACTS, 8, 4; EMINENT DOMAIN, 5; MUNICIPAL CORPORATIONS, 2, 3.

1. The owner of a swamp which is the natural place of deposit of the surface waters and perennial streams for the higher adjoining territory cannot complain because a municipal corporation continues to deposit such waters on such swamp by means of mere storm sewers after such swamp has been improved. *St. Paul & D. R. Co. v. Duluth* (Minn.) 86

2. A municipal corporation is not liable to the owner of private premises within its boundaries for failing to provide a system of sewerage to carry away from such premises surface water and the water of perennial streams naturally coming thereon. *Id.*

3. The fact that a municipal corporation has diverted surface waters from natural ravines, and, through sewers, deposited them on a swamp at different points in the same swamp from those at which the ravines terminate, will not give the owner of the swamp any right to complain after he has adopted the change made by such diversion by building the roadbed of a railroad across the swamp, leaving no openings in the raised surface of such roadbed opposite to the ends of the ravines, and by putting in box culverts across such roadbed opposite the ends of some of the sewers, to carry off such waters. *St. Paul & D. R. Co. v. Duluth* (Minn.) 88

4. A water company is not liable to the owner of a house destroyed by fire, because of failure to furnish water under a contract with the municipality, although a special tax was provided for in the contract to pay part of the consideration to the water company, and an express provision made that the company should be liable for all damages occasioned by failure to furnish an adequate supply of water to extinguish any fire. *Housmon v. Trenton Water Co.* (Mo.) 146

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Liability for loss by fire due to the lack of adequate water supply:—(I.) of city or municipality; (II.) of water company. 146

Right of city to turn surface water. 89

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The estate of each daughter becomes indefeasible on arriving at the age of twenty-three years, under a will giving each a share of property on arriving at that age, and providing that in case of the death of either before that age the children of the deceased shall inherit the parent's share, or, in default of issue, that it shall go to the survivor. *Keepers v. Fidelity Title & D. Co.* (N. J. ETT. & App.) 184

WITNESSES. See also APPEAL AND ERROR, 14.

Letters contradicting a witness for defendant on a trial for perjury, in respect to her belief as to the paternity of a child alleged to be that of defendant, are not inadmissible on the ground that the contradiction is on an immaterial matter. *People v. Hayes* (N. Y.) 880

WOMEN. See CONSTITUTIONAL LAW, 1.

WRIT AND PROCESS. See also GARNISHMENT, 3; OFFICERS, 3.

1. The privilege of members of the legislature, under the Minnesota constitution, from arrest except in cases of treason, felony, and breach of the peace, does not extend to the

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service of summons in a civil action. *Rhodes v. Walsh* (Minn.) 639

2. A person who has full charge of the business of a foreign corporation dealing in lumber and merchandise at a particular place within the state, and subject to no authority from any other person or agent within the state, although the corporation has one or more other agents at other places in the state, but who corresponds with, accounts to, and receives instructions from, the main office of such foreign corporation in the foreign state, receives and disburses moneys, pays freight, makes contracts with customers as to terms of payment of accounts, issues receipts for money, employs all necessary temporary assistance for and in behalf of the corporation, and, with the knowledge and under the instructions of the corporation, holds himself out and advertises in the newspaper as manager, is, within the meaning of Dak. Comp. Laws, § 4598, the "managing agent" of such foreign corporation for the purpose of service of process. *Foster v. Charles Batchelor Lumber Co.* (S. D.) 490

3. The failure of a foreign corporation to file a copy of its articles of incorporation, and the certificate of the appointment of an agent authorized to accept service of process, as required by Dak. Comp. Laws, §§ 3190, 3193, cannot be taken advantage of by such corporation to avoid service of summons upon a managing agent of such corporation within the state. *Id.*

4. Service on the auditor of state in Arkansas, in an action against a foreign insurance company which has not complied with the statute requiring as a condition of doing business that the auditor or some agent be appointed to receive service, is not authorized by the fact that certain persons have solicited insurance for the company within the state and forwarded applications to its office in another state, although they may be subject to penalties under the statute. *Rothrock v. Dwelling-House Ins. Co.* (Mass.) 863

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Writ and process; who may be served with process in suit against a foreign corporation: early doctrines; later doctrines; statutes authorizing service; where corporation is not engaged in business within the state; service on director; service on stockholder; effect of designating agent; failure to make designation; termination of agency; cashier; managing agent; other agents; service on state officer; admission of service; return of service; in garnishment cases; serving process of federal court; English cases. 490

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L. R. A. CASES AS AUTHORITIES

SHOWING WHERE THE CASES IN THIS VOLUME HAVE BEEN AP-
PLIED, DEVELOPED, STRENGTHENED, LIMITED, OR IN ANY
WAY AFFECTED BY LATER DECISIONS THAT HAVE
CITED THESE CASES AS PRECEDENTS, WITH
HOLDINGS OF CITING CASES; ALSO
REFERENCES TO LATER AN-
NOTATIONS CITING
CASES OR NOTES



L. R. A. CASES AS AUTHORITIES.

CASES IN 23 L. R. A.

23 L. R. A. 33, *LONG v. FORREST*, 150 Pa. 413, 24 Atl. 711.

Conflicting claims of foreign creditors.

Cited in *Hilliard v. Enders*, 196 Pa. 594, 46 Atl. 839, holding preference over assignment creditors not obtainable by nonresident by foreign attachment of estate of citizen of foreign state; *Paladini v. Maryland Silk Co.* 18 Pa. Co. Ct. 175, denying nonresident's right to obtain preference over foreign receiver by foreign attachment; *Witters v. Globe Sav. Bank*, 171 Mass. 427, 50 N. E. 932, and *Wing v. Bradner*, 162 Pa. 77, 29 Atl. 291, holding preference against general creditors after assignment not permissible by attachment by foreign creditor of property of foreign debtor; *DeTurck v. Woelfel*, 19 Pa. Super. Ct. 270, holding that debt of domestic corporation contracted in foreign state to foreign creditor passes to assignee thereof; *McKean v. New York National Bldg. & L. Asso.* 24 Pa. Co. Ct. 460, denying attachment to stockholder of foreign corporation, after appointment of foreign receiver thereof; *Weil v. Bank of Burr Oak*, 76 Mo. App. 38, dismissing attachment suit of foreign creditor on interpleader for property by foreign receiver; *Williams v. Kemper, H. & McD. Dry Goods Co.* 4 Okla. 150, 43 Pac. 1148, upholding voluntary foreign assignment as against foreign attaching creditor.

Cited in footnotes to *Barth v. Backus*, 23 L. R. A. 47, which denies validity of voluntary assignment though valid in state of assignor's domicile, requiring discharge of debts of creditors accepting dividends; *Crippen v. Rogers*, 25 L. R. A. 821, which holds that resident assignee of notes from nonresident against insolvent nonresident has no rights as attaching creditor superior to his assignor; *Holbrook v. Ford*, 27 L. R. A. 324, which holds rule against allowing preference to foreign receiver over resident creditor inapplicable to domestic receiver in suit instituted by nonresident; *Farmers' Loan & T. Co. v. Bankers' & M. Teleg. Co.* 31 L. R. A. 403, which holds no lien obtained by attaching telegraph lines in property in other states after receiver appointed in state of which attaching creditor a citizen; *Nathan v. Lee*, 43 L. R. A. 820, which sustains, in state where land lies, mortgage by foreign corporation to nonresidents in other state to secure antecedent debt; *Fenton v. Edwards*, 46 L. R. A. 832, which holds voluntary assignment for creditors by foreign corporation in other state precludes garnishment of debt in state where debtor resides.

Cited in note (23 L. R. A. 54, 57) on rights of receiver as to property outside of jurisdiction in which he is appointed.

23 L. R. A. 47, *BARTH v. BACKUS*, 140 N. Y. 230, 55 N. Y. S. R. 561, 37 Am. St. Rep. 545, 35 N. E. 425.

Comity as to property of insolvent foreign debtor.

Cited in *Marshall v. Sherman*, 148 N. Y. 25, 34 L. R. A. 766, 51 Am. St. Rep. 654, 42 N. E. 419, holding statutory liability of domestic stockholder in foreign corporation not enforceable to injustice to citizens of state of forum; *Rogers v. Pell*, 154 N. Y. 526, 49 N. E. 75, holding that foreign corporation may make valid general assignment in New York if assignment is also valid under law of domicile; *Stoddard v. Lum*, 159 N. Y. 277, 45 L. R. A. 556, 70 Am. St. Rep. 541, 53 N. E. 1108, holding action maintainable by foreign assignee of foreign corporation to enforce common-law contractual liability of stockholders to pay subscription price of stock; *Mosher v. Supreme Sitting, O. of I. H.* 88 Hun, 399, 34 N. Y. Supp. 816, holding preference by creditor over receiver of foreign corporation not obtainable by attachment subsequent to receivership, although before actual possession by receiver; *Dearing v. McKinnon Dash & Hardware Co.* 33 App. Div. 40, 53 N. Y. Supp. 513, holding transfer of property for benefit of creditors by instrument valid at domicile, but void in New York, not valid as to property in New York; *Re Hulbert Bros. & Co.* 38 App. Div. 327, 57 N. Y. Supp. 38, holding title to insolvent foreign creditor's dividend from insolvent estate vested in foreign trustee under valid assignment by law of domicile; *Hammond v. National Life Asso.* 58 App. Div. 455, 69 N. Y. Supp. 585, upholding power of court to retain assets of dissolved foreign corporation for benefit of domestic creditor against receiver; *Workum v. Caldwell*, 27 Misc. 73, 58 N. Y. Supp. 175, upholding assignment in New York of Pennsylvania partnership association directing appropriation first to payment of debts, surplus to undissolved company; *Weil v. Bank of Burr Oak*, 76 Mo. App. 39; *Townsend v. Coxe*, 151 Ill. 67, 37 N. E. 689; *Bloomington v. Weil*, 29 Wash. 624, 70 Pac. 94,—upholding title of foreign assignee against attachment of foreign creditor; *Moore v. Land, Title & T. Co.* 82 Md. 290, 33 Atl. 641, holding claim of foreign assignee of foreign debtor superior to that of domestic attaching creditor; *Thompson v. Tetley*, 68 N. H. 482, 41 Atl. 179, holding funds of insolvent debtor, obtained by creditor bona fide by suit in foreign state, not recoverable by assignee in subsequent insolvency proceedings; *Cross v. Brown*, 19 R. I. 237, 33 Atl. 147, upholding attachment against title of foreign assignees in involuntary insolvency proceeding; *Fowler v. Bell*, 90 Tex. 160, 39 L. R. A. 257, 59 Am. St. Rep. 788, 37 S. W. 1058, refusing to uphold mortgage by foreign debtor for benefit of one of its creditors; *Segnitz v. Garden City Bkg. & T. Co.* 107 Wis. 175, 50 L. R. A. 329, 81 Am. St. Rep. 830, 83 N. W. 327, holding that state insolvency law, essentially a bankruptcy act, will not be given extraterritorial force; *Security Trust Co. v. Dodd*, 173 U. S. 629, 43 L. ed. 838, 19 Sup. Ct. Rep. 545, holding property of foreign debtor assigned under foreign insolvency law subject to subsequent attachment in Massachusetts by New York creditors; *National Park Bank v. Clark*, 92 App. Div. 266, 87 N. Y. Supp. 185, holding lien of attachment of domestic creditor superior to claim of foreign receiver of foreign corporation.

Distinguished in *Vanderpoel v. Gorman*, 140 N. Y. 567, 24 L. R. A. 549, 37 Am. St. Rep. 601, 35 N. E. 932, holding valid, assignment in New York of insolvent foreign corporation, valid under law of domicile.

Comity as to perjury.

Cited in *People v. Martin*, 175 N. Y. 322, 96 Am. St. Rep. 628, 67 N. E. 589,

holding one taking false oath required or permitted by laws of sister state, guilty of perjury.

Voluntary assignment by lessee.

Cited in *Medinah Temple Co. v. Currey*, 58 Ill. App. 435, holding voluntary assignment under statute by lessee not breach of covenant not to assign lease.

Insolvency statutes providing for discharge of debtor.

Cited in *Howland's Appeal*, 67 N. H. 577, 35 Atl. 943, holding state insolvency law providing for distribution of debtor's property and his discharge, a bankruptcy law.

Equality of rights of foreign and domestic creditors.

Cited in *Mabon v. Ongley Electric Co.* 156 N. Y. 201, 50 N. E. 805, holding action not maintainable by foreign receiver for appointment of ancillary receiver.

Corporation considered as "person."

Cited in *People ex rel. United Auctioneers v. Scully*, 23 Misc. 733, 53 N. Y. Supp. 125, holding that city clerk with authority to grant auctioneer's license to persons cannot be compelled to license corporation.

23 L. R. A. 52, *GILMAN v. HUDSON RIVER BOOT & SHOE MFG. CO.* 84 Wis. 60, 36 Am. St. Rep. 899, 54 N. W. 395.

Comity as affecting foreign representatives and property rights.

Cited in *Hughes v. Hunner*, 91 Wis. 120, 64 N. W. 887, holding title to debenture bonds passes to foreign receiver subject to claims of domestic creditors; *Parker v. Stoughton Mill Co.* 91 Wis. 180, 51 Am. St. Rep. 881, 64 N. W. 751, upholding action by foreign receiver against domestic debtor; *Swing v. White River Lumber Co.* 91 Wis. 521, 65 N. W. 174, holding complaint of foreign trustee insufficient in failing to allege authority to sue under foreign law and appointment; *Wyman v. Kimberly-Clark Co.* 93 Wis. 559, 67 N. W. 932, upholding act limiting time within which foreign receiver may sue; *Finney v. Guy*, 106 Wis. 277, 49 L. R. A. 495, 82 N. W. 595, dismissing action against domestic stockholder to enforce double liability, under foreign statutes, after suit in foreign state; *Iowa & C. Land Co. v. Hoag*, 132 Cal. 629, 64 Pac. 1073, holding action maintainable by foreign trustee to foreclose mortgage; *Castleman v. Templeman*, 87 Md. 553, 41 L. R. A. 370, 67 Am. St. Rep. 363, 40 Atl. 275, holding action maintainable by foreign receiver to recover unpaid subscription to capital stock and referring with approval to annotation in 23 L. R. A. 52; *Weil v. Bank of Burr Oak*, 76 Mo. App. 38, dismissing attachment suit of foreign creditor on interpleader for property by foreign receiver; *Barley v. Gittings*, 15 App. D. C. 439, holding permission to foreign receiver to sue or intervene not a right, but privilege; *Small v. Smith*, 14 S. D. 624, 86 Am. St. Rep. 807, 86 N. W. 649, holding action maintainable by foreign receiver to recover realty from resident of state of forum; *E. F. Kirwan Mfg. Co. v. Truxton*, 2 Penn. (Del.) 60, 44 Atl. 427, holding action not maintainable by corporation in its own name after appointment of foreign receiver; *Hale v. Harris*, 112 Iowa, 375, 83 N. W. 1046, holding action maintainable by foreign receiver as assignee to foreclose mortgage; *Hibernia Bank & T. Co. v. Lewis*, 119 Fed. 397, holding that tendency of court is to recognize right of receiver to possession of property embraced in decree, although outside jurisdiction of appointing court; *Eingartner v. Illinois Steel Co.* 94 Wis. 84, 34 L. R. A. 508, 59 Am. St. Rep. 859, 68 N. W. 664 (dissenting opinion), n:2-

jority holding citizens of one state have same right of action in courts of sister state as citizens thereof.

Cited in footnotes to *Barth v. Backus*, 23 L. R. A. 47, which denies validity of voluntary assignment though valid in state of assignor's domicile, requiring discharge of debts of creditors accepting dividends; *Buswell v. Supreme Sitting, O. I. H.* 23 L. R. A. 846, which upholds right of intervention of receiver of foreign corporation appointed at its domicile; *American Waterworks Co. v. Farmers Loan & T. Co.* 25 L. R. A. 338, which upholds receiver's right to object to prosecution by corporate officer of writ of error in other state; *Holbrook v. Ford*, 27 L. R. A. 324, which holds receiver of foreign corporation's property takes no title to debts due from persons in other state; *Commercial Nat. Bank v. Matherwell Iron & Steel Co.* 29 L. R. A. 164, which denies right of receiver to sue in other state for property never in his possession; *Robertson v. Stead*, 33 L. R. A. 203, which holds foreign receiver obtaining possession of property is entitled to protection anywhere; *Guarantee Trust & S. D. Co. v. Philadelphia, R. & N. E. R. Co.* 38 L. R. A. 804, which sustains jurisdiction of state court appointing railroad receiver to direct as to wages for operation within state, though services also performed in other state; *Castleman v. Templeman*, 41 L. R. A. 367, which denies receiver's power to consent to decree in other state for payment of assessments by stockholders to creditors; *Ward v. Connecticut Pipe Mfg. Co.* 42 L. R. A. 706, which requires attachment creditor to account for fair value of goods at time of attachment, before sharing in benefit of receivership in other state; *Wyman v. Eaton*, 43 L. R. A. 695, which denies foreign receiver's right to enforce stockholder's liability created by law of other state, when injurious to residents; *Linville v. Hadden*, 43 L. R. A. 222, which holds nonresident creditor of foreign corporation in hands of receiver entitled to same protection as resident creditors against receiver's claim to property; *Price v. Ward*, 46 L. R. A. 459, which denies administrator's right to sue to redeem from mortgage, land in other state, by setting off waste committed by mortgagee in possession; *Segnitz v. Garden City Bkg. & T. Co.* 50 L. R. A. 327, which holds money on deposit in bank of other state applicable to notes of assignor for creditors held by bank after their maturity.

Cited in notes (23 L. R. A. 33, 42) on transfer of property out of state by bankruptcy or insolvency proceedings or by assignment for creditors; (26 L. R. A. 218) on garnishment of money due from receiver.

23 L. R. A. 58, *JASPER v. HAZEN*, 4 N. D. 1, 58 N. W. 454.

Appellate jurisdiction as to questions of fact.

Cited in *Christianson v. Farmers' Warehouse Asso.* 5 N. D. 444, 32 L. R. A. 731, 67 N. W. 300, upholding constitutionality of act requiring supreme court, on appeal, to try anew all cases tried below.

Deed intended as mortgage.

Followed in *McGuin v. Lee*, 10 N. D. 169, 86 N. W. 714, holding evidence insufficient to show absolute deed intended as mortgage.

Cited in *Rubo v. Bennett*, 85 Ill. App. 488, holding that in case of doubt, court of equity prefers construing deed as mortgage.

Review of evidence on appeal.

Cited in *Nichols & S. Co. v. Stangler*, 7 N. D. 109, 72 N. W. 1089, holding that when evidence is evenly balanced, or nearly so, appellate court should adopt view of court below; *Riley v. Riley*, 9 N. D. 583, 84 N. W. 347, holding on appeal, evi-

dence of material alteration not sufficiently strong and convincing to warrant annulling of deed; *Paulson v. Ward*, 4 N. D. 106, 58 N. W. 792, reviewing and holding evidence sufficient to show grantee's participation in fraud of grantor, warranting setting aside conveyance; *Hostetter v. Brooks Elevator Co.* 4 N. D. 361, 61 N. W. 40, holding appellate court not warranted in disturbing findings of fact upon examination of evidence; *Re Eaton*, 4 N. D. 518, 62 N. W. 597, holding fact that there is some evidence to support finding in disbarment proceeding not conclusive on appellate court; *Axion Min. Co. v. White*, 10 S. D. 202, 72 N. W. 462, refusing to disturb finding not against fair preponderance of testimony.

23 L. R. A. 67, *STATE ex rel. FIRST NAT. BANK v. BARTLEY*, 39 Neb. 353, 58 N. W. 172.

Deposits in banks.

Cited in *Re State Treasurer's Settlement*, 51 Neb. 131, 36 L. R. A. 751, footnote p. 746, 70 N. W. 532, holding deposit of public money by state treasurer in legally constituted depository a loan of such money; *Bartley v. State*, 53 Neb. 337, 73 N. W. 744, holding bank a debtor of state to amount of deposit of state moneys therein; *Nichols v. State*, 46 Neb. 719, 65 N. W. 774, holding that general deposit in bank by customer is in nature of loan.

Cited in footnotes to *Marquette v. Wilkinson*, 43 L. R. A. 840, which holds that city funds redeposited in other bank, under arrangement for sharing deposits, are held in trust for city as against original banker's assignee for creditors; *Maloy v. Bernalillo County*, 52 L. R. A. 126, which denies defaulting county treasurer's liability to county for interest paid to him by bank in which public money deposited, after he has paid county.

23 L. R. A. 73, *FURLEY v. CHICAGO, M. & ST. P. R. CO.* 90 Iowa, 146, 57 N. W. 719.

Violation of statutory regulations.

Cited in *State v. Chicago, M. & St. P. R. Co.* 122 Iowa, 25, 101 Am. St. Rep. 254, 96 N. W. 904, holding penal statute requiring trains to stop at certain places not violated where failure to comply due to defective brakes.

Cited in note (26 L. R. A. 640) on validity and construction of statutory regulations as to infected animals.

23 L. R. A. 82, *WIANT v. HAYS*, 38 W. Va. 681, 18 S. E. 807.

Personal property subject to transfer.

Cited in *Stevenson v. Kyle*, 42 W. Va. 232, 57 Am. St. Rep. 854, 24 S. E. 886, holding that order on fund does not operate as assignment, unless fund has real or potential existence in hands of drawee.

Lien upon personal property.

Cited in footnote to *Boisseau v. Penn*, 57 L. R. A. 380, which holds execution not lien on interest of debtor in twenty-year distribution policy on his life, which ceases on failure to pay premiums.

Forfeiture proceedings.

Cited in *Cecil v. Clark*, 44 W. Va. 679, 30 S. E. 216, holding forfeiture proceeding for sale of lands for benefit of school fund, chancery suit; *Cecil v. Clark*, 44 W. Va. 680, 30 S. E. 216, holding heirs having interest in land, not made par-

ties to forfeiture proceeding relating thereto, not bound thereby; *King v. Mullins*, 171 U. S. 432, 43 L. ed. 225, 18 Sup. Ct. Rep. 925, holding proceeding in circuit court of West Virginia for sale of forfeited lands, a judicial proceeding.

23 L. R. A. 86, *FORT v. STATE*, 92 Ga. 8, 18 S. E. 14.

Lloyds association.

Cited in *Enterprise Lumber Co. v. Mundy*, 62 N. J. L. 21, 55 L. R. A. 201. 42 Atl. 1063, upholding validity of "Lloyds" contract or policy of insurance.

Cited in footnote to *Com. v. Reinæhl*, 25 L. R. A. 247, which holds guarantee Lloyds not a "company" within provision as to acting as agent for foreign company.

Cited in note (25 L. R. A. 239) on restrictions on insurance by unincorporated associations or individuals; Lloyds associations.

23 L. R. A. 88, *ST. PAUL & D. R. CO. v. DULUTH*, 56 Minn. 494, 45 Am. St. Rep. 491, 58 N. W. 159.

Interference with natural flow of surface waters.

Cited in *Dudley v. Buffalo*, 73 Minn. 352, 76 N. W. 44, holding village not liable for overflow of private property by reason of inadequate drains.

Cited in footnotes to *Albany v. Sikes*, 26 L. R. A. 653, which holds no common law as to surface water established by adjudication before independence of country; *Gilfillan v. Schmidt*, 31 L. R. A. 547, which sustains power to deepen natural line of drainage of marsh fed entirely by surface water; *Churchill v. Beethe*, 35 L. R. A. 442, which sustains right of county to divert surface water in exercise of right of eminent domain; *Jordan v. Benwood*, 36 L. R. A. 519, which denies liability of city for change of street grade, preventing flow of surface water from lot; *McAskill v. Hancock*, 55 L. R. A. 738, which holds township liable for causing surface water to overflow private property; *Franklin v. Durgée*, 58 L. R. A. 112, which denies right to fill depressions in land, casting surface water back on highway to its injury.

Cited in note (61 L. R. A. 674) on duty and liability of municipality with respect to drainage.

23 L. R. A. 90, *ISHAM v. POST*, 141 N. Y. 100, 56 N. Y. S. R. 656, 38 Am. St. Rep. 766, 35 N. E. 1084.

Report of second appeal in 167 N. Y. 532, 60 N. E. 1113, Affirming 51 App. Div. 605, 64 N. Y. Supp. 1137.

Liability for negligence.

Cited in *Price v. Ga Nun*, 11 Misc. 75, 32 N. Y. Supp. 801, holding optician liable for negligence in making pair of glasses from prescription; *Steube v. Christopher & S. Architectural Iron Foundry Co.* 85 Mo. App. 650, holding that in action for personal injury, where negligence is in reasonable doubt, it is question for jury.

— Of banks and bankers.

Cited in *First Nat. Bank v. German Bank*, 107 Iowa, 545, 70 Am. St. Rep. 216, 78 N. W. 195, holding bank not liable for negligence of notary public, its assistant cashier; *Clinton Nat. Bank v. National Park Bank*, 37 App. Div. 607, 56 N. Y. Supp. 244, holding evidence as to custom of bankers as to examination

of securities admissible on question of negligence; *Watson v. Fagner*, 208 Ill. 144, 70 N. E. 23, holding banker liable for negligence in loaning customer's money to unsafe borrower.

Cited in footnote to *Grow v. Cockrill*, 36 L. R. A. 89, which holds bank receiver not liable for president's loan of depositor's money.

23 L. R. A. 95, *PEOPLE ex rel. THURBER-WHYLAND CO. v. BARKER*, 141 N. Y. 118, 56 N. Y. S. R. 586, 35 N. E. 1073.

Taxable personalty, and deductions allowable.

Cited in *People ex rel. Yellow Pine Co. v. Barker*, 23 App. Div. 526, 48 N. Y. Supp. 553, holding foreign corporation taxable on credits and bills receivable on business done in New York; *People ex rel. Barney v. Barker*, 16 App. Div. 268, 44 N. Y. Supp. 718, holding nonresident not entitled to exemption from taxation of sum invested in New York, merely because of greater indebtedness to citizens of state; *People ex rel. Lemmon v. Feitner*, 167 N. Y. 9, 82 Am. St. Rep. 698, 60 N. E. 265, holding value of seat in stock exchange owned by nonresident not taxable; *Sprague v. Fletcher*, 69 Vt. 81, 37 L. R. A. 844, 37 Pac. 239, holding invalid, statute denying right to nonresidents only of deducting debts from taxable property; *People ex rel. Bird v. Barker*, 145 N. Y. 242, 39 N. E. 1065, holding nonresident special partner not entitled to deduction of partnership indebtedness from sum taxable.

Cited in note (60 L. R. A. 332) on constitutional equality in United States in relation to corporate taxation.

Limited in *People ex rel. Hecker-Jones-Jewell Mill. Co. v. Barker*, 147 N. Y. 34, 29 L. R. A. 395, footnote p. 393, 41 N. E. 435, Affirming 86 Hun, 152, 67 N. Y. S. R. 756, 33 N. Y. Supp. 1019, requiring deduction of unpaid part of purchase money for property bought in state by foreign corporation in determining sum invested.

23 L. R. A. 97, *Re WORTHINGTON*, 141 N. Y. 9, 56 N. Y. S. R. 561, 35 N. E. 929.

Assignments against public policy.

Cited in *Woodbridge v. Bockes*, 59 App. Div. 517, 69 N. Y. Supp. 417, holding release by *cestui que trust* of accrued income valid; *Re King*, 110 Mich. 207, 68 N. W. 154, holding assignment of compensation for services as executrix against public policy.

23 L. R. A. 99, *LIMBURG v. GERMAN F. INS. CO.* 90 Iowa, 709, 48 Am. St. Rep. 468, 57 N. W. 626.

Occupancy within terms of insurance policy.

Cited in *Names v. Dwelling House Ins. Co.* 95 Iowa, 650, 64 N. W. 628, holding occupancy of house, with sole intent of burning property therein, not occupancy within terms of policy; *Des Moines Ice Co. v. Niagara F. Ins. Co.* 99 Iowa, 200, 68 N. W. 600, holding ice house not vacant, as matter of law, within meaning of policy, because nothing therein in October except tools and small quantity of ice.

Cited in footnotes to *Moody v. Amazon Ins. Co.* 26 L. R. A. 313, which holds nonoccupancy without increase of risk or fraud insufficient to avoid policy; *Henderson Trust Co. v. Stuart*, 48 L. R. A. 49, which holds executor liable for loss of insurance from failure to apply for extension of vacancy permit; *Home Ins. Co.*

v. Hancock, 52 L. R. A. 665, which holds house not vacant because custodian has access to only one room; German Ins. Co. v. Russell, 58 L. R. A. 234, which holds policy absolutely forfeited by allowing premises to remain vacant time specified in policy; Hampton v. Hartford F. Ins. Co. 52 L. R. A. 344, which holds church building kept for use for purposes for which designed not vacant and unoccupied.

Ignoring instruction of court.

Cited in World Mut. Ben. Asso. v. Worthing, 59 Neb. 589, 81 N. W. 620, holding failure of jury to follow court's instructions reversible error.

23 L. R. A. 103, WILKES v. DAVIES, 8 Wash. 112, 35 Pac. 611.

Rights of owner of improvements on school lands.

Cited in Brummett v. Campbell, 32 Wash. 368, 73 Pac. 403, holding that one lawfully in possession of school lands, and having improvements thereon, has right as against subsequent purchaser to retain possession until paid for.

Conclusiveness of prior decisions and judgments.

Cited in Furth v. Snell, 13 Wash. 665, 43 Pac. 935, holding that where evidence on second trial is substantially same as on first, law as established on facts on first appeal is binding; Isensee v. Austin, 15 Wash. 358, 46 Pac. 394, holding assignees barred by rule of *res judicata* as to defenses available to assignors in former action; Dunsmuir v. Port Angeles, Gas, Water, Electric Light & P. Co. 30 Wash. 592, 71 Pac. 9, holding action for recovery of taxes not barred by former action between same parties, in which controversy was not determined because remedy not deemed appropriate.

Cited in note (34 L. R. A. 327) on conclusiveness of prior decisions on subsequent appeals.

23 L. R. A. 111, ADAMS v. FIRST NAT. BANK, 113 N. C. 332, 18 S. E. 513.

Settlement of accounts with banks.

Cited in Hodgin v. Peoples' Nat. Bank, 124 N. C. 543, 32 S. E. 887, holding deposit of individual partner not applicable to indebtedness of firm to bank.

Distinguished in Davis v. Industrial Mfg. Co. 114 N. C. 333, 23 L. R. A. 325, 19 S. E. 371, holding receiver of insolvent bank in settling with creditor entitled to deduct all sums for which he is debtor, as principal or surety.

23 L. R. A. 113, *Re* MUNICIPAL SUFFRAGE TO WOMEN, 160 Mass. 586, 36 N. E. 488.

Statutes to take effect upon acceptance by vote of people.

Cited in Owen v. Baer, 154 Mo. 509, 55 S. W. 644, holding sewer tax law applicable to cities of fourth class, upon two-thirds vote in favor thereof, unconstitutional.

Cited in footnotes to State *ex rel.* Witter v. Forkner, 28 L. R. A. 206, which upholds statute requiring consent of city council and majority of electors to suspension of penalties of prohibitory liquor law; State *ex rel.* Childs v. Copeland, 34 L. R. A. 777, which holds void, local-option law granting charter power to cities of certain class, to take effect in city only on adoption thereby.

Delegation of power.

Cited in Brodbine v. Revere, 182 Mass. 600, 66 N. E. 607, upholding act giv-

ing metropolitan park commissioners power to make rules for regulation of boulevards within their care.

23 L. R. A. 120, CRUMLISH v. CENTRAL IMPROV. CO. 38 W. Va. 390, 45 Am. St. Rep. 872, 18 S. E. 456.

Payment of debt by volunteer.

Cited in Schoonover v. Osborne, 117 Iowa, 438, 90 N. W. 844, holding grantee of land redeeming same after execution sale on erroneous judgment not volunteer.

Cited in footnotes to United States use of Fidelity Nat. Bank v. Rundle, 52 L. R. A. 505, which holds money furnished to pay labor claims not within bond for paying persons supplying principal with labor or materials for prosecuting work; People's & D. Bank v. Craig, 52 L. R. A. 872, which holds remittance to owner of amount of note by one receiving for collection, out of his own funds, constitutes payment by volunteer; Marshall v. Bullard, 54 L. R. A. 862, which holds third person's part payment of judgment sufficient consideration for release of balance; Jackson v. Pennsylvania R. Co. 55 L. R. A. 87, which holds accord and satisfaction with third person, authorized or ratified by debtor, prevents action by creditor.

Right to subrogation.

Cited in Irvine v. Kearney County, 75 Fed. 767, holding purchaser of void bonds entitled to subrogation to rights of holders of warrants for which bonds were issued; Bates v. Swiger, 40 W. Va. 429, 21 S. E. 874, holding one officially paying debt of another as stranger not entitled to subrogation; Hawker v. Moore, 40 W. Va. 52, 20 S. E. 848, upholding right of cosurety to subrogation; Davis v. Schlemmer, 150 Ind. 477, 50 N. E. 373, holding that replevin bail signing bond at request of one not a party may be entitled to subrogation on payment of judgment; Gray v. Zellmer, 66 Kan. 518, 72 Pac. 228, denying subrogation to rights of prior mortgagee, where mortgage paid without mortgagor's knowledge out of proceeds of subsequent invalid mortgage.

Cited in footnotes to Faires v. Cockrill, 28 L. R. A. 528, which denies right to contribution or subrogation between co-obligors on written contract; Union Mortg. Bkg. & T. Co. v. Peters, 30 L. R. A. 829, which authorizes subrogation of one advancing money at debtor's instance for use in paying prior security; Meeker v. Larson, 57 L. R. A. 901, which denies right of one furnishing money to discharge mortgage, to be subrogated to mortgagee's rights.

Effect to be given foreign judgment.

Cited in Wells-Stone Mercantile Co. v. Truax, 44 W. Va. 537, 29 S. E. 1006, holding foreign judgment, in absence of fraud, conclusive on collateral attack; Winham v. Kline, 77 Mo. App. 47, holding foreign judgment, obtained on personal service, binding on parties; American Mut. L. Ins. Co. v. Mason, 159 Ind. 11, 64 N. E. 525, holding judgment of foreign court having jurisdiction of subject-matter and persons not open to collateral attack.

Erroneous judgments.

Cited in Maxwell v. Leeson, 50 W. Va. 369, 88 Am. St. Rep. 675, 40 S. E. 420, holding erroneous judgment on scire facias not void as original judgment where it awarded execution.

Question of payment for jury.

Cited in *First Nat. Bank v. School Dist. No. 1*, 6 Wyo. 491, 46 Pac. 1030, refusing to reverse verdict of payment of note, sustained by sufficient evidence.

Right of corporation officers to compensation.

Cited in *Ravenswood & S. G. R. Co. v. Woodyard*, 46 W. Va. 561, 33 S. E. 285, holding compensation for president or director of private joint stock corporation not allowable except by vote of stockholders.

Cited in footnotes to *Eaton v. Robinson*, 29 L. R. A. 100, which requires officers to account for salaries voted and paid to deprive stockholders of rights; *Huffaker v. Germania Safety Vault & T. Co.* 46 L. R. A. 384, which holds directors entitled to compensation for extraordinary services performed without contract, by which company saved from bankruptcy; *Bassett v. Fairchild*, 52 L. R. A. 611, which sustains director's right, without direct contract, to compensation for services not connected with office.

23 L. R. A. 135, *COTE v. MURPHY*, 159 Pa. 420, 39 Am. St. Rep. 686, 28 Atl. 190.

Lawful and unlawful combinations.

Followed in *Buchanan v. Kerr*, 159 Pa. 434, 28 Atl. 195, upholding action of association of employers refusing to sell material to person acceding to demand for advance in wages.

Cited in *Macauley Bros. v. Tierney*, 19 R. I. 263, 37 L. R. A. 461, 61 Am. St. Rep. 770, 33 Atl. 1, holding agreement of members of association not to deal with wholesalers selling to persons not members of association not conspiracy, *Patterson v. Building Trades Council*, 11 Kulp, 22, enjoining boycott by labor organization against manufacturer of building materials; *Marietta Casting Co. v. Thuma*, 20 Lanc. L. Rev. 192, 28 Pa. Co. Ct. 260, holding that court will enjoin organization of strikers from threatening or otherwise interfering with workmen taking their places.

Cited in footnotes to *Ertz v. Produce Exchange*, 48 L. R. A. 90, which holds malicious, conspiracy to injure dealer by inducing other people not to deal with him; *Jackson v. Stanfield*, 23 L. R. A. 588, which holds combination of retail lumber dealers to destroy business of brokers by compelling refusal of sales to them, actionable.

Cited in note (62 L. R. A. 711) on effect of bad motive to make actionable what would otherwise not be.

Distinguished in *Temple Iron Co. v. Carmanoskie*, 10 Kulp, 40, 7 Northampton Co. Rep. 261, and *O'Neil v. Behanna*, 182 Pa. 245, 38 L. R. A. 386, 61 Am. St. Rep. 702, 37 Atl. 843, holding display of force by strikers to intimidate newly employed men, illegal; *Vegelahn v. Gunter*, 167 Mass. 99, 35 L. R. A. 724, 57 Am. St. Rep. 443, 44 N. E. 1077, holding maintenance of patrol in front of factory, in connection with social pressure and threats, unlawful; *Brown v. Jacobs' Pharmacy Co.* 115 Ga. 450, 57 L. R. A. 557, 90 Am. St. Rep. 126, 41 S. E. 553, holding combination of merchants to compel another dealing in similar goods to sell at prices fixed by it, enjoined; *Martell v. White*, 185 Mass. 262, 64 L. R. A. 264, 69 N. E. 1085, holding action for damage maintainable by quarry owner against members of voluntary association imposing fine on any member dealing with him.

23 L. R. A. 139, *PEOPLE ex rel. BRADLEY v. ILLINOIS STATE REFORMATORY*, 148 Ill. 413, 36 N. E. 76.

State reformatories.

Cited in *Henderson v. People*, 165 Ill. 611, 46 N. E. 711, holding state reformatory not a penitentiary; *Marshall v. Illinois State Reformatory*, 201 Ill. 16, 66 N. E. 314, holding state reformatory to be penal institution.

Cited in footnote to *Re Sanders*, 23 L. R. A. 603, which denies probate court's power to commit infant to reform school for specific crime without previous conviction.

Indeterminate sentences.

Cited in *Murphy v. Com.* 172 Mass. 275, 43 L. R. A. 159, 70 Am. St. Rep. 266, 52 N. E. 505, holding duration of indeterminate sentence not uncertain; *People ex rel. Abraham v. Fox*, 77 App. Div. 250, 79 N. Y. Supp. 56, upholding vagrancy law permitting prisoner's earlier discharge in case of not having been previously convicted; *Miller v. State*, 149 Ind. 616, 40 L. R. A. 112, 49 N. E. 894, holding that act providing for indeterminate sentence to reformatory does not authorize cruel and unusual punishment; *State v. Page*, 60 Kan. 667, 57 Pac. 514, upholding act providing for indeterminate sentence; *People ex rel. Clark v. Sing Sing Prison*, 30 Misc. 117, 78 N. Y. Supp. 907, upholding act providing for indeterminate sentence for felons, not to exceed maximum term.

Distinguished in *Re Lorkowski*, 94 Mo. App. 634, 68 S. W. 610, holding provision in act authorizing indefinite sentence of one convicted of crime unconstitutional.

Right of jury to fix punishment.

Cited in *State v. Haméy*, 168 Mo. 178, 57 L. R. A. 852, footnote p. 846, 67 S. W. 620, denying right under Constitution to have jury assess punishment in criminal cases.

Validity and construction of reformatory acts.

Cited in *Bartley v. People*, 156 Ill. 241, 40 N. E. 831, upholding constitutionality of Illinois reformatory act; *George v. People*, 167 Ill. 464, 47 N. E. 741, upholding right of legislature to grant penitentiary commissioners discretionary power to parol prisoners; *People ex rel. Martin v. Mallary*, 195 Ill. 589, 88 Am. St. Rep. 212, 63 N. E. 508, holding section of act authorizing transfer of prisoner in state reformatory to penitentiary, by managers of reformatory, unconstitutional; *Sullivan v. People*, 156 Ill. 96, 40 N. E. 288, holding provision in reformatory act, requiring finding of age of defendant by jury, applicable only to minors.

Acts partly unconstitutional.

Cited in *Noel v. People*, 187 Ill. 597, 52 L. R. A. 291, 79 Am. St. Rep. 238, 58 N. E. 616, upholding portion of pharmacy act requiring registration, although unconstitutional in another respect; *Re Linden*, 112 Wis. 525, 88 N. W. 645, holding that constitutionality of provision of act allowing transfer of prisoners from one institution to another may be considered independently of general statute relating to indeterminate sentences.

23 L. R. A. 144, *SENATE OF HAPPY HOME CLUB v. ALPENA COUNTY*, 99 Mich. 117, 57 N. W. 1101.

Treatment of persons convicted of drunkenness.

Cited in footnotes to *Baltimore v. Keeley Institute*, 27 L. R. A. 646, which

holds valid, act authorizing treatment of habitual drunkard at expense of county or city of residence; *Re House*, 33 L. R. A. 832, which sustains right to use county funds to pay for cure of indigent inebriates in private establishment; *Wisconsin Keeley Inst. Co. v. Milwaukee County*, 36 L. R. A. 55, which holds invalid, statute for treatment of habitual drunkards at private institution at county expense.

Commitment of prisoners to private institutions or individuals.

Cited in footnotes to *Farmer v. St. Paul*, 33 L. R. A. 199, which denies right to select as workhouse, house under control of religious society; *Simmons v. Georgia Iron & Coal Co.* 61 L. R. A. 739, which denies right to work convicts in private chain gangs controlled by private individuals.

Delegation of power.

Distinguished in *Hurst v. Warner*, 102 Mich. 245, 26 L. R. A. 492, 47 Am. St. Rep. 525, 60 N. W. 440, sustaining right to delegate to state board of health power to establish quarantine system with inspection of persons and baggage from places where contagious disease is known to exist.

23 L. R. A. 146, *HOWSMON v. TRENTON WATER CO.* 119 Mo. 304, 41 Am. St. Rep. 654, 24 S. W. 784.

Rights and liabilities of third persons on contracts.

Cited in *Porter v. Woods*, 138 Mo. 554, 39 S. W. 794, holding action maintainable against third party by holder of note made solely for his benefit; *Harberg v. Arnold*, 78 Mo. App. 239, and *Hicks v. Hamilton*, 144 Mo. 500, 66 Am. St. Rep. 641, 46 S. W. 432, holding grantee assuming mortgage debt not liable for deficiency, if prior grantor is not liable therefor; *Crone v. Stinde*, 156 Mo. 268, 55 S. W. 863, holding contrary to and overruling the preceding case; *McKay v. Ward*, 20 Utah, 183, 46 L. R. A. 633, 57 Pac. 1024 (dissenting opinion), majority holding assumption of mortgage debt as part consideration for purchase renders grantee personally liable on debt, although prior grantor was not; *St. Louis use of Glencoe Lime & Cement Co. v. Von Phul*, 133 Mo. 572, 54 Am. St. Rep. 695, 34 S. W. 843, holding person laboring in or furnishing material for improvement of city streets entitled to benefit of bond by contractor to city; *Devers v. Howard*, 144 Mo. 678, 46 S. W. 625, holding action maintainable by material men against contractor's bondsmen on failure to pay for material used on city work; *Montgomery v. Rief*, 15 Utah, 500, 50 Pac. 623, holding contractor's bondsmen not liable to material men, where bond is given for benefit of state; *United States use of Dishman v. Rundle*, 27 Wash. 12, 67 Pac. 395, upholding right of action under Federal statute giving material men right to sue on contractor's bond in name of United States; *Carpenter v. Reliance Realty Co.* 103 Mo. App. 502, 77 S. W. 1004, holding adjacent owner not entitled to benefit of bond by contractor to protect adjoining property while excavating; *Lewis v. Brookdale Land Co.* 124 Mo. 685, 28 S. W. 324, holding action not maintainable for rescission by purchasers of lots on breach of contract between land company and third party; *State v. St. Louis & S. F. R. Co.* 125 Mo. 617, 28 S. W. 1074, holding action not maintainable by third party on agreement by one to "save harmless" the other; *American Bank v. Klock*, 58 Mo. App. 347, holding that third party has no greater right against grantee of mortgage debt, assuming to pay on taking deed, than original grantor; *Street v. Goodale*, 77

Mo. App. 321, holding action by payee against bank not warranted by promise of bank to pay checks of customer; *Rothwell v. Skinker*, 84 Mo. App. 177, holding action maintainable by contractor against third person for whose benefit contract sued upon was made.

Cited in note (25 L. R. A. 260, 269) on right of third party to sue on contract made for his benefit.

Liability for failure to supply water or gas.

Cited in *Boston Safe-Deposit & T. Co. v. Salem Water Co.* 94 Fed. 240; *House v. Houston Waterworks Co.* 88 Tex. 239, 28 L. R. A. 533, footnote p. 532, 31 S. W. 179; *Nichol v. Huntington Water Co.* 53 W. Va. 354, 44 S. E. 290; *Bush v. Artesian Hot & Cold Water Co.* 4 Idaho, 622, 95 Am. St. Rep. 161, 43 Pac. 69,—denying liability under contract with city, of water company for loss of citizen's property by fire; *Ukiah City v. Ukiah Water & Improv. Co.* 142 Cal. 178, 64 L. R. A. 235, footnote p. 231, 100 Am. St. Rep. 107, 75 Pac. 773, holding contract to compensate municipality for loss of property by fire from negligent failure to furnish water not shown by mere acceptance of payment for furnishing of water for general fire purposes.

Cited in footnotes to *Watson v. Needham*, 24 L. R. A. 287, which holds municipality liable for failure to furnish water supply according to contract for steam heating in green house; *Capital City Water Co. v. State*, 29 L. R. A. 743, which upholds right to forfeit water-works charter for failure to supply water according to contract; *Springfield F. & M. Ins. Co. v. Keeseville*, 30 L. R. A. 660, which denies liability of city for damage by fire due to its failure to maintain sufficient water works; *Du Bois v. Du Bois City Waterworks Co.* 34 L. R. A. 92, which holds cancelation of contract by city for water supply not justified by inadequacy of supply; *Coy v. Indianapolis Gas Co.* 36 L. R. A. 535, which holds sickness and death of children from failure to furnish gas for fuel, element of damages; *Gorrell v. Greensboro Water Supply Co.* 46 L. R. A. 513, which sustains right of action by citizen for breach of water company's contract to supply sufficient water to prevent loss by fire; *Middlesex Water Co. v. Knappmann Whiting Co.* 49 L. R. A. 572, which holds water company failing to supply sufficient water for fire purposes liable to consumer for loss of property by fire.

Cited in note (61 L. R. A. 96, 98) on establishment and regulation of municipal water supply.

23 L. R. A. 152, *ODOM v. ST. LOUIS SOUTHWESTERN R. CO.* 45 La. Ann. 1201, 14 So. 734.

Injuries received in boarding and leaving trains.

Cited in *Caruth v. Texas & P. R. Co.* 45 La. Ann. 1231, 14 So. 736, holding carrier liable for injuries received by passenger while alighting from train suddenly starting; *Brashear v. Houston C. A. & N. R. Co.* 47 La. Ann. 738, 28 L. R. A. 612, 49 Am. St. Rep. 382, 17 So. 260, holding action maintainable for injury to passenger alighting from moving train at station called, at which train did not stop; *Atchison, T. & S. F. R. Co. v. Hughes*, 55 Kan. 500, 40 Pac. 919, holding question of plaintiff's contributory negligence in alighting from moving train upon invitation, for jury.

Cited in footnotes to *Distler v. Long Island R. Co.* 35 L. R. A. 762, which holds stepping from station platform onto slowly moving train not negligence *per se*;

Jones v. New York C. & H. R. R. Co. 41 L. R. A. 490, which denies right of one attempting to enter car of mixed train at distance from station, to recover for injury from sudden jolting of car in coupling; *Brashear v. Houston C. A. & N. R. Co.* 28 L. R. A. 811, which sustains right of recovery of passenger going on platform with intent to get off, when thrown off by sudden increase of speed.

23 L. R. A. 155, *JONES v. MILLSAPS*, 71 Miss. 10, 14 So. 440.

Maintenance and care of buildings and premises.

Cited in footnotes to *Canandaigua v. Foster*, 41 L. R. A. 554, which holds lessor required to keep sidewalk grate in repair, though tenant has exclusive right to use same; *Olson v. Schultz*, 36 L. R. A. 790, which holds lessor liable, without notice, for defects in elevator which he covenants to keep in repair.

Cited in notes (25 L. R. A. 34) on liability for injury to elevator passenger; (34 L. R. A. 558) on individual liability for falling walls or buildings; (34 L. R. A. 616) on liability of landlord for injury to tenant's guests and servants from defects in premises.

— Liability for condition of premises in control of landlord.

Cited in *Kuhn v. Sol Heavenrich Co.* 115 Wis. 452, 60 L. R. A. 587, footnote p. 585, denying implied contract obligation of one leasing building in sections, to keep in repair part remaining in his possession.

Cited in footnotes to *McGinley v. Alliance Trust Co.* 56 L. R. A. 334, which holds lessor of apartment house retaining control of stairways liable for injury to tenants from lack of repair of stair railing; *Railton v. Taylor*, 39 L. R. A. 246, which holds landlord not exempt by lease from liability for damage resulting from negligence in use of heating apparatus remaining under his own control.

— Fire escapes.

Cited in footnotes to *Schmalzried v. White*, 32 L. R. A. 782, which holds landlord not required to provide fire escapes for safety of tenant; *Arms v. Ayer*, 58 L. R. A. 277, which sustains statute requiring fire escapes on certain kinds of buildings, giving factory inspector discretion as to their number, location, etc.; *Carrigan v. Stillwell*, 61 L. R. A. 163, which holds owner of rented building liable for injury from lack of fire escapes.

Easement of light and air.

Cited in footnotes to *Kennedy v. Burnap*, 40 L. R. A. 476, which holds easement of light and air does not pass by implication on conveyance of building with windows looking over vacant lot; *Baker v. Willard*, 40 L. R. A. 754, which denies application to easement of light and air of doctrine that easement appurtenant to close is appurtenant to every portion of same; *Townsend v. Epstein*, 52 L. R. A. 409, which sustains abutter's right to relief against diminution of light and air by bridge over street.

23 L. R. A. 161, *TYSON v. WESTERN NAT. BANK*, 77 Md. 412, 26 Atl. 520.

Indorsement for collection and for deposit.

Cited in *National Bank of Commerce v. Johnson*, 6 N. D. 184, 69 N. W. 49, holding title not passed by indorsement of certificate of deposit for collection and credit.

Cited in note (32 L. R. A. 716) on trust in proceeds of collection made by bank when insolvent.

Distinguished in *Ditch v. Western Nat. Bank*, 79 Md. 204, 23 L. R. A. 167, 47 Am. St. Rep. 375, 29 Atl. 72, holding title to check indorsed for deposit passes to subsequent indorsee for value.

Judgment on agreed case.

Cited in *Baltimore, C. & A. R. Co. v. Wicomico County*, 93 Md. 128, 48 Atl. 853, holding provision prohibiting court of appeal from deciding any question not decided below not applicable to case tried on agreed statement of facts; *Salfner v. State*, 84 Md. 302, 35 Atl. 885, holding submission on agreed statement of fact should be accompanied by agreement permitting court to enter judgment.

23 L. R. A. 164, *DITCH v. WESTERN NAT. BANK*, 79 Md. 192, 47 Am. St. Rep. 375, 29 Atl. 72, 138.

Indorsement of commercial paper for collection and deposit.

Cited in *Winfield Nat. Bank v. McWilliams*, 9 Okla. 508, 60 Pac. 229, holding that upon proof that check indorsed in blank was deposited with bank for "collection," one receiving it from bank must as against one claiming to be real owner, show that he received it in good faith and for value.

Cited in footnotes to *Tyson v. Western Nat. Bank*, 23 L. R. A. 161, which holds that title to commercial paper does not pass to bank by depositing with indorsement "for collection;" *Averell v. Second Nat. Bank*, 25 L. R. A. 761, which holds bank receiving post-dated check on itself for collection liable to depositor where drawer had sufficient funds on morning of date of check.

23 L. R. A. 173, *EXCHANGE BANK v. SUTTON BANK*, 78 Md. 577, 28 Atl. 563.

Nature of cashier's check.

Cited in footnote to *Phillips v. Mercantile Nat. Bank*, 23 L. R. A. 584, which holds payment by drawee of cashier's checks on forged indorsements by cashier of payees' names, good as against his bank.

23 L. R. A. 177, *CREED v. SUN FIRE OFFICE*, 101 Ala. 522, 46 Am. St. Rep. 134, 14 So. 323.

Misstatements in application for insurance with agent's knowledge.

Cited in *Pope v. Glens Falls Ins. Co.* 130 Ala. 360, 30 So. 496; *Triple Link Mut. Indemnity Asso. v. Williams*, 121 Ala. 145, 77 Am. St. Rep. 34, 26 So. 19; *Sellers v. Commercial F. Ins. Co.* 105 Ala. 290, 16 So. 798,—holding policy not avoided by misstatements in application written by agent of company; *Strause v. Palatine Ins. Co.* 128 N. C. 65, 38 S. E. 256, holding that agent's knowledge of facts estops defense of lack of sole ownership of premises by insured.

23 L. R. A. 181, *SLATER v. CAPITAL INS. CO.* 89 Iowa, 628, 57 N. W. 422.

23 L. R. A. 184, *KEEPERS v. FIDELITY TITLE & DEPOSIT CO.* 56 N. J. L. 302, 44 Am. St. Rep. 397, 28 Atl. 585.

Gifts inter vivos and causa mortis.

Cited in *Buecker v. Carr*, 60 N. J. Eq. 305, 47 Atl. 34, and *Snyder v. Harris*, 61 N. J. Eq. 486, 48 Atl. 329, refusing to declare transaction a gift *causa mortis*, where sought to be proved mainly on testimony of donee; *Knight v. Tripp*, 121 Cal. 681, 54 Pac. 267, holding delivery of key to receptacle which is itself capable

of delivery not sufficient to constitute delivery of its contents; *Whalen v. Milholland*, 89 Md. 211, 44 L. R. A. 213, 43 Atl. 45, holding deposit in joint name of depositor and sister, payable to order of either or survivor, not sufficient to constitute gift, depositor retaining bank book.

Cited in footnotes to *Royston v. McCulley*, 52 L. R. A. 899, which holds gift *causa mortis* of bank certificates made by donor asking to have trunks unlocked and certificates indorsed; *Lord v. New York L. Ins. Co.* 56 L. R. A. 597, which sustains gift of policy found among papers of insured at his death, on proof of his declarations that it was donee's.

23 L. R. A. 187, *WATTS v. WATTS*, 160 Mass. 464, 39 Am. St. Rep. 509, 36 N. E. 479.

Former action as bar to subsequent suit.

Cited in *Clement Mfg. Co. v. Wood*, 162 Mass. 175, 38 N. E. 444, holding parties bound by finding as to height of dam, necessarily involved in issues tried; *Gilmore v. Williams*, 162 Mass. 352, 38 N. E. 976, holding judgment by consent on note for purchase price of chattels, and payment of same not bar to action for breach of warranty; *Cobb v. Fogg*, 166 Mass. 477, 44 N. E. 534, holding judgment in former action between same parties not bar to subsequent action on entirely different issues; *Walker v. Walker*, 172 Mass. 84, 51 N. E. 455, holding wife's desertion not bar to her libel for husband's adultery committed before desertion by her; *Nashua & L. R. Corp. v. Boston & L. R. Corp.* 164 Mass. 226, 49 Am. St. Rep. 454, 41 N. E. 268 (dissenting opinion), majority holding former action between same parties not conclusive as to issue in pleadings on which record is silent; *Waterhouse v. Levine*, 182 Mass. 409, 65 N. E. 822, holding judgment on action because prematurely brought not bar to subsequent action between same parties involving same subject-matter.

23 L. R. A. 190, *BANK OF COMMERCE v. GOOS*, 39 Neb. 437, 58 N. W. 84.

Damages recoverable.

Cited in *First Nat. Bank v. Railsback Bros.* 58 Neb. 251, 78 N. W. 512, holding assessment of damages for wrongful refusal to pay check proper, although no special damages were proved; *Svendsen v. State Bank*, 64 Minn. 42, 31 L. R. A. 553, 58 Am. St. Rep. 522, 65 N. W. 1086, holding general compensatory damages recoverable for wrongful refusal of banker to honor check; *J. M. James Co. v. Continental Nat. Bank*, 105 Tenn. 12, 51 L. R. A. 259, 80 Am. St. Rep. 857, 58 S. W. 261, holding that law conclusively presumes damages from wrongful dishonor of check; *American Nat. Bank v. Morey*, 113 Ky. 863, 58 L. R. A. 958, 69 S. W. 759, holding punitive damages not recoverable for wrongful refusal to honor check; *American Nat. Bank v. Morey*, 113 Ky. 863, 58 L. R. A. 958, 101 Am. St. Rep. 379, 69 S. W. 759, holding one whose check is wrongfully dishonored entitled to compensatory damages, but not to damages for humiliation and mortification; *Ellison v. Brown*, 43 Neb. 71, 61 N. W. 97, holding instruction in effect leaving determination of general damages from malicious prosecution to jury, proper; *Jensen v. Hallam*, 51 Neb. 494, 70 N. W. 1121, holding \$500 damages for loss of reputation and humiliation for wrongful attachment, excessive; *Harvard v. Stiles*, 54 Neb. 28, 74 N. W. 399, holding damages for future and permanent effect of personal injuries recoverable under general *ad damnum* clause; *Hier v. Hutchings*, 58 Neb. 335, 78 N. W. 638, holding amount of general

damages of wrongful rearrest of prisoner after discharge in habeas corpus liquidated at \$500 by statute.

23 L. R. A. 194, *STATE ex rel. ROBB v. STONE*, 120 Mo. 428, 25 S. W. 376.

Mandamus to executive and legislative officers.

Cited in *State ex rel. North & South R. Co. v. Meier*, 143 Mo. 443, 45 S. W. 306, Reversing 72 Mo. App. 620, holding that mandamus will lie to compel president of city council to perform ministerial duty; *Albright v. Fisher*, 164 Mo. 62, 64 S. W. 106, holding court powerless to restrain municipal assembly from passage of ordinance granting right of way to railway; *Shipman v. State Live-Stock Sanitary Commission*, 115 Mich. 491, 73 N. W. 817, denying mandamus to compel state live stock commission to appraise condemned cattle at market value; *State ex rel. State Pub. Co. v. Smith*, 23 Mont. 49, 57 Pac. 449, holding that governor cannot be compelled by mandamus to exercise duty not ministerial; *People ex rel. Broderick v. Morton*, 156 N. Y. 141, 41 L. R. A. 233, footnote p. 231, 66 Am. St. Rep. 547, 50 N. E. 791, denying right of mandamus to compel performance of act by governor; *State ex rel. Wright v. Savage*, 64 Neb. 698, 90 N. W. 898, holding that court may issue writ of mandamus to compel governor to perform ministerial duty.

Distinguished in *State ex rel. Barricelli v. Noonan*, 59 Mo. App. 526, holding that mandamus will lie to compel performance of duty by mayor of city.

Independence of different branches of government.

Cited in *State ex rel. Crow v. Shepherd*, 177 Mo. 236, 99 Am. St. Rep. 624, 76 S. W. 79, holding that legislature cannot abridge power of court to punish for contempt.

23 L. R. A. 196, *WRIGHT v. WRIGHT*, 99 Mich. 170, 58 N. W. 54.

Adoption of children.

Cited in *Re Susman*, 28 Pittsb. L. J. N. S. 103, holding child adopted by parol agreement entitled to share in distribution of estate.

Distinguished in *Renz v. Drury*, 57 Kan. 88, 45 Pac. 71, holding rights of inheritance acquired by adopted children only by substantial compliance with statutes relating to adoption, where such statutes exist; *Sarazin v. Union R. Co.* 153 Mo. 486, 55 S. W. 92, holding that foster parent cannot recover for death of child, where deed of adoption is defective for want of acknowledgment.

Oral contract to convey property on death, or make will.

Cited in *Svanburg v. Fosseen*, 75 Minn. 359, 43 L. R. A. 431, footnote p. 427, 74 Am. St. Rep. 490, 78 N. W. 4, holding oral agreement to leave entire property at death to members of promisor's family rendered valid by their services and by selling land at sacrifice for promisor's benefit; *Weeks v. Lund*, 69 N. H. 83, 45 Atl. 249, holding performance by personal services insufficient to take oral contract to convey land out of statute of frauds; *Quinn v. Quinn*, 5 S. D. 336, 49 Am. St. Rep. 875, 58 N. W. 808, holding foster parent without power to deprive adopted child of property agreed to be given as consideration of adoption; *Kofka v. Rosicky*, 41 Neb. 347, 25 L. R. A. 213, 43 Am. St. Rep. 685, 59 N. W. 788, holding parol agreement by foster parents to leave adopted child all their property, enforceable; *Owens v. McNally*, 113 Cal. 449, 33 L. R. A. 372, footnote p. 369, 45 Pac. 710, holding oral contract to give niece property at death, en-

forceable after performance of services by her; *Kofka v. Rosicky*, 41 Neb. 347, 43 Am. St. Rep. 685, 59 N. W. 788, holding executed parol contract of foster parents to adopt and rear child and leave her their property upon death, enforceable; *McCabe v. Healy*, 138 Cal. 86, 70 Pac. 1008, holding executed oral contract to make will enforceable.

Cited in footnotes to *Bryson v. McShane*, 49 L. R. A. 527, which holds specifically enforceable, executed oral contract to give entire property for support during life and burial after death; *Clancy v. Flusky*, 52 L. R. A. 277, which authorizes specific performance of executed oral contract to convey land to son for taking care of father for life, though father left before death.

Disapproved in *Martin v. Martin*, 108 Wis. 289, 81 Am. St. Rep. 895, 84 N. W. 439, holding oral contract to convey property to adopted child void under statute of frauds.

23 L. R. A. 200, *WILLIAMSON v. LOUISVILLE INDUSTRIAL SCHOOL OF REFORM*, 95 Ky. 251, 44 Am. St. Rep. 243, 24 S. W. 1065.

Exemptions and liabilities of state and charitable institutions.

Cited in *Herr v. Central Kentucky Lunatic Asylum*, 97 Ky. 463, 28 L. R. A. 395, footnote p. 394, 53 Am. St. Rep. 414, 30 S. W. 971, authorizing injunction against nuisance maintained by charitable organization; *Deaconess Home & Hospital v. Bontjes*, 104 Ill. App. 492, sustaining injunction against continuance of charitable hospital next door to private residence on ground of nuisance, and referring particularly to annotation in 23 L. R. A. 200; *State v. Laramie County*, 8 Wyo. 134, 55 Pac. 451, holding state penitentiary not charitable institution within constitutional provision relating to exemption from taxation; *Nicholson v. Detroit*, 129 Mich. 256, 56 L. R. A. 605, 88 N. W. 695, holding city not liable for death of employee from smallpox contracted in tearing down smallpox hospital; *Hearns v. Waterbury Hospital*, 66 Conn. 121, 31 L. R. A. 231, footnote p. 224, 33 Atl. 595, denying liability of charitable hospital for wrongful neglect of servants; *Powers v. Massachusetts Homeopathic Hospital*, 47 C. C. A. 128, 109 Fed. 300, holding charitable hospital not liable to pay patient for negligence of nurse; *Williams v. Indianapolis*, 26 Ind. App. 630, 60 N. E. 367, holding action not maintainable against city by patient of city hospital for damages for malpractice of hospital physician; *White v. Alabama Insane Hospital*, 138 Ala. 483, 35 So. 454, holding state insane hospital public charity not suable in tort under statute providing in general terms that it may be sued.

Cited in footnotes to *Union P. R. Co. v. Artist*, 23 L. R. A. 581, which holds railroad company not liable for malpractice of physician at hospital maintained for employees; *Eighmy v. Union P. R. Co.* 27 L. R. A. 296, which holds railroad company not liable for negligence of physicians in hospitals voluntarily maintained for injured employees; *Pittsburgh, C. C. & St. L. R. Co. v. Sullivan*, 27 L. R. A. 840, which holds corporation gratuitously furnishing medical services to employees liable only for care in selecting physician; *Hannon v. Siegel-Cooper Co.* 52 L. R. A. 429, which holds department store estopped to deny responsibility for malpractice of dentist; *Downs v. Harper Hospital*, 25 L. R. A. 602, which denies liability of insane hospital for injury to inmate by negligence or tort of employees.

Distinguished in *Gross v. Kentucky Bd. of Managers*, 105 Ky. 846, 43 L. R. A. 704, 49 S. W. 458, holding Kentucky Board of Managers of World's Columbian

Exposition liable for breach of contract; *Texas & P. Coal Co. v. Connaughten*, 20 Tex. Civ. App. 645, 50 S. W. 173, and *Haggerty v. St. Louis, K. & N. W. R. Co.* 100 Mo. App. 443, 74 S. W. 456, holding master liable to servant for negligence of physician paid from compulsory fund raised by deduction from servants' wages.

23 L. R. A. 203, *ANDERSON v. CHICAGO, ST. P. M. & O. R. CO.* 87 Wis. 195, 58 N. W. 79.

Evidence of precautions to prevent repetition of accident.

Cited in *Georgia Southern & F. R. Co. v. Cartledge*, 116 Ga. 167, 59 L. R. A. 120, footnote p. 118, 42 S. E. 405, and *Green v. Ashland Water Co.* 101 Wis. 269, 43 L. R. A. 121, 70 Am. St. Rep. 911, 77 N. W. 722, holding evidence of precautions to prevent repetition of injuries inadmissible; *Kreider v. Wisconsin River Paper & Pulp Co.* 110 Wis. 650, 86 N. W. 662, holding evidence as to remedying of defects in machinery after accident incompetent on question of negligence.

Contributory negligence.

Cited in *Vant v. Chicago & N. W. R. Co.* 101 Wis. 367, 77 N. W. 713, holding it contributory negligence to cross railroad by much-frequented private way without looking.

Cited in footnote to *Price v. Philadelphia, W. & B. R. Co.* 36 L. R. A. 213, which holds negligence of trespasser in sitting down on railroad track not excused by drunkenness.

Cited in note (40 L. R. A. 133) on intoxication as affecting negligence.

Implied licensees and trespassers on railroads.

Cited in *Schug v. Chicago, M. & St. P. R. Co.* 102 Wis. 521, 78 N. W. 1090, holding unlawful use of tracks by pedestrians not proof of license by company; *Felton v. Aubrey*, 20 C. C. A. 446, 43 U. S. App. 278, 74 Fed. 361, holding higher degree of evidence requisite to establish license to walk on trestle or railroad bridge than on less dangerous place; *Sheehan v. St. Paul & D. R. Co.* 22 C. C. A. 125, 46 U. S. App. 498, 76 Fed. 204, holding locomotive engineer not bound to be on lookout for trespassers.

Cited in footnotes to *Ward v. Southern P. Co.* 23 L. R. A. 715, which holds knowledge of frequent trespassing on railroad track without taking steps to prevent same not license to use track; *Pennsylvania R. Co. v. Hammill*, 24 L. R. A. 531, which holds duty owed to one using footway alongside railroad bridge in accordance with recognized custom; *Neal v. Carolina C. R. Co.* 49 L. R. A. 684, which denies liability for death of person on track by train running at excessive speed without ringing bell; *Atchison, T. & S. F. R. Co. v. Potter*, 56 L. R. A. 575, as to what constitutes license to cross railroad track at place other than public crossing.

Distinguished in *Mason v. Chicago, St. P. M. & O. R. Co.* 89 Wis. 156, 61 N. W. 300, holding act making it unlawful to walk on railroad track inapplicable to licensed path about railroad grounds.

Last clear chance.

Cited in note (55 L. R. A. 463) on doctrine of last clear chance.

23 L. R. A. 208, *ELLIOTT v. NEWPORT STREET R. CO.* 18 R. I. 707, 28 Atl. 338, 31 Atl. 694.

Negligence causing injury to passenger.

Cited in *Anderson v. City & Suburban R. Co.* 42 Or. 509, 71 Pac. 659, holding it usually question for jury whether it is negligence in carrier to permit permanent obstructions to remain so close to tracks as to endanger safety of passengers.

Cited in footnote to *Budd v. United Carriage Co.* 27 L. R. A. 279, which holds burden of proving freedom from negligence on carrier on proof of injury to passenger from running and kicking of team on public carriage.

Contributory negligence.

Cited in *Watson v. Portland & C. E. R. Co.* 91 Me. 592, 44 L. R. A. 159, footnote p. 157, holding riding on front platform of electric car not negligence *per se*; *Citizens Street R. Co. v. Hoffbauer*, 23 Ind. App. 621, 56 N. E. 54, holding question of passenger's negligence in going upon running board at night to get transfer, while car was on wrong track, for jury; *Cummings v. Worcester, L. & S. Street R. Co.* 166 Mass. 223, 44 N. E. 126, holding that passenger on front platform of closed car, deliberately leaning out beyond car, cannot recover for injuries received thereby; *Nicholas v. Peck*, 21 R. I. 406, 43 Atl. 1038, holding it contributory negligence, as matter of law, knowingly to walk over unsafe portion of sidewalk; *San Antonio Traction Co. v. Bryant*, 30 Tex. Civ. App. 440, 70 S. W. 1015, holding passenger using running board of crowded open car, instead of aisle, to get to seat, not guilty of contributory negligence as matter of law.

Cited in footnotes to *Fisher v. West Virginia & P. R. Co.* 33 L. R. A. 69, which holds riding on car platform and refusing to go inside at request, negligence; *North Chicago Street R. Co. v. Baur*, 45 L. R. A. 108, which holds standing on street car platform with back against dash-board not necessarily negligent; *Sweetland v. Lynn & B. R. Co.* 51 L. R. A. 783, which sustains rule forbidding passenger's riding on front platform of electric car; *Third Ave. R. Co. v. Barton*, 52 L. R. A. 471, which denies right of passenger on running board of street car to recover for injuries by contact with pillar near track, while passing around conductor, who was also on running board.

Amount of damages.

Cited in *Blackwell v. O'Gorman Co.* 22 R. I. 642, 49 Atl. 28, holding \$10,000 verdict for severe and permanent injuries to woman not excessive.

23 L. R. A. 210, *SINGER MFG. CO. v. FLEMING*, 39 Neb. 679, 42 Am. St. Rep. 613, 58 N. W. 226.

Followed without special discussion in *Bishop v. Middleton*, 43 Neb. 12, 26 L. R. A. 447, footnote p. 445, 61 N. W. 129.

Title of act.

Cited in *State ex rel. Green v. Power*, 63 Neb. 499, 88 N. W. 769, holding title of act for "better protection of earnings of laborers, etc.," comprehensive enough to permit provisions for punishment of violations thereof.

Laws partly unconstitutional.

Cited in *State ex rel. Wheeler v. Stuht*, 52 Neb. 217, 71 N. W. 941, refusing to oust councilmen elected under act providing for government of metropolitan cities, on ground that detached portions were unconstitutional.

Rights of nonresident creditors.

Cited in *Baltimore & O. S. W. R. Co. v. McDonald*, 112 Ill. App. 402, holding foreign garnishment judgment obtained without personal service or appearance of debtor not bar to recovery of wages, exempt by law of state where earned.

Cited in footnotes to *Ward v. Boyce*, 36 L. R. A. 549, which holds trustee process in other state to reach note held by nonresident not personally served, ineffectual; *Hawley v. Hurd*, 52 L. R. A. 195, which sustains discrimination between banks in and out of state as to attachment of negotiable paper; *Tootle v. Coleman*, 57 L. R. A. 120, which holds right to garnish debtor not limited to situs of chose in action.

Cited in notes (36 L. R. A. 583) on debtor's right of action against creditor for debt in another jurisdiction in evasion of exemption laws of their domicile; (47 L. R. A. 134) on effect of judgment against garnishee to merge or satisfy liability of principal debtor.

23 L. R. A. 215, *WOLCOTT v. HOLCOMB*, 97 Mich. 361, 56 N. W. 837.

Charitable institutions.

Cited in *State ex rel. Olsen v. Board of Control*, 85 Minn. 193, 88 N. W. 533 (dissenting opinion), majority holding state normal schools charitable institutions within meaning of title to act.

Residence as affecting electoral and property rights.

Cited in *Lawrence v. Leidigh*, 58 Kan. 599, 62 Am. St. Rep. 631, 50 Pac. 600, and *Re Registration of Voters*, 21 Pa. Co. Ct. 478, 8 Pa. Dist. R. 17, holding that inmates of soldiers' home vote only in districts where they last resided; *People ex rel. Saunders v. Hanna*, 98 Mich. 516, 57 N. W. 738, and *Powell v. Spackman*, 7 Idaho, 705, 54 L. R. A. 383, 65 Pac. 503, holding inmates of soldiers' home from other townships not legal voters in township of home; *Powell v. Spackman*, 7 Idaho, 705, 54 L. R. A. 383, footnote p. 378, 65 Pac. 503, holding residence as voter not acquired by inmate of soldiers' home.

Cited in footnotes to *People v. Cady*, 25 L. R. A. 399, which denies power to gain residence as voter while irregularly committed to prison; *Langhammer v. Munter*, 27 L. R. A. 330, which denies necessity of voter having any particular "home;" *Re Barry*, 52 L. R. A. 831, which denies power of student for priesthood at Roman Catholic seminary to acquire residence as voter; *Montgomery v. Lebanon*, 54 L. R. A. 914, which holds farmer retaining country house as home not taxable in town where he goes to give children school privileges.

Cited in note (25 L. R. A. 480) on how far right to vote is absolute.

Distinguished in *Cory v. Spencer*, 67 Kan. 657, 63 L. R. A. 279, 73 Pac. 920, holding that inmate of soldiers' home may acquire residence there for voting purposes.

Ministerial duties of inspectors of election.

Cited in *State ex rel. McMillan v. Sadler*, 25 Nev. 175, 83 Am. St. Rep. 573, 58 Pac. 284, holding inspectors of election without power to refuse to receive vote of elector whose name is on check list, except on failure to prove identity.

23 L. R. A. 221, *PEOPLE v. SHELDON*, 139 N. Y. 251, 54 N. Y. S. R. 513, 36 Am. St. Rep. 690, 34 N. E. 785.

Combinations, agreements, and laws relating to trade.

Cited in *Judd v. Harrington*, 139 N. Y. 110, 34 N. E. 790, holding void, agree-

ment for purpose of controlling market and suppressing competition in sale of meat; *Cummings v. Union Blue Stone Co.* 164 N. Y. 405, 52 L. R. A. 263, 79 Am. St. Rep. 655, 58 N. E. 525, Affirming 15 App. Div. 604, 44 N. Y. Supp. 787, holding agreement to sell all manufactured products of wholesale blue stone dealers and apportion profits void; *People v. Milk Exchange*, 145 N. Y. 272, 27 L. R. A. 440, 45 Am. St. Rep. 609, 39 N. E. 1062, Affirming 77 Hun, 437, 29 N. Y. Supp. 259, holding incorporated milk exchange, a combination of dealers and creamery men to control price of milk, illegal; *People ex rel. Tyroler v. City Prison*, 157 N. Y. 133, 43 L. R. A. 271, 68 Am. St. Rep. 763, 51 N. E. 1006, holding act prohibiting sale of tickets by scalpers unconstitutional; *Re Davies*, 168 N. Y. 101, 56 L. R. A. 860, 61 N. E. 118, holding that act of 1899 relating to suppression of monopolies authorized proceedings against illegal combinations formed before its passage; *Drake v. Siebold*, 81 Hun, 181, 30 N. Y. Supp. 697, holding agreement by association of retailers to fix uniform price of coal, followed by overt acts, criminal conspiracy; *Cohen v. Berlin & J. Envelope Co.* 38 App. Div. 500, 56 N. Y. Supp. 588, holding agreement to insure protection against ruinous competition valid; *John D. Park & Sons Co. v. National Wholesale Druggists' Asso.* 175 N. Y. 34, 62 L. R. A. 647, 96 Am. St. Rep. 578, 67 N. E. 136 (dissenting opinion), Affirming 54 App. Div. 231 note, Which Affirmed 30 Misc. 679, 64 N. Y. Supp. 276, majority upholding agreement between manufacturers of proprietary drugs and wholesalers, to fix prices and refrain from selling to dealers who would not comply with terms; *Export Lumber Co. v. South Brooklyn Sawmill Co.* 54 App. Div. 521, 67 N. Y. Supp. 626, upholding contract between lumber dealers to account for and divide profits of their export business; *Re Atty. Gen.* 21 Misc. 106, 47 N. Y. Supp. 20, upholding constitutionality of act to prevent monopolies in articles of general necessity; *Excelsior Quilting Co. v. Creter*, 36 Misc. 700, 74 N. Y. Supp. 361, holding valid, agreement to make no more of certain kind of machine, patents having all expired; *Booth v. Seibold*, 37 Misc. 103, 74 N. Y. Supp. 776, upholding agreement for discontinuance of fish business, limited as to territory and time; *Brown v. Jacobs' Pharmacy Co.* 115 Ga. 435, 57 L. R. A. 551, footnote p. 548, 90 Am. St. Rep. 126, 41 S. E. 553, sustaining right to injunction against combination of merchants to prevent sales to other dealers unless selling at fixed prices; *State ex rel. Crow v. Firemen's Fund Ins. Co.* 152 Mo. 47, 45 L. R. A. 377, 52 S. W. 595, upholding constitutionality of law forbidding combinations to fix insurance rates; *West Virginia Transp. Co. v. Standard Oil Co.* 50 W. Va. 620, 56 L. R. A. 809, 88 Am. St. Rep. 895, 40 S. E. 591, holding combination of several to do lawful act not actionable, although injury result; *State ex rel. Durner v. Huegin*, 110 Wis. 253, 62 L. R. A. 742, 85 N. W. 1046, upholding power of legislature to make civilly or criminally liable, participants in malicious combination to injure another; *Continental Ins. Co. v. Fire Underwriters*, 67 Fed. 318, upholding legality of combination of underwriters for regulation of premium rates, rebates, and compensation of agents; *United States v. Addyston Pipe & Steel Co.* 46 L. R. A. 134, 29 C. C. A. 157, 54 U. S. App. 723, 85 Fed. 288, holding agreement between iron pipe manufacturers, reserving territory to different members of association free from competition, illegal; *People v. McFarlin*, 43 Misc. 601, 89 N. Y. Supp. 527, holding agreement to purchase materials only from factories approved of by labor unions, illegal; *Walsh v. Association of Master Plumbers*, 97 Mo. App. 294, 71 S. W. 455

holding agreement between plumbers' association and dealers and manufacturers for purpose of fixing prices and limiting production, illegal; *Ferd Heim Brewing Co. v. Belinder*, 97 Mo. App. 70, 71 S. W. 691, holding illegal, agreement by breweries not to sell beer to anyone in debt to any other member of the combination; *State ex rel. Crow v. Armour Packing Co.* 173 Mo. 387, 61 L. R. A. 473, footnote p. 464, 96 Am. St. Rep. 515, 73 S. W. 645, holding unlawful combination to fix prices shown by acts of competing dealers.

Cited in footnotes to *United States v. E. C. Knight Co.* 24 L. R. A. 428, which holds monopoly not involved in control of business of refining and selling sugar; *Hawarden v. Youghiogheny & L. Coal Co.* 55 L. R. A. 828, which sustains retail coal dealer's right of action against wholesalers and favored retailers, combining to drive other retailers out of business; *Com. v. Grinstead*, 56 L. R. A. 709, which holds agreement not to resell goods at less than specified price not with statute for suppression of conspiracies.

Cited in notes (21 L. R. A. 798) on constitutionality of statutes restricting contracts and business; (64 L. R. A. 731) on illegal trusts under modern anti-trust laws.

23 L. R. A. 227, *MEAD v. STIRLING*, 62 Conn. 586, 27 Atl. 591.

Rights of members of voluntary associations to invoke aid of courts.

Cited in *Lawson v. Hewell*, 118 Cal. 619, 49 L. R. A. 402, 50 Pac. 763, holding that courts will not restrain voluntary society from trial of member according to its rules for breach of discipline.

Cited in footnote to *Supreme Lodge, O. G. C. v. Simering*, 41 L. R. A. 720, which sustains right to injunction against excluding representative from right to vote in supreme lodge of benefit society.

23 L. R. A. 231, *CHICAGO & I. COAL R. CO. v. HALL*, 135 Ind. 91, 34 N. E. 704.

Liabilities of consolidated and other corporations.

Cited in *Citizens' Street R. Co. v. Robbins*, 144 Ind. 678, 42 N. E. 916, holding corporation assuming liability of another to specified amount not bound beyond such amount; *New York Security & T. Co. v. Louisville, E. & St. L. Consol. R. Co.* 102 Fed. 393, holding that effect of consolidation of railroad corporation is to bind consolidated company for indebtedness of all constituent companies; *Midland R. Co. v. Galey*, 141 Ind. 486, 39 N. E. 940, holding consolidated corporation liable for damages for appropriation of land for right of way by old company; *Southern R. Co. v. Gregg*, 101 Va. 315, 43 S. E. 570, holding corporations purchasing railroad liable for unpaid award in condemnation proceedings instituted by company building road.

Cited in footnotes to *Southern R. Co. v. Bouknight*, 30 L. R. A. 823, which authorizes holding consolidated railroad company responsible for acts and neglects of constituent members; *Austin v. Tecumseh Nat. Bank*, 35 L. R. A. 444, which holds new corporation liable for obligations of predecessor only when transaction fraudulent; *Lamkin v. Baldwin & L. Mfg. Co.* 44 L. R. A. 786, which holds taxes against partnership not payable from assets of corporation subsequently formed, till corporate debts paid; *Morgan v. Randolph-Clowes Co.* 51 L. R. A. 653, which denies right of firm creditor to sue corporation assuming firm debts; *Capital Traction Co. v. Offutt*, 53 L. R. A. 390, which denies liability

of street railway company for debts of other company whose property and franchises bought; *Combes v. Milwaukee & M. R. Co.* 27 L. R. A. 369, which denies right to sue corporation divested of property and franchises by judicial sale.

Cited in note (52 L. R. A. 391) on right of corporations to consolidate.

Claim for payment in condemnation proceeding.

Cited in *Coburn v. Sands*, 150 Ind. 146, 48 N. E. 786, holding claim for payment of appropriated land superior to any subsequent lien.

Remedies of owner after taking of land.

Cited in *Pittsburgh, C. C. & St. L. R. Co. v. Harper*, 11 Ind. App. 487, 37 N. E. 41, holding owner acquiescing in appropriation of land by railroad company not bound to proceed under special statute for assessment of damages; *Chicago, I. & E. R. Co. v. Patterson*, 26 Ind. App. 298, 59 N. E. 688, holding appearance in statutory proceeding and exception to award not waiver of right of independent action.

23 L. R. A. 239, *ROSHOLT v. MEHUS*, 3 N. D. 513, 57 N. W. 783.

Right to homestead.

Cited in *Brady v. Kreuger*, 8 S. D. 470, 59 Am. St. Rep. 771, 66 N. W. 1083, holding wife's homestead rights extinguished by divorce; *Moore v. Ward*, 107 Tenn. 734, 64 S. W. 1087, denying right of wife after divorce to assert right of homestead in independent suit; *Barkman v. Barkman*, 209 Ill. 275, 70 N. E. 652, holding that homestead estate remains in husband where divorce decree is silent as to its disposition.

Cited in footnotes to *Stern v. Lee*, 26 L. R. A. 814, which holds exemption of homestead continues after conveyance in fee during minority of youngest child; *Duffy v. Harris*, 40 L. R. A. 750, which holds homestead rights of widow not forfeited by her previous abandonment of husband and living with other man.

Binding effect of decree of divorce on property rights.

Cited in *Baird v. Connell*, 121 Iowa. 291, 96 N. W. 863, holding adjudication of property rights between husband and wife in divorce action, bar to subsequent action by wife to recover part of property.

23 L. R. A. 244, *SPRINGER v. BYRAM*, 137 Ind. 15, 45 Am. St. Rep. 159, 36 N. E. 361.

Right to affirm correct judgment on independent grounds.

Cited in *Abbitt v. Lake Erie & W. R. W. Co.* 150 Ind. 512, 50 N. E. 729, holding that decision of general term may be followed on appeal, if correct, although reasons given below be insufficient.

Privileged communications.

Cited in *Warsaw v. Fisher*, 24 Ind. App. 48, 55 N. E. 42, holding plaintiff not deprived of benefit of rule against admission of confidential communications to physician, by suing corporation for damages; *Masons Union L. Ins. Asso. v. Brockman*, 26 Ind. App. 188, 59 N. E. 401, holding conversations between patient and physician in presence of third persons not privileged.

Admissibility of statements made in presence of another.

Cited in *Leach v. Dickerson*, 14 Ind. App. 376, 42 N. E. 1031, holding statement made in presence of another not admissible unless made in his hearing

Injury to elevator passengers.

Cited in note (25 L. R. A. 33) on liability for injury to elevator passengers.

23 L. R. A. 250, SCHMITZ v. ST. LOUIS, I. M. & S. R. CO. 119 Mo. 256, 24 S. W. 472.

Second appeal in 55 Mo. App. 577.

Degree of care required to prevent accidents on railroad track.

Cited in Covell v. Wabash R. Co. 82 Mo. App. 186, holding witness properly allowed to testify that no whistle was blown near crossing, although not required by ordinance.

Cited in note (25 L. R. A. 790) on care required of railroad companies to prevent injuring small children on track.

Distinguished in Melton v. St. Louis & S. F. R. Co. 99 Mo. App. 287, 73 S. W. 231, holding carrier not bound to give warning of approaching train to one driving in highway parallel to railway.

Admissibility of depositions.

Cited in Benjamin v. Metropolitan Street R. Co. 133 Mo. 287, 34 S. W. 590, holding fact that nonresident witness is within jurisdiction of court not ground for exclusion of deposition; Barber Asphalt Paving Co. v. Ullman, 137 Mo. 571, 38 S. W. 458, holding deposition of witness present in courtroom properly excluded.

Contributory negligence of children.

Cited in Anderson v. Union Terminal R. Co. 161 Mo. 424, 61 S. W. 874, holding child of eleven not negligent in crossing tracks, if acting as might be reasonably expected of one of his age and capacity; Krenzer v. Pittsburg, C. C. & St. L. R. Co. 151 Ind. 600, 68 Am. St. Rep. 252, 52 N. E. 220 (dissenting opinion), majority holding boy aged seven and a half years, going to sleep on railroad tracks, guilty of contributory negligence as matter of law; Rogers v. Meyerson Printing Co. 103 Mo. App. 688, 78 S. W. 79, holding lesser degree of care required of child than of adult.

Erroneous instruction invited by appellant.

Cited in Horgan v. Brady, 155 Mo. 670, 56 S. W. 294; Seckinger v. Philibert & J. Mfg. Co. 129 Mo. 602, 31 S. W. 957, holding that appellant cannot complain of erroneous instruction invited by himself.

Harmless instructions.

Cited in Green v. Cole, 127 Mo. 615, 30 S. W. 135, dissenting opinion by Barclay, J., who holds erroneous instruction not ground for reversal, where more favorable to appellant than he was entitled to; Blackwell v. Hill, 76 Mo. App. 52, holding that no ground for reversal exists where instructions, taken together, state correct principle of law.

Mental anguish as element of damages.

Cited in St. Louis Trust Co. v. Murmann, 90 Mo. App. 561, holding person entitled to recover for mental anguish caused by physical injury.

Prospective damages.

Cited in Schmitz v. St. Louis, I. M. & S. R. Co. 55 Mo. App. 577, sustaining verdict for loss of services of minor on proof of loss of earning capacity by injury; Blackwell v. Hill, 76 Mo. App. 55, holding direct evidence not necessary to

establish amount parent entitled to for loss of services of child; *Dunn v. North-east Electric R. Co.* 81 Mo. App. 44, holding value of boy's earning capacity after reaching maturity, question for jury, without direct proof; *Pryor v. Metropolitan Street R. Co.* 85 Mo. App. 373, holding loss of prospective profits of contractor not element of damages resulting from injury.

Practice as to objection to excessiveness of verdict on finding.

Cited in *Minton v. Steele*, 125 Mo. 196, 28 S. W. 746, holding objection to excessive verdict in ejectment must be taken in trial court to be available on appeal; *Lilly v. Menke*, 126 Mo. 231, 28 S. W. 994, dissenting opinion by Barclay, J., who holds objection to excessive award in petition not available unless assigned on ground of motion for new trial; *Corrigan v. Kansas City*, 93 Mo. App. 176, holding that excessive finding as to damages must be called to trial court's attention to be available on appeal.

Crossing between cars extending over public way.

Cited in *Littlejohn v. Richmond & D. R. Co.* 49 S. C. 16, 26 S. E. 967, holding person injured while attempting to climb between cars at crossing, to be "person injured in his person or property by collision with engines or cars" at crossing.

23 L. R. A. 258, POLLEY v. JOHNSON, 52 Kan. 478, 35 Pac. 8.

Rights in growing crops.

Cited in *Voils v. Battin*, 6 Kan. App. 743, 50 Pac. 940, and *Mabry v. Harp*, 53 Kan. 400, 36 Pac. 743, holding growing crops to be personal property; *Strawhacker v. Ives*, 114 Iowa, 663, 87 N. W. 669, holding that leasehold interest of judgment debtor may be levied on after assignment of growing crops; *Sims v. Jones*, 54 Neb. 772, 69 Am. St. Rep. 749, 75 N. W. 150, holding that interest of landlord and tenant in growing crops, where portion is reserved for rent, may be levied on; *Phillips v. Keysaw*, 7 Okla. 681, 56 Pac. 695, holding one holding land by adverse possession entitled to growing crops harvested before ouster; *Johns v. Kamarad*, 2 Herdman (Neb.) 158, 96 N. W. 118, holding growing crops subject to levy irrespective of stage of growth.

Cited in footnotes to *Bagley v. Columbus Southern R. Co.* 34 L. R. A. 286, which holds growing crops part of land for purposes of jurisdiction; *Riddle v. Dow*, 32 L. R. A. 811, which holds rights of mortgagee of lessor's interest in crops raised by tenant superior to subsequent garnishment proceedings.

Cited in note (23 L. R. A. 477) on sale or mortgage of future crops.

Distinguished in *Tipton v. Martzell*, 21 Wash. 274, 75 Am. St. Rep. 838, 57 Pac. 806, holding growing crop planted by tenant under contract with landlord to harvest and deliver one third, not subject to levy under execution.

23 L. R. A. 264, LEEP v. ST. LOUIS, I. M. & S. R. CO. 58 Ark. 407, 41 Am. St. Rep. 109, 25 S. W. 75.

Statutes affecting property rights and right to contract.

Cited in *Ritchie v. People*, 155 Ill. 105, 29 L. R. A. 82, 46 Am. St. Rep. 315, 40 N. E. 454, holding statute forbidding women to work more than eight hours a day unconstitutional; *Re Morgan*, 26 Colo. 447, 47 L. R. A. 65, 77 Am. St. Rep. 269, 58 Pac. 1071, and *Low v. Rees Printing Co.* 41 Neb. 146, 24 L. R. A. 710, 43 Am. St. Rep. 670, 59 N. W. 362, declaring eight-hour law unconstitu-

tional; *State ex rel. Zillmer v. Kreutzberg*, 114 Wis. 542, 58 L. R. A. 754, 91 Am. St. Rep. 934, 90 N. W. 1098, holding legislature without power to forbid discharge of employee because member of labor organization; *Dugger v. Mechanics' & T. Ins. Co.* 95 Tenn. 252, 28 L. R. A. 798, 32 S. W. 5, holding act making void, stipulations limiting insurance liability to three fourths of loss not interference with freedom to contract; *McFadden v. Blocker* (Ind. Terr.) 58 L. R. A. 896, 54 S. W. 873, upholding chattel mortgage registry act applicable to residents of territory only; *Carson v. St. Francis Levee District*, 59 Ark. 528, 27 S. W. 590, upholding constitutionality of delegation to levee board of power to tax property specially benefited by levee; *Dennis v. Moses*, 18 Wash. 592, 40 L. R. A. 314, 32 Pac. 333, holding act requiring mortgaged property to be appraised, and forbidding sale at less than 80 per cent of appraised value, constitutional; *Callahan v. St. Louis, Merchants' Bridge Terminal R. Co.* 170 Mo. 492, 60 L. R. A. 254, 94 Am. St. Rep. 746, 71 S. W. 208, upholding fellow-servant act imposing liability on railroads for injury to servants by negligence of fellow servants in operating railroad; *Kansas City, P. & G. R. Co. v. Moon*, 66 Ark. 413, 50 S. W. 996, reaffirming constitutionality of act requiring railroad corporations to pay employee wages due upon discharge; *Woodson v. State*, 69 Ark. 528, 65 S. W. 465, upholding constitutionality of act requiring corporations to weigh coal before screening; *Com. v. Brown*, 8 Pa. Super. Ct. 355, 43 W. N. C. 75, 8 Atl. 339, holding act requiring weighing of coal before screening unconstitutional; *Bienville Water Supply Co. v. Mobile*, 186 U. S. 221, 46 L. ed. 1136, 22 Sup. Ct. Rep. 820, upholding right of legislature to amend or revoke charter not granting exclusive water privileges.

Cited in footnote to *People ex rel. Nechamcus v. City Prison*, 27 L. R. A. 718, which upholds act requiring examination of and certificate from employing or master plumbers.

Cited in notes (28 L. R. A. 344) on validity and effect of statutes regulating time of payment of wages; (60 L. R. A. 323) on constitutional equality in United States in relation to corporate taxation.

Distinguished in *Opinion of Justices*, 163 Mass. 591, 28 L. R. A. 345, 40 N. E. 713, holding that legislature may require employers to pay employees weekly; *Tullis v. Lake Erie & W. R. Co.* 175 U. S. 351, 44 L. ed. 194, 20 Sup. Ct. Rep. 136, upholding constitutionality of Indiana employers' liability act of 1893; *State v. Haun*, 61 Kan. 176, 47 L. R. A. 379, 59 Pac. 340 (dissenting opinion), Reversing 7 Kan. App. 520, 54 Pac. 130, majority holding act requiring payment of employees in money, draft, or check, unconstitutional; *St. Louis, I. M. & S. R. Co. v. Paul*, 173 U. S. 406, Affirming 64 Ark. 85, 37 L. R. A. 505, 62 Am. St. Rep. 154, 40 S. W. 705, holding equal protection of law not denied by act imposing penalty on railroad corporation for failure to pay employees on day of discharge.

Laws partly good and partly bad. •

Cited in *Verdin v. St. Louis*, 131 Mo. 138, 33 S. W. 480, holding ordinance providing for paving and maintenance thereof, though void as to maintenance should be upheld as to paving.

Disapproved in *Ballard v. Mississippi Cotton Oil Co.* 81 Miss. 572, 62 L. R. A. 417, 34 So. 533, holding court only authorized to sever parts of statute, where constitutional and unconstitutional provisions, not interdependent, exist on its face.

Reasonable doubt as to validity of statute.

Cited in *State v. Foster*, 22 R. I. 172, 50 L. R. A. 343, 46 Atl. 833, holding that reasonable doubt as to validity of statute must be resolved in favor of its validity.

Actions for statutory damages.

Cited in *St. Louis, I. M. & S. R. Co. v. Pickett*, 70 Ark. 228, 67 S. W. 870, holding separate action maintainable by railway employee to recover statutory damages for failure of company to pay wages on day of discharge.

23 L. R. A. 278, *FLORER v. SHERIDAN*, 137 Ind. 28, 36 N. E. 365.

Collection of omitted personalty taxes.

Cited in *Reynolds v. Bowen*, 138 Ind. 451, 36 N. E. 756, refusing cancellation of taxes against decedent's estate under act permitting assessments of omitted property.

Deduction of debts from credits.

Cited in *First Nat. Bank v. Turner*, 154 Ind. 465, 57 N. E. 110, holding bona fide indebtedness of national bank stockholder not deductible from assessed value of stock for taxation; *State ex rel. Lewis v. Smith*, 158 Ind. 553, 63 L. R. A. 121, 63 N. E. 25, holding statute authorizing deduction of mortgage indebtedness not exceeding \$700, from assessed valuation of real estate for purpose of taxation, constitutional.

Cited in note (60 L. R. A. 321) on constitutional equality in United States in relation to corporate taxation.

Distinguished in *Deniston v. Terry*, 141 Ind. 684, 41 N. E. 143, holding paid-up stock in building association taxable.

23 L. R. A. 283, *BITTLE v. CAMDEN & A. R. CO.* 55 N. J. L. 615, 28 Atl. 305.
Liability for frightening horses by operation of railroad.

Cited in *Louisville & N. R. Co. v. Smith*, 107 Ky. 183, 53 S. W. 269, holding carrier's continuing to blow whistle after noticing horses would thereby be frightened not justified when statute permitted ringing of bell; *Weil v. St. Louis S. W. R. Co.* 64 Ark. 538, 43 S. W. 967, holding railroad company liable for frightening horse by needless and negligent blowing of whistle; *Race v. Easton & A. R. Co.* 62 N. J. L. 538, 41 Atl. 710, holding that in case of indirect injury resulting from blowing of whistle, facts showing negligence should be pleaded.

Cited in footnotes to *Mitchell v. Nashville, C. & St. L. R. Co.* 40 L. R. A. 426, which holds blowing locomotive whistle under much used bridge, negligence; *Omaha & R. Valley R. Co. v. Clarke*, 23 L. R. A. 504, which holds railroad company not liable for frightening horse by escape of steam from engine; *McCann v. Consolidated Traction Co.* 38 L. R. A. 236, which holds running tank car on street railway track, with black coats waving from it, frightening horse, negligence; *Kentucky & I. Bridge Co. v. Montgomery*, 57 L. R. A. 781, which requires railroad company operating railroad bridge as toll bridge, to keep lookout to prevent frightening teams by trains.

When question of negligence is for jury.

Cited in *State Consolidated Traction Co., Prosecutor, v. Reeves*, 58 N. J. L.

577, 34 Atl. 128, holding proper, trial court's refusal to take disputable question of negligence from jury; *Day v. Donohue*, 62 N. J. L. 382, 41 Atl. 934, holding nonsuit improper where conclusion of fact one about which reasonable men might honestly differ.

Proximate cause of injury.

Cited in footnote to *Snyder v. Philadelphia Co.* 63 L. R. A. 896, which holds negligent blowing off of gas well proximate cause of injury to teamster whose horses were frightened, although one of his lines broke because of insufficiency.

23 L. R. A. 287, *ELLIS'S APPEAL*, 55 Minn. 401, 43 Am. St. Rep. 514, 56 N. W. 1056.

Foreign divorces.

Cited in *Andrews v. Andrews*, 176 Mass. 95, 57 N. E. 333, holding, under statute, that Dakota decree of divorce may be held void on collateral attack; *Starbuck v. Starbuck*, 173 N. Y. 508, 93 Am. St. Rep. 631, 66 N. E. 193, holding that plaintiff in action for dower cannot impeach decree of divorce, obtained by her in another state, husband not appearing; *Re Swales*, 60 App. Div. 603, 70 N. Y. Supp. 220, holding decree of divorce obtained by woman in court of another state not impeachable by her to obtain administration on former husband's estate.

Cited in footnotes to *Clutton v. Clutton*, 31 L. R. A. 160, which authorizes divorce on cross-bill to nonresident defendant in suit by resident; *Lynde v. Lynde*, 48 L. R. A. 679, which holds binding judgment authorized against defendant voluntarily appearing without reservation in divorce proceeding; *Arrington v. Arrington*, 52 L. R. A. 201, which holds foreign decree for alimony after defendant's appearance entitled to full faith and credit; *Kempson v. Kempson*, 58 L. R. A. 484, which sustains jurisdiction in state where parties married and wife resides, of suit to enjoin fraudulent divorce suit by husband in other state.

Cited in notes (57 L. R. A. 593) on right to contest validity of divorce decree after death of one or both of parties; (59 L. R. A. 144, 183, 185) on conflict of laws on subject of divorce.

Domicil of wife for purpose of divorce.

Cited in footnote to *Atherton v. Atherton*, 40 L. R. A. 291, which holds matrimonial domicil of wife leaving husband for cruelty may be changed by removal to other state.

23 L. R. A. 294, *SHAW v. DAVIS*, 78 Md. 308, 28 Atl. 619.

Power of courts over corporations or associations.

Cited in *DuPuy v. Transportation & Terminal Co.* 82 Md. 426, 33 Atl. 889, upholding power of courts to protect stockholder from fraudulent, illegal, and *ultra vires* acts of corporation officers; *Dailey v. Wight*, 94 Md. 276, 51 Atl. 38, refusing to remove trustee of stock, because he was voted salary as president of corporation; *Ryan v. Williams*, 100 Fed. 174, refusing preliminary injunction to restrain measures for consolidation in anticipation of statute authorizing it; *Supreme Lodge, O. G. C. v. Simering*, 88 Md. 288, 41 L. R. A. 722, 71 Am. St. Rep. 409, 40 Atl. 723, upholding power of court to enjoin supreme lodge of fraternal association from excluding qualified representatives from

right to vote; *United States Steel Corp. v. Hodge*, 64 N. J. Eq. 816, 60 L. R. A. 748, footnote p. 742, 54 N. E. 1, holding all stockholders bound by all proceedings sanctioned by vote of majority stockholders, taken and ascertained according to law.

Distinguished in *Urner v. Sollenberger*, 89 Md. 333, 43 Atl. 810, holding defense of fraudulently created debts not available on suit against stockholder for unpaid subscription.

Personal interest of stockholders in matters voted on.

Cited in *Worth Mfg. Co. v. Bingham*, 54 C. C. A. 125, 116 Fed. 791, holding stockholder not forbidden to vote upon propriety of sale of property merely because interested in it.

23 L. R. A. 301, *ATLANTA v. WARNOCK*, 91 Ga. 210, 44 Am. St. Rep. 17, 18 S. E. 135.

Nuisances.

Cited in *Holmes v. Atlanta*, 113 Ga. 962, 39 S. E. 458, holding discharge of polluted surface waters by city drainage system upon premises of private citizen, actionable; *Waycross v. Houk*, 113 Ga. 965, 39 S. E. 577, holding nuisance by discharge of sewage from sewerage system of city, actionable; *Carmichael v. Texarkana*, 94 Fed. 572, holding municipal corporation liable for discharge of sewage on land of individual; *Pierce v. Gibson County*, 107 Tenn. 233, 55 L. R. A. 481, 89 Am. St. Rep. 946, 64 S. W. 33, holding that county may be enjoined from construction and operation of sewer system discharging upon private property; *Fuchs v. St. Louis*, 167 Mo. 637, 57 L. R. A. 141, 67 S. W. 610, holding city not bound to open vents leading to sewers to permit escape of gases.

Cited in footnotes to *Lowe v. Prospect Hill Cemetery Asso.* 46 L. R. A. 237, which authorizes injunction against interment in cemetery when likely to pollute and poison water in wells in vicinity; *Hughes v. Auburn*, 46 L. R. A. 636, which denies city's liability for disease due to neglect of proper sanitary precautions as to sewer system.

Injunction to prevent diversion of stream.

Cited in *Goodrich v. Georgia R. & Bkg. Co.* 115 Ga. 345, 41 S. E. 659, holding that injunction may issue to prevent wrongful diversion of stream by upper proprietor.

23 L. R. A. 305, *BRADLEY v. THOMPSON SMITH'S SONS*, 98 Mich. 449, 39 Am. St. Rep. 565, 57 N. W. 576.

Right of set-off.

Cited in *Koegel v. Michigan Trust Co.* 117 Mich. 544, 76 N. W. 74, holding assignment of rent to become due in future, not subject to have debt due from assignor before assignment set off against it; *Farmers' Nat. Bank v. Woodell*, 38 Or. 313, 61 Pac. 837, holding instalment due on contract for raising sugar beets subject to set-off of damages at maturity of instalment for failure to care for crop.

Cited in footnote to *Bacon v. Reich*, 49 L. R. A. 311, which holds original cause of action for breach of contract not merged in judgment preventing set-off.

Cited in note (23 L. R. A. 313) on right to set off insolvent's obligation on claim in hands of his receiver, assignee, or trustee for creditors.

Distinguished in *Johnston v. Humphrey*, 91 Wis. 81, 51 Am. St. Rep. 873, 64 N. W. 317, allowing debtor of insolvent bank set-off of certificates purchased after bank had closed doors.

23 L. R. A. 313, *MERRILL v. CAPE ANN GRANITE CO.* 161 Mass. 212, 36 N. E. 797.

Right of set-off or counterclaim.

Cited in *Colton v. Drovers' Perpetual Bldg. & L. Asso.* 90 Md. 91, 46 L. R. A. 391, 78 Am. St. Rep. 431, 45 Atl. 23, holding depositor entitled to set off amount of deposit against indebtedness on note after appointment of receiver of bank.

Cited in footnotes to *Davis v. Industrial Mfg. Co.* 23 L. R. A. 322, which requires receiver of insolvent bank to give debtor credit for sums due from bank; *Fidelity & D. Co. v. Haines*, 23 L. R. A. 652, which denies right to interpose existing counterclaim against assignor for creditors, to subsequent claim in favor of assignee; *Niblack v. Park Nat. Bank*, 39 L. R. A. 159, which denies bank's right to appropriate fund to own claim against deposit after presentation by holder of check constituting equitable assignment of fund; *Re Hatch* 40 L. R. A. 664, which holds claim accruing in favor of assignee for creditors on contract with assignor subject to set-off against claim due from assignor before assignment; *Lauraglen Mills v. Ruff*, 49 L. R. A. 448, which denies stockholder's right to set off corporate obligation against liability as shareholder in action at law; *Meherin v. Ambrose*, 54 L. R. A. 272, which denies right of creditor bidding in debtor's property at execution sale to set off claim against amount of bid; *Fidelity Ins. Trust & S. D. Co. v. Mechanics' Sav. Bank*, 56 L. R. A. 228, which sustains stockholder's right to set off, in action to enforce liability in Federal court in other state, debt due him from corporation.

Cited in notes (25 L. R. A. 548) on exceptions to prohibition of preferences by insolvent national banks; (55 L. R. A. 77) on set-off in bankruptcy cases.

23 L. R. A. 322, *DAVIS v. INDUSTRIAL MFG. CO.* 114 N. C. 321, 19 S. E. 371.
Necessity of notice or demand.

Cited in *Arnold v. Hart*, 75 Ill. App. 172, holding right to notice or demand by depositors for deposit waived by discontinuance of bank; *Meadowcroft v. People*, 163 Ill. 83, 35 L. R. A. 186, 54 Am. St. Rep. 447, 45 N. E. 303, holding proof of demand not necessary in criminal prosecution of banker receiving deposit with knowledge of insolvency.

Rights adjustable in single action.

Cited in *Parrish v. Graham*, 129 N. C. 231, 39 S. E. 825, holding that issue whether indorsers were cosureties should be submitted in action against maker and indorser of note.

Right to set-off.

Cited in *Thompson v. Union Trust Co.* 130 Mich. 513, 97 Am. St. Rep. 494, 90 N. W. 294, upholding right of depositor to set off deposit against his unmatured notes to insolvent bank.

Actions maintainable by receivers.

Cited in *Smathers v. West Carolina Bank*, 135 N. C. 413, 47 S. E. 893, holding action maintainable by receiver to enforce double liability of stockholders of corporation.

23 L. R. A. 325, *VANN v. MARBURY*, 100 Ala. 438, 46 Am. St. Rep. 70, 14 So. 273.

Negotiable paper held as collateral.

Cited in footnote to *Birket v. Elward*, 64 L. R. A. 568, which holds indorsee of negotiable note taken as collateral security for pre-existing debt, holder for value in due course of business.

Purchase of property mortgaged to secure payment of notes.

Cited in *First Nat. Bank v. Sproull*, 105 Ala. 281, 16 So. 879, holding buyer of part of property mortgaged to secure payment of notes, without inquiry as to ownership or payments of notes and mortgage, not bona fide purchaser.

Right to set-off.

Cited in footnotes to *Adams v. Spokane Drug Co.* 23 L. R. A. 334, which holds bank receiver takes immature notes subject to maker's right to set off deposit; *Niblack v. Park Nat. Bank*, 39 L. R. A. 159, which denies bank's right to appropriate fund to own claim against deposit after presentation by holder of check constituting equitable assignment of fund.

Cited in notes (23 L. R. A. 306) on set-off against assigned claim of debtor's demand against assignor; (23 L. R. A. 320) on right to set off insolvent's obligation on claim in hands of his receiver or assignee or trustee for creditors.

23 L. R. A. 334, *ADAMS v. SPOKANE DRUG CO.* 57 Fed. 888.

Right to set-off.

Cited in *Thompson v. Union Trust Co.* 130 Mich. 513, 97 Am. St. Rep. 494, 90 N. W. 294, upholding right of depositor to set off deposit against his unmat-ured notes to insolvent bank.

23 L. R. A. 335, *BENSON v. HAYWOOD*, 86 Iowa, 107, 53 N. W. 85.

Rule as to parol evidence offered to vary written instrument.

Distinguished in *De Goey v. Van Wyk*, 97 Iowa, 496, 66 N. W. 787, holding rule prohibiting parol evidence to vary consideration shown by written instrument not applicable to third persons not parties thereto.

Attorneys' liens and right of set-off against judgments.

Cited in footnotes to *Roberts v. Mitchell*, 29 L. R. A. 705, which holds right to set off independent judgments subject to attorney's liens; *Cleveland v. McCanna*, 41 L. R. A. 852, which denies set-off of judgment, where entire property of one debtor less than statute exempts from seizure; *Bacon v. Reich*, 49 L. R. A. 311, which holds original cause of action for breach of contract not merged in judgment preventing set-off; *Loofbourow v. Hicks*, 55 L. R. A. 874, which holds lien for attorney's fees allowed by judgment of foreclosure enforceable against land bid in by mortgagee or assignee.

23 L. R. A. 340, *STATE ex rel. REED v. JONES*, 6 Wash. 452, 34 Pac. 231.

Conclusiveness of enrolled bills and elections.

Cited in *State ex rel. Bray v. Long*, 21 Mont. 35, 52 Pac. 645, holding that courts will not go behind enrolled bill to ascertain whether legislative forms have been observed; *Narregang v. Brown County*, 14 S. D. 365, 85 N. W. 602; *State ex rel. Osburn v. Beck*, 25 Nev. 81, 56 Pac. 1008; *Lafferty v. Huffman*, 99 Ky. 90, 32 L. R. A. 206, footnote p. 203, 35 S. W. 123,—holding duly enrolled bill not impeachable by reference to house journals; *Coler v. Stanly County*, 89 Fed. 263, holding, under constitutional provision, fact that legislative journals contain yeas and nays vote on tax law must be affirmatively shown; *Parmeter v. Bourne*, 8 Wash. 56, 35 Pac. 586 (distinguished in dissenting opinion), majority holding court without jurisdiction to enjoin removal of county seat on ground of fraud in election; *Krieschel v. Snohomish County*, 12 Wash. 440, 41 Pac. 186 (dissenting opinion), majority upholding court's jurisdiction to enjoin county commissioners from declaring result of election contrary to law.

Cited in footnotes to *Carr v. Coke*, 28 L. R. A. 737, which denies power of court to interfere with printing statute on ground of fraud in procuring enrollment of bill and signature thereto; *Cohn v. Kingsley*, 38 L. R. A. 74, which requires journals to show compliance with mandatory provision as to enacting bills by yeas and nays vote after three several readings; *Stanly County v. Snuggs*, 39 L. R. A. 439, which holds fatal, omission to enter yeas and nays in journal on second and third readings on bill authorizing tax; *State ex rel. Cheyenne v. Swan*, 40 L. R. A. 195, which sustains court's right to examine journals to determine whether alleged statutes properly passed; *People v. Dettenthaler*, 44 L. R. A. 164, which holds void, bill in which enacting clause added without authority by clerk of one branch of legislature; *Montgomery Beer Bottling Works v. Gaston*, 51 L. R. A. 396, which holds permanent record delivered to secretary of state to be legislative journal.

Unconstitutionality of statute as defense to mandamus.

Cited in note (47 L. R. A. 519) on unconstitutionality of statute as defense against mandamus to compel its enforcement.

23 L. R. A. 354, *ATTY. GEN. ex rel. WERTS v. ROGERS*, 56 N. J. L. 480, 28 Atl. 726, 29 Atl. 173.

Judicial powers.

Cited in *Wanser v. Hoos*, 60 N. J. L. 524, 64 Am. St. Rep. 600, 38 Atl. 449, holding construction and force to be given constitutional provisions, question for court; *Bott v. Wurts*, 63 N. J. L. 294, 45 L. R. A. 254, 43 Atl. 744, 881, upholding power of court to consider whether legislative department and agencies have observed requirements of Constitution in attempting amendments; *State ex rel. McClurg v. Powell*, 77 Miss. 571, 48 L. R. A. 656, 27 So. 927, holding question whether submission or adoption of amendment to Constitution is legal, for the court.

Cited in footnote to *Norwalk Street R. Co.'s Appeal*, 39 L. R. A. 794, which holds approval and adoption or modification of plan for street railway not a judicial power.

23 L. R. A. 388, *LEVEE DIST. NO. 9 v. FARMER*, 101 Cal. 178, 35 Pac. 569.

Proceedings and judgments not open to collateral attack.

Cited in *Re Camp*, 131 Cal. 470, 82 Am. St. Rep. 371, 63 Pac. 736, holding proceedings and order of adoption not open to collateral attack upon contest for letters of administration; *Sutter County v. Tisdale*, 136 Cal. 478, 69 Pac. 141, holding determination of supervisors as to necessity of road not open to collateral attack in condemnation proceedings.

Rights of abutters in highway.

Cited in *Long v. Wilson*, 119 Iowa, 271, 60 L. R. A. 722, 97 Am. St. Rep. 315, 93 N. W. 282, holding abutter who is not made party not bound by decree in suit against city to change and fix boundaries of highway.

Cited in footnotes to *Buhl v. Fort Street Union Depot Co.* 23 L. R. A. 392, which denies recovery for inconvenience to abutter by discontinuing other portions of street; *Van Witsen v. Gutman*, 24 L. R. A. 403, which denies right to take away for private use abutter's easement in public alley; *Re Melon Street*, 38 L. R. A. 275, which holds abutting owners entitled to recover for vacating other portion of street, leaving remaining portion a *cul de sac*; *Cram v. Laconia*, 57 L. R. A. 282, which denies right to recover for injury by discontinuing part of street on which property abuts.

23 L. R. A. 392, *BUHL v. FORT STREET UNION DEPOT CO.* 98 Mich. 596, 57 N. W. 829.

Obstruction or discontinuance of highway.

Cited in *Dantzer v. Indianapolis Union R. Co.* 141 Ind. 609, 34 L. R. A. 772, 50 Am. St. Rep. 347, 39 N. E. 223, holding action not maintainable for obstruction not substantially impairing or depriving lot owner of access to property; *Cram v. Laconia*, 71 N. H. 48, 57 L. R. A. 286, 51 Atl. 635, holding action not maintainable for obstruction of highway not depriving lot owner of access to general system of streets; *Baudistel v. Michigan C. R. Co.* 113 Mich. 688, 71 N. W. 1114, holding that vacation of street under authorizing statute, on notice to persons interested, requires notice to only such as have right to compensation; *Henry v. Ann Arbor R. Co.* 116 Mich. 319, 75 N. W. 886, holding that railroad cannot be restrained by private individuals from discontinuance of track, injury not being specific to them; *Kinnear Mfg. Co. v. Beatty*, 65 Ohio St. 283, 87 Am. St. Rep. 600, 62 N. E. 341, holding abutting owner without remedy for obstruction of highway not in front of premises, access not being cut off; *Dennis v. Mobile & M. R. Co.* 137 Ala. 659, 97 Am. St. Rep. 69, 35 So. 30, holding abutting owner not entitled to injunction against maintenance of freight depot across street by railroad company, access to lot not being cut off.

Cited in footnotes to *Van Witsen v. Gutman*, 24 L. R. A. 403, which denies right to take away for private use abutter's easement in public alley; *Jacksonville, T. & K. W. R. Co. v. Thompson*, 26 L. R. A. 410, which denies right to maintain private action for inconvenience from obstruction of highway in common with others; *O'Brien v. Central Iron & Steel Co.* 57 L. R. A. 508, which authorizes private action for permanent obstruction of street within 200 feet of abutter.

23 L. R. A. 396, *HICKEY v. LAKE SHORE & M. S. R. CO.* 51 Ohio St. 40, 46 Am. St. Rep. 545, 36 N. E. 672.

Covenants running with land.

Cited in *Borgman v. Spellmire*, 4 Ohio N. P. 418, holding last grantee of leasehold and immediate grantee liable to assignee of reversion on covenant to pay taxes, etc.

Cited in footnotes to *Bald Eagle Valley R. Co. v. Nittany Valley R. Co.* 29 L. R. A. 423, which holds intention of parties controlling in determining whether covenant runs with land; *Brown v. Southern P. Co.* 47 L. R. A. 409, which holds covenant by grantors for railroad to build fences, or not hold company liable for injury to stock, personal only; *Doty v. Chattanooga Union R. Co.* 48 L. R. A. 160, which holds covenant for running certain trains binding on subsequent purchaser of railroad.

23 L. R. A. 402, *BEARD v. HOPKINSVILLE*, 95 Ky. 239, 44 Am. St. Rep. 222, 24 S. W. 872.

Constitutional limitations as to municipal indebtedness; municipal contracts.

Cited in *Covington v. McKenna*, 99 Ky. 513, 36 S. W. 518, holding bond issue in anticipation of collection of future local assessments, indebtedness, within meaning of Constitution; *La Porte v. Gamewell Fire Alarm Teleg. Co.* 146 Ind. 409, 35 L. R. A. 688, footnote p. 686, 58 Am. St. Rep. 359, 45 N. E. 588, holding that city contract for water or light does not create indebtedness for aggregate sum of all instalments; *Merchants' Nat. Bank v. Spates*, 41 W. Va. 30, 56 Am. St. Rep. 828, 23 S. E. 681, holding county court without power to bind tax levies for future years for courthouse repairs without submission to vote of people; *Windsor v. Des Moines*, 110 Iowa, 194, 80 Am. St. Rep. 280, 81 N. W. 476, holding sums due from city on contract for erection of electric light plant, not provided for in levy, indebtedness within meaning of Constitution; *State ex rel. Helena Waterworks Co. v. Helena*, 24 Mont. 532, 55 L. R. A. 341, footnote p. 336, 81 Am. St. Rep. 453, 63 Pac. 99, holding contract for water supply for term of years within provision as to limitation of city indebtedness; *Earles v. Wells*, 94 Wis. 298, 59 Am. St. Rep. 885, 68 N. W. 964, holding contract by city indirectly assuming payment of waterworks bonds to amount beyond constitutional debt limit, void; *Ottumwa v. City Water Supply Co.* 56 C. C. A. 233 note, 119 Fed. 315 note, holding indebtedness within meaning of Constitution created by ordinance authorizing issuance of bonds to build water-works plant and referring particularly to annotation in 23 L. R. A. 402; *Walla Walla v. Walla Walla Water Co.* 172 U. S. 19, 43 L. ed. 349, 19 Sup. Ct. Rep. 77, holding contract for supply of water for twenty-five years, payable in instalments, not objectionable because aggregate of indebtedness exceeded constitutional limit; *Swanson v. Ottumwa*, 118 Iowa, 176, 59 L. R. A. 626; 91 N. W. 1048, holding issuance of bonds for water supply, payable out of sinking fund provided for by special tax, not indebtedness within meaning of Constitution; *Crogster v. Bayfield County*, 99 Wis. 16, 74 N. W. 635, holding contract to bond county to aid in construction of railroad upon performance by railroad of its part of agreement, contract for indebtedness within Constitution; *Chicago v. Galpin*, 183 Ill. 406, 55 N. E. 731, holding that contract for specified number of street lamps, more or less, fixes amount of city's liability from its date; *McAleer v. Angell*, 19 R. I. 694, 36 Atl. 588, holding judgment for damages for defective highways not debt within statutory provision

limiting indebtedness of town; *Eaton v. Minnaugh*, 43 Or. 470, 73 Pac. 754, holding void act to compel county to create indebtedness beyond constitutional limit; *Mayfield Woolen Mills v. Mayfield*, 111 Ky. 177, 61 S. W. 43, holding indebtedness within Constitution created by contract by city with water company for payment of water rent.

Cited in footnotes to *Brooke v. Philadelphia*, 24 L. R. A. 781, which holds certificates of indebtedness placed in sinking fund not part of city indebtedness; *Linn v. Burgess*, 25 L. R. A. 217, which holds burden of showing municipal indebtedness exceeded, on one seeking to enjoin incurring further indebtedness; *Howard v. Huron*, 26 L. R. A. 493, which denies right to set up invalidity of alleged city indebtedness to defeat mandamus to enforce judgment; *Kelly v. Minneapolis*, 30 L. R. A. 281, which requires deduction of amount of sinking fund from total apparent debt to ascertain actual debt; *McBean v. Fresno*, 31 L. R. A. 794, which holds limitation of city indebtedness not violated by contract to pay annual sum for term of years, if annual sum within limit; *Lamar Water & Electric Light Co. v. Lamar*, 32 L. R. A. 157, which holds contract for term of years, with annual payments, creates indebtedness for only amount falling due yearly; *Grand Island & N. W. R. Co. v. Baker*, 34 L. R. A. 835, which requires compulsory obligations imposed by legislature to be included in determining whether limitation of county indebtedness exceeded; *Kiehl v. South Bend*, 36 L. R. A. 228, which holds indebtedness for hydrant rentals invalid where limitation of indebtedness exceeded when rentals become due; *Rauch v. Chapman*, 36 L. R. A. 407, which holds necessary expenditures imposed by Constitution not within limitation of county indebtedness; *National L. Ins. Co. v. Mead*, 48 L. R. A. 785, which holds new indebtedness not created by refunding bonds; *South Bend v. Reynolds*, 49 L. R. A. 795, which holds limitation of city debt not exceeded by contract for erection of city hall, for which yearly rent to be paid with option to purchase; *Barber Asphalt Paving Co. v. Harrisburg*, 29 L. R. A. 401, which holds city liable under contract for cost of paving streets, when assessment proves invalid; *Indianapolis v. Wann*, 31 L. R. A. 743, which holds contract for street lights for five years, payable monthly, void; *Brashear v. Madison*, 33 L. R. A. 474, which authorizes appropriation to buy fire alarm apparatus when sufficient on hand appropriated for fire purposes, though city already indebted beyond constitutional limit; *McGillivray v. Joint School Dist. No. 1*, 58 L. R. A. 100, which denies district's liability as on implied contract for material used in building school-house, if express contract void because debt limit exceeded.

Cited in note (59 L. R. A. 614) on effect of limitation of municipal indebtedness on acquisition of water supply or sewer system.

Disapproved in *Saleno v. Neosho*, 127 Mo. 640, 27 L. R. A. 773, footnote p. 769, 48 Am. St. Rep. 653, 30 S. W. 190, holding contract by city to pay fixed price annually for water supply not a debt for aggregate amount.

Self-executing constitutional provisions.

Cited in *O'Mahoney v. Bullock*, 97 Ky. 779, 31 S. W. 878, holding constitutional limit of indebtedness of counties and taxing districts, self-executing; *Russell v. Ayer*, 120 N. C. 196, 37 L. R. A. 251, 27 S. E. 133 (dissenting opinion), majority holding that revenue act fixing poll tax, being unconstitutional, executive department cannot levy poll tax at constitutional rates.

Cited in footnotes to *Anderson v. Whatcom County*, 33 L. R. A. 137, which

holds constitutional provision for justices of peace receiving salary instead of fees, self-executing; Illinois C. R. Co. v. Ihlenberg, 34 L. R. A. 393, which holds constitutional provision that employee's knowledge of defect shall be no defense to action for injury, self-executing; Criswell v. Montana C. R. Co. 33 L. R. A. 554, which holds act imposing liability on domestic railroad companies for fellow servant's negligence abrogated by adopting Constitution against special privileges to foreign corporations; State v. Kyle. 56 L. R. A. 115, which holds self-operating. constitutional amendment for criminal prosecution by indictment or information only.

Special legislation.

Cited in Pearce v. Mason County, 99 Ky. 365, 35 S. W. 1122, holding special acts already in operation not affected by adoption of Constitution forbidding special legislation.

Conclusiveness of census.

Distinguished in O'Bryan v. Owensboro, 113 Ky. 686, 68 S. W. 858, holding census taken by city under statute, conclusive, in absence of fraud or mistake.

23 L. R. A. 410, McCULLOUGH v. BROWN, 41 S. C. 220, 19 S. E. 458.

Police power of state.

Cited in Darlington v. Ward, 48 S. C. 578, 38 L. R. A. 337, 26 S. E. 906 (dissenting opinion), majority upholding ordinance prohibiting keeping of hogs within corporate limits of town.

Cited in footnote to Bennett v. Pulaski, 47 L. R. A. 278, which sustains ordinance for closing saloons between 10 P. M. and 4 A. M. and on Sundays, but not requirement for removing curtains on front doors and windows.

Overruled in State *ex rel.* George v. Aiken, 42 S. C. 225, 26 L. R. A. 349, footnote p. 345, 20 S. E. 221, holding valid, act giving state exclusive control of liquor traffic.

Right to attack constitutionality of law.

Cited in Butler v. Ellerbe, 44 S. C. 283, 22 S. E. 425, dissenting opinion by McIver, Ch. J., who upholds right of taxpayer to test constitutionality of law relating to application of moneys arising from taxation.

Right of state or municipality to embark in trade.

Cited in Lowenstein v. Evans, 69 Fed. 911, holding state assuming monopoly of sale of liquor not violation of Federal anti-trust law of 1890.

Cited in footnotes to Farmville v. Walker, 61 L. R. A. 125, which sustains legislative power to permit town to establish dispensary for exclusive sale of liquor; Lofton v. Collins, 61 L. R. A. 150, which denies municipal authority to organize dispensary by appointing commissioners authorized to sell liquor.

Power to grant liquor licenses after dispensary act.

Cited in Barringer v. Florence, 41 S. C. 503, 19 S. E. 745, holding no authority in state vested with power to grant liquor licenses after passage of dispensary act of 1892.

Injunction to restrain governmental or political action.

Cited in footnotes to State *ex rel.* Taylor v. Lord, 31 L. R. A. 473, which denies power of court to interfere with location by governor of site for public

institution; State *ex rel.* Cranmer v. Thorson, 33 L. R. A. 582, which denies right to enjoin certifying of proposed constitutional amendment.

Power of state to grant monopoly.

Cited in note (53 L. R. A. 764) on constitutionality of statute attempting to grant monopoly.

23 L. R. A. 435, ELLERBE v. BARNEY, 119 Mo. 632, 25 S. W. 384.

Liability of members of mutual insurance companies on assessments.

Cited in *Fulton v. Stevens*, 99 Wis. 316, 74 N. W. 803, holding member of benefit association liable under contract for assessments made before membership ceased; *Provident Mut. Relief Asso. v. Pelissier*, 69 N. H. 608, 45 Atl. 562, holding member of mutual insurance company liable for assessments levied after suspension, but during continuance of membership; *Calkins v. Angell*, 123 Mich. 82, 81 N. W. 977, holding member of mutual benefit association liable for assessments for death claims during membership; *L'Union St. Jean Baptiste v. Ostiguy* 25 R. I. 480, 64 L. R. A. 159, footnote p. 158, 56 Atl. 681, denying right of benefit society to sue former member for dues for nonpayment of which he had been expelled.

Cited in note (32 L. R. A. 481) on liability of members of mutual fire insurance companies.

Distinguished in *Lehman v. Clark*, 174 Ill. 289, 43 L. R. A. 653, footnote p. 648, 51 N. E. 222, Reversing 65 Ill. App. 251, denying liability of member of mutual benefit association to pay assessment after policy lapses; *Ellerbe v. Faust*, 119 Mo. 656, 25 L. R. A. 150, 25 S. W. 390, holding action not maintainable against expelled member of association for assessment after expulsion.

Disapproved in *Gibson v. Megrew*, 154 Ind. 285, 48 L. R. A. 367, footnote p. 362, 56 N. E. 674, holding assessments of mutual benefit association not collectable by suit.

Construction of contract.

Cited in *D. M. Osborne & Co. v. Henry*, 70 Mo. App. 27, holding defense of breach of warranty in action on notes for purchase price of harvesting machine not defeated by its retention, under contract for its purchase; *Folkens v. Northwestern Nat. L. Ins. Co.* 98 Mo. App. 486, 72 S. W. 720, holding policy of life insurance not providing for assessments on persons holding similar policies, old line contract.

23 L. R. A. 442, GALLOWAY v. CHICAGO, M. & ST. P. R. CO. 56 Minn. 346, 45 Am. St. Rep. 468, 57 N. W. 1058.

Liability of carriers for acts of persons not employees or agents.

Cited in *McGrath v. Eastern R. Co.* 74 Minn. 365, 77 N. W. 136, holding carrier not liable to person on platform of station struck by bundle thrown from moving train by news agent; *West Memphis Packet Co. v. White*, 99 Tenn. 270, 38 L. R. A. 432, 41 S. W. 583, holding ferry company liable to passenger negligently shot by fellow passenger; *Shaw v. Chicago & G. T. R. Co.* 123 Mich. 635, 49 L. R. A. 310, footnote p. 308, 81 Am. St. Rep. 230, 82 N. W. 618, denying railroad company's liability for mail agents' unknown practice of throwing mail from moving train; *Williams v. Louisville & N. R. Co.* 98 Ky. 252, 41 S. W. 1100, holding carrier liable to person assisting shipper, for injury by being struck

by mail pouch thrown from passing train; *St. Louis, C. & St. P. R. Co. v. Waggoner*, 90 Ill. App. 558, holding railroad liable only for negligent act of mail clerk which is so frequent as to charge it with notice; *Carver v. Minneapolis & St. L. R. Co.* 120 Iowa, 348, 94 N. W. 862, holding railroad liable for injury due to negligent throwing of mail bag from train by mail clerk, where practice known to it.

Cited in footnotes to *Cleghorn v. Western R. Co.* 60 L. R. A. 269, which holds railroad liable for frightening of horse by mail crane erected in or beside highway; *Poling v. Ohio River R. Co.* 24 L. R. A. 215, which holds carrier not liable to bystander for postal clerk's negligence in catching mail pouch from crane; *Pennsylvania R. Co. v. Russ*, 26 L. R. A. 283, which denies carrier's liability for mail agent's negligence in throwing off mail bag.

23 L. R. A. 445, *ROOT v. DAVIS*, 51 Ohio St. 29, 36 N. E. 669.

Followed without comment in *National Bank v. Lawler*, 62 Ohio St. 649, 58 N. E. 1100.

Garnishment against nonresident debtor.

Cited in *Goebel v. Kanauha Valley Bank*, 3 Ohio N. P. 110, holding credits of nonresident debtor, served by publication, attachable in garnishment proceeding; *Olcott v. Guerinck*, 19 Ohio C. C. 35, holding situs of attachable debt owed to nonresident, to be state where writ of attachment is given; *Ashley v. Quintard*, 90 Fed. 97, holding that stock of foreign corporation owned by nonresident cannot be reached by service of garnishment on corporation agent and of summons on defendant stockholder by publication.

Cited in footnote to *Tootle v. Coleman*, 57 L. R. A. 120, which holds right to garnish debtor not limited to situs of chose in action.

Cited in note (59 L. R. A. 370) on garnishment of unliquidated claims.

23 L. R. A. 448, *McMULLEN v. CARNEGIE BROS.* 158 Pa. 518, 27 Atl. 1043.

Liability for injuries due to defective cars or appliances.

Cited in *Anderson v. Pittsburgh & L. E. R. Co.* 5 Pa. Dist. R. 402, 26 Pittsb. L. J. N. S. 472, holding carrier not liable to employee of furnace company, injured by collision due to defective brakes of cars delivered on tracks of furnace company; *Rehm v. Pennsylvania R. Co.* 164 Pa. 94, 30 Atl. 356, holding neither railroad nor coal company liable for killing of employee of latter through negligence of coservant in placing defective car on trestle; *Louisville, N. A. & C. R. Co. v. Bates*, 146 Ind. 570, 45 N. E. 108, holding carrier not required to make impracticable or unreasonable inspection of foreign cars; *McGill v. Maine & N. H. Granite Co.* 70 N. H. 127, 85 Am. St. Rep. 618, 46 Atl. 684, holding shipping company not liable for death of employee, due to defective appliance on cars delivered on its tracks by railroad company.

Cited in note (41 L. R. A. 102) on knowledge as element of employer's liability to injured servant.

23 L. R. A. 449, *DICKEY v. WALDO*, 97 Mich. 255, 56 N. W. 608.

Mortgages of personal property.

Cited in footnotes to *Riddle v. Dow*, 32 L. R. A. 811, which holds rights of mortgagee of lessor's interest in crops raised by tenant superior to subsequent

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garnishee proceedings; *Wilson v. Donaldson*, 43 L. R. A. 524, which denies superiority of statutory lien for harvesting grain over chattel mortgage given before grain ripe; *Jones v. Adams*, 50 L. R. A. 388, which holds purchaser of land on foreclosure entitled to growing crops covered by chattel mortgage; *Battle Creek Valley Bank v. First Nat. Bank*, 56 L. R. A. 124, which holds provision in mortgage giving mortgagee lien on increase thereafter begotten, agreement only for lien.

Exemptions against claim for rent.

Cited in note (24 L. R. A. 812) on availability of exemptions against claim for rent.

Crops as personal property for purposes of levy and sale.

Cited in footnote to *Bagley v. Columbus Southern R. Co.* 34 L. R. A. 286, which holds growing crops part of land for purposes of jurisdiction.

23 L. R. A. 479, *MEADE v. CLARK*, 159 Pa. 159, 39 Am. St. Rep. 669, 28 Atl. 214.

Contracts of married women.

Cited in *Erdelyi v. Bernat*, 27 Pittsb. L. J. N. S. 175, rescinding contract of married woman for exchange of real estate, without separate acknowledgment, and induced by fraud; *Simon's Estate*, 20 Pa. Super. Ct. 469, holding deed by married woman, executed without husband joining, satisfied after she was declared *feme sole* trader, by her becoming party to partition action involving land conveyed by such deed.

23 L. R. A. 481, *PEOPLE ex rel. COPCUTT v. BOARD OF HEALTH*, 140 N. Y. 1, 37 Am. St. Rep. 522, 35 N. E. 320.

Summary action on ground of public necessity.

Cited in *Health Department v. Trinity Church*, 145 N. Y. 48, 27 L. R. A. 713, 45 Am. St. Rep. 579, 39 N. E. 833, upholding act of board of health requiring owner of tenement to provide sufficient water facilities; *Egan v. Health Department*, 20 Misc. 40, 45 N. Y. Supp. 325, upholding power of health board to order unsanitary buildings vacated without notice to owner; *Cartwright v. Cohoes*, 39 App. Div. 73, 56 N. Y. Supp. 731, holding that health board had power to order privy-vault nuisance abated, without notice or hearing; *Gunning System v. Buffalo*, 62 App. Div. 499, 71 N. Y. Supp. 155, restraining destruction of high signboards until termination of action determining reasonableness of ordinance authorizing such destruction; *Stone v. Heath*, 179 Mass. 387, 60 N. E. 975, refusing injunction to prevent board of health from abating alleged nuisance; *Delaware, L. & W. R. Co. v. Buffalo*, 158 N. Y. 271, 53 N. E. 44, Affirming 4 App. Div. 568, 38 N. Y. Supp. 510, holding city had right summarily to remove, at their peril, railroad bridge abutments as obstruction to street.

Cited in footnotes to *Board of Health v. Copcutt*, 23 L. R. A. 485, which authorizes board of health to enjoin maintenance of malarious pond in city; *Valparaiso v. Bozarth*, 47 L. R. A. 487, which holds notice or request to remove building encroaching on street unnecessary before action to abate it; *Western & A. R. Co. v. Atlanta*, 54 L. R. A. 294, which holds power to abate nuisance in city in police court only.

Cited in notes (36 L. R. A. 598, 613) on power of municipal corporations to

define, prevent, and abate nuisances; (38 L. R. A. 166, 168) on municipal power over buildings and other structures as nuisances.

Distinguished in *People ex rel. Ordway v. St. Saviour's Sanitarium*, 34 App. Div. 372, 56 N. Y. Supp. 431, holding summary commitment of inebriate female to institution for treatment and reformation, not due process of law.

Redress of person summarily proceeded against.

Cited in *Fire Department v. Gilmour*, 149 N. Y. 459, 52 Am. St. Rep. 747, 44 N. E. 177, upholding right of defendant in action for penalty, to contest reasonableness of order of fire department as to storage of combustibles; *Eckhardt v. Buffalo*, 19 App. Div. 15, 46 N. Y. Supp. 204, holding owner of premises entitled to contest reasonableness of health board order to abate nuisance in action to set aside assessment, the result thereof; *Smith v. Irish*, 37 App. Div. 222, 55 N. Y. Supp. 837, reversing judgment for plaintiff in action for damages for removal of top story of building by order of board of health, as against weight of evidence; *Westchester Electric R. Co. v. Angevine*, 52 App. Div. 241, 65 N. Y. Supp. 376, affirming judgment for plaintiff for killing of three horses by officer of society for prevention of cruelty to animals; *Sahr v. Scholle*, 89 Hun, 43, 35 N. Y. Supp. 97, holding common-law action for damages open to owner of horse killed by officer of society for prevention of cruelty to animals, if unwarranted; *Golden v. Health Department*, 21 App. Div. 424, 47 N. Y. Supp. 623, upholding action in equity to restrain health department from interfering with plaintiff's use of buildings, and for damages for ordering same vacated and demolished.

Limit of powers of health boards.

Cited in *Re Smith*, 146 N. Y. 77, 28 L. R. A. 823, 48 Am. St. Rep. 769, 40 N. E. 497, holding health commissioner without power to quarantine person for refusal to be vaccinated.

Review by certiorari.

Cited in *Chittenden v. Wurster*, 152 N. Y. 398, 37 L. R. A. 826, 46 N. E. 857, dissenting opinion by O'Brien, J., who held erroneous civil service classification not reviewable by certiorari; *People ex rel. Kennedy v. Brady*, 166 N. Y. 47, 59 N. E. 701, holding removal of subordinate in department of public buildings on written charges, with opportunity for hearing, not reviewable by certiorari; *People ex rel. Mack v. Burt*, 65 App. Div. 159, 72 N. Y. Supp. 567, holding action of municipal civil service commissioners in classifying positions not reviewable by certiorari; *People ex rel. Howe v. Conway*, 59 App. Div. 331, 69 N. Y. Supp. 837, holding removal of school commissioner of city by mayor, without charges or hearing, not reviewable by certiorari; *People ex rel. Greenleaf v. Board of Health*, 83 App. Div. 574, 82 N. Y. Supp. 21, holding action of board of health in imposing fine on person, without notice, not reviewable by certiorari; *Re Donovan*, 89 App. Div. 58, 85 N. Y. Supp. 406 (dissenting opinion), majority holding decision of municipal civil service commission as to character of duties of newly created position not reviewable by mandamus.

Compulsory holding over under quarantine.

Cited in *Regan v. Fosdick*, 19 Misc. 495, 47 N. Y. Supp. 1102, holding renewal of lease not implied by compulsory holding over under quarantine ordered by health board.

Power of municipalities as to nuisances.

Cited in *Waters Pierce Oil Co. v. New Iberia*, 47 La. Ann. 867, 17 So. 343, upholding power of municipality to regulate storage of petroleum and other highly inflammatory substances.

Distinguished in *Flushing v. Carraher*, 87 Hun. 64, 33 N. Y. Supp. 951, holding health ordinance of village, requiring permit for keeping cows within 200 feet of dwelling, invalid.

23 L. R. A. 485, *BOARD OF HEALTH v. COPCUTT*, 140 N. Y. 12, 55 N. Y. S. R. 422, 35 N. E. 443.

Power to remedy conditions affecting safety, health, and personal comfort.

Cited in *Health Department v. Trinity Church*, 145 N. Y. 48, 27 L. R. A. 716, 45 Am. St. Rep. 579, 39 N. E. 833, upholding act authorizing health boards to require tenement houses to be properly supplied with water; *Golden v. Health Department*, 21 App. Div. 424, 47 N. Y. Supp. 623, upholding right of action in equity to restrain demolition of building by order of health department, and for damages for loss of rents by ordering same vacated; *Cartwright v. Cohoes*, 39 App. Div. 72, 56 N. Y. Supp. 731, holding rule of health board prohibiting privy vaults within 25 feet of door or window of residence, reasonable.

Cited in footnotes to *People ex rel. Copcutt v. Board of Health*, 23 L. R. A. 481, which holds board of health liable for destroying private property in abating, as nuisance, what is not such; *Western & A. R. Co. v. Atlanta*, 54 L. R. A. 294, which holds power to abate nuisance in city in police court only.

Cited in notes (36 L. R. A. 613) on power of municipal corporation to define, prevent, and abate nuisance; (38 L. R. A. 168) on municipal power over buildings and other structures as nuisances; (38 L. R. A. 327) on municipal power over nuisances affecting safety, health, and personal comfort; (51 L. R. A. 662) on right of municipality to maintain suit to enjoin or abate public nuisance; (59 L. R. A. 849) on liability for damming back water of stream.

Necessity of notice and hearing.

Cited in footnote to *Valparaiso v. Bozarth*, 47 L. R. A. 487, which holds notice or request to remove building encroaching on street unnecessary before action to abate it.

23 L. R. A. 488, *BUCHANAN v. BARRE*, 66 Vt. 129, 44 Am. St. Rep. 329, 28 Atl. 878.

Ejectment action against town.

Cited in *Lynch v. Rutland*, 66 Vt. 573, 29 Atl. 1015, holding ejectment not maintainable against town to recover land within limits of highway.

23 L. R. A. 490, *FOSTER v. CHARLES BETCHER LUMBER CO.* 5 S. D. 57, 49 Am. St. Rep. 859, 58 N. W. 9.

Actions against foreign corporations and service of process.

Cited in *Lubrano v. Imperial Council*, O. U. F. 20 R. I. 30, 38 L. R. A. 548, footnote p. 546, 37 Atl. 345, denying jurisdiction of foreign insurance company acquired by service on insurance commissioner; *Denver & R. G. R. Co. v. Roller*, 49 L. R. A. 81, 41 C. C. A. 26, 100 Fed. 742, holding service in state on general

passenger and freight agent of foreign railroad valid; *Mars v. Oro Fino Min. Co.* 7 S. D. 611, 65 N. W. 19, holding service upon attorney in fact to apply for patent not service upon "managing agent" of corporation; *Modern Woodmen v. Noyes*, 158 Ind. 506, 64 N. E. 21, holding service of chief officers of local lodge of foreign fraternal corporation sufficient, where corporation failed to file consent that service might be made on state auditor.

Cited in footnotes to *Rothrock v. Dwelling-House Ins. Co.* 23 L. R. A. 863, which holds unauthorized service on auditor of state in action against foreign insurance company; *Sullivan v. Sullivan Timber Co.* 25 L. R. A. 543, which holds corporation not doing business in county, so as to subject it to suit by having agent therein, who pays taxes on unemployed railroad and machinery; *Craig v. Gunn*, 27 L. R. A. 511, which holds foreign corporation with principal office in other state not subject to garnishment; *Hilary v. Great Northern R. Co.* 32 L. R. A. 448, which authorizes service of process on assistant ticket agent in union depot; *George v. American Ginning Co.* 32 L. R. A. 764, which denies right to serve foreign corporation by serving papers on officer who is in fact plaintiff or plaintiff's attorney; *Carstens & Earles v. Leidigh & H. Lumber Co.* 39 L. R. A. 548, which holds service of process on officer of foreign corporation temporarily in state will not authorize personal judgment against corporation; *Hammond Beef & Provision Co. v. Best*, 42 L. R. A. 528, which holds foreign corporation not bound by discharge of debtor by state insolvency proceedings, although statutory service made upon it; *National Bank v. Furtick*, 44 L. R. A. 115, which requires service on foreign insurance company as garnishee to be made on president, treasurer, cashier, or paying clerk; *Connecticut Mut. L. Ins. Co. v. Spratley*, 44 L. R. A. 442, which authorizes service on agent of foreign insurance company coming into state to examine conditions under which death occurred; *Mutual Reserve Fund Life Asso. v. Boyer*, 50 L. R. A. 538, which denies right to serve process on state officer designated by foreign insurance company which has ceased to do business in state; *Abbeville Electric Light & P. Co. v. Western Electrical Supply Co.* 55 L. R. A. 146, which authorizes service on traveling salesman of foreign corporation, sent to investigate controversy out of which cause of action arose; *Buie v. Chicago, R. I. & P. R. Co.* 55 L. R. A. 861, which authorizes service of railroad company by serving in other state, officers of company organized to construct extension of system.

Cited in notes (24 L. R. A. 297) on recognition or exclusion of foreign corporations; (50 L. R. A. 589, 590) on what service of process is sufficient to constitute due process of law.

Effect of failure of foreign corporation to comply with statutes.

Cited in *Barricklow v. Stewart*, 31 Ind. App. 451, 68 N. E. 316, holding bond of foreign surety company not invalid because of failure of corporation to comply with statutes authorizing it to do business in state.

23 L. R. A. 504, *OMAHA & R. VALLEY R. CO. v. CLARKE*, 35 Neb. 867, 53 N. W. 970.

Injury due to blowing of whistle or escape of steam.

Cited in *Chicago & E. R. Co. v. Cummings*, 24 Ind. App. 199, 53 N. E. 1026, and *Rodgers v. Baltimore & O. S. W. R. Co.* 150 Ind. 401, 49 N. E. 453, holding complaint alleging unnecessary, negligent, and reckless blowing of whistle, resulting in injury to person without his fault, sufficient.

Cited in footnotes to *Mitchell v. Nashville, C. & St. L. R. Co.* 40 L. R. A. 426, which holds blowing locomotive whistle under much used bridge, negligence; *Kentucky & I. Bridge Co. v. Montgomery*, 57 L. R. A. 781, which requires railroad company operating railroad bridge as toll bridge, to keep lookout to prevent frightening teams by trains.

Inference of negligence from facts.

Cited in *Omaha Street R. Co. v. Craig*, 39 Neb. 614, 58 N. W. 209, holding question whether plaintiff was negligent in stepping on platform of moving car, preparatory to alighting, for jury; *Dunn v. Wilmington & W. R. Co.* 124 N. C. 261, 32 S. E. 711 (dissenting opinion), majority holding unnecessary keeping of engine in close proximity to highway, strong evidence of negligence.

Cited in footnote to *McCann v. Consolidated Traction Co.* 38 L. R. A. 236, which holds running tank car on street railway track, with black coats waving from it, frightening horse, negligence.

General allegations of negligence.

Cited in note (59 L. R. A. 230) on sufficiency of general allegations of negligence.

Proximate cause of injury.

Cited in footnote to *Snyder v. Philadelphia Co.* 63 L. R. A. 896, which holds negligent blowing off of gas well, proximate cause of injury to teamster whose horses were frightened, although one of his lines broke because of insufficiency.

23 L. R. A. 510, *LEWIS v. LEWELLING*, 53 Kan. 201, 36 Pac. 351.

Unconstitutional tenure of office.

Disapproved in *Indianapolis Brewing Co. v. Claypool*, 149 Ind. 202, 48 N. E. 228, holding provision in act fixing term of park commissioners at five years unconstitutional.

Law partly good and partly bad.

Cited in *State ex rel. Wheeler v. Stuht*, 52 Neb. 220, 71 N. W. 941, upholding act creating municipal corporation, although detached portions were unconstitutional.

State militia.

Cited in footnotes to *Nixon v. Reeves*, 33 L. R. A. 506, which denies right of captain of company of National Guard summarily to imprison member for disobedience; *Devlin v. Dalton*, 41 L. R. A. 379, which holds unreviewable on certiorari, decision of military examining board as to competency of militia officer.

23 L. R. A. 513, *DAY v. H. C. AKELEY LUMBER CO.* 54 Minn. 522, 56 N. W. 243.

Liability for injuries by fire or nuisance.

Cited in *Shute v. Princeton Twp.* 58 Minn. 339, 59 N. W. 1050, holding town not liable for negligence of contractor in destroying brush by fire under its authority.

Cited in footnotes to *Cook v. Minneapolis, St. P. & S. Ste. M. R. Co.* 40 L. R. A. 457, which denies liability of one negligently causing fire, for property burned after joinder with other fire; *Owen v. Cook*, 47 L. R. A. 646, which holds one

starting back fire to protect own property not liable for loss which would have resulted from original fire.

Distinguished in *Berger v. Minneapolis Gaslight Co.* 60 Minn. 300, 62 N. W. 336, holding corporation liable without proof of negligence for escape of crude petroleum, creating nuisance upon premises of another.

Evidence as to changes after accident.

Cited in *Hammargren v. St. Paul*, 67 Minn. 7, 69 N. W. 470, and *Lally v. Crookston Lumber Co.* 82 Minn. 410, 85 N. W. 157, holding erroneous, admission of evidence as to changes after accident.

23 L. R. A. 517, *DILLINGHAM v. HAWK*, 9 C. C. A. 101, 23 U. S. App. 273, 60 Fed. 494.

Actions and judgments against receivers.

Followed in *St. Louis S. W. R. Co. v. Holbrook*, 19 C. C. A. 387, 41 U. S. App. 33, 73 Fed. 114, holding judgment in state court against Federal receiver for personal injuries conclusive as to plaintiff's right therein and amount of claim.

Cited in *New York Security & T. Co. v. Equitable Mortg. Co.* 71 Fed. 560, holding that Missouri court could properly determine amount of creditor's claim against corporation under New York receivership; *State v. Port Royal & A. R. Co.* 84 Fed. 68, holding judgment against one receiver binding on successor; *Fidelity Ins. Trust & S. D. Co. v. Norfolk & W. R. Co.* 114 Fed. 391, holding judgment for tort against railroad company after receivership in suit to foreclose mortgage not entitled to preference over claims of mortgage bondholders; *Reinhart v. Sutton*, 58 Kan. 728, 51 Pac. 221, holding judgment in state court against Federal receiver conclusive, except as to time and manner of satisfaction; *Garrison v. Texas & P. R. Co.* 10 Tex. Civ. App. 137, 30 S. W. 725, holding judgments in state courts against Federal receivers conclusive as to amount; *Malott v. Shimer*, 153 Ind. 41, 74 Am. St. Rep. 278, 54 N. E. 101, upholding right of action for tort against Federal receiver of railroad in state court, without previous leave of appointing court; *Cowen v. Merriman*, 17 App. D. C. 199, holding plaintiff entitled to proceed at law for judgment against receivers for tort after order directing return of property to road, but not finally discharging receivers.

23 L. R. A. 520, *STATE v. EASON*, 114 N. C. 787, 41 Am. St. Rep. 811, 19 S. E. 88.

Navigable streams.

Cited in *State v. Baum*, 128 N. C. 605, 38 S. E. 900, holding public cove used by fishing boats, some from 18 to 20 feet long, navigable stream.

Cited in note (42 L. R. A. 322) on navigable waters.

23 L. R. A. 525, *STATE, ALEXANDER, PROSECUTOR, v. ELIZABETH*, 56 N. J. L. 71, 28 Atl. 51.

Special immunities and privileges.

Cited in *Burlington v. Pennsylvania R. Co.* 56 N. J. Eq. 264, 38 Atl. 849, holding act discriminating between railroads already located in cities and roads to be located in future, as to consent of abutting owners to laying of tracks, unconstitutional; *Schmalz v. Wooley*, 56 N. J. Eq. 653, 39 Atl. 539, holding act pro-

viding special remedies to associations and unions of workmen against persons counterfeiting their trade labels unconstitutional.

Racing and race courses.

Cited in footnotes to *State ex rel. Matthews v. Forsyth*, 33 L. R. A. 221, which holds unlawful, race meeting continued on other track near first, after holding thereon for time allowed; *State v. Walsh*, 35 L. R. A. 231, which holds void, statute against bookmaking, etc., containing proviso exempting persons within limits of regular race course; *People ex rel. Lawrence v. Fallon*, 37 L. R. A. 227, which holds test of speed or endurance of horses for prizes not lottery or gambling; *State v. Thompson*, 54 L. R. A. 950, which sustains statute prohibiting pool selling elsewhere than where races run, or by other than licensed persons.

Classification by legislature.

Cited in footnote to *Sutton v. State*, 33 L. R. A. 589, which holds classification of counties according to previous census, without respect to actual population, void.

Delegation of power.

Cited in *Albright v. Sussex County Lake & Park Commission*, 68 N. J. L. 537, 53 Atl. 612, holding act authorizing, subject to referendum, the acquiring of lands for public fisheries, to be under control of park commissioners, not unconstitutional delegation of power.

Special and local legislation.

Cited in *State ex rel. Board of Health v. Diamond Mills Paper Co.* 63 N. J. Eq. 113, 51 Atl. 1019, holding statute prohibiting discharge of sewage into river used by cities, etc., for water supply, not special and local legislation.

Internal affairs of municipalities.

Cited in *Ex parte Braun*, 141 Cal. 211, 74 Pac. 780, upholding power of city to impose license tax on liquor dealers under charter conferring power of taxation for revenue.

23 L. R. A. 531, *WHITNEY v. HANOVER NAT. BANK*, 71 Miss. 1009, 15 So. 33.

Receiverships of individuals and corporations.

Cited in *Pennsylvania Co. v. Finney*, 145 Ind. 551, 42 N. E. 816, holding appointment of receiver of all property of individual upon complaint of holder of chattel mortgage, invalid; *State ex rel. Johnston v. District Court*, 21 Mont. 160, 69 Am. St. Rep. 645, 53 Pac. 272, holding stranger not punishable for contempt for interfering with invalid order of receivership; *Taber v. Royal Ins. Co.* 124 Ala. 689, 26 So. 252, holding court of equity cannot exempt assets of insolvent corporation under receivership, from actual debts, duly established.

Cited in footnotes to *State ex rel. Merriam v. Ross*, 23 L. R. A. 534, which upholds right of receiver duly appointed, collaterally to attack void appointment by other court; *Sternberg v. Wolff*, 39 L. R. A. 762, which authorizes appointment of receiver of trading corporation in case of deadlock from dissensions of stockholders; *Phillips v. Providence Steam Engine Co.* 45 L. R. A. 560, which refuses to appoint receiver in suit by minority stockholder for corporation unable to continue business.

23 L. R. A. 534, *STATE ex rel. MERRIAM v. ROSS*, 122 Mo. 435, 25 S. W. 947.

Contempt proceeding in 136 Mo. 265, 31 S. W. 600.

Receiverships of individuals and corporations.

Cited in *Merriam v. St. Louis, C. G. & Ft. S. R. Co.* 126 Mo. 447, 29 S. W. 152, holding order appointing receiver and directing delivery of property to him pending suit not appealable; *Miller Bros. v. Perkins*, 154 Mo. 637, 55 S. W. 874, holding void, appointment of receiver in action at law to recover money judgment; *Steele Lumber Co. v. Laurens Lumber Co.* 98 Ga. 348, 24 S. E. 755, holding that corporation cannot, as party plaintiff, file petition in equity to marshal its own assets; *State v. Union Nat. Bank*, 145 Ind. 551, 57 Am. St. Rep. 209, 44 N. E. 585, holding appointment of receiver over all of individual's property, upon complaint of chattel mortgage holder, void; *Hay v. McDaniel*, 26 Ind. App. 687, 60 N. E. 729, holding action not maintainable by owner of real estate against life tenant for appointment of receiver; *Wallace v. Pierce-Wallace Pub. Co.* 101 Iowa, 332, 38 L. R. A. 128, 63 Am. St. Rep. 389, 70 N. W. 216, holding mere dissensions between equal owners of corporation stock, also corporation officers, not ground for receivership.

Cited in footnotes to *Whitney v. Hanover Nat. Bank*, 23 L. R. A. 531, denying right collaterally to attack appointment of receiver in suit by general creditors; *Sternberg v. Wolff*, 39 L. R. A. 762, which authorizes appointment of receiver of trading corporation in case of deadlock from dissensions of stockholder; *Phillips v. Providence Steam Engine Co.* 45 L. R. A. 560, which refuses to appoint receiver in suit by minority stockholder for corporation unable to continue business.

Disapproved in *McNary v. Bush*, 35 Or. 121, 56 Pac. 646, holding appointment of receiver of corporation by court of competent jurisdiction not open to collateral attack.

Prerogative writs and superintending control.

Cited in note (51 L. R. A. 59) on superintending control and supervisory jurisdiction of superior over inferior and subordinate tribunal.

Distinguished in *State ex rel. Hofmann v. Searritt*, 128 Mo. 340, 30 S. W. 1026, holding that writ of prohibition will not issue to stop investigation of alleged contempt, because of defect in petition for receivership, court having jurisdiction.

Commencement of action.

Cited in *Moore v. Ruxlow*, 83 Mo. App. 53, holding, under statutes, suit commenced in court of record on filing petition therein; *Vila v. Grand Island Electric Light, Ice & Cold Storage Co. (Neb.)* 63 L. R. A. 796, 97 N. W. 613, holding action not commenced by filing of petition containing no prayer for specific relief, other than appointment of receiver.

23 L. R. A. 545, *PHILADELPHIA v. MASONIC HOME*, 160 Pa. 572, 40 Am. St. Rep. 736, 28 Atl. 954.

Public charities and exemption from taxation.

Cited in *Grubb v. Weaver*, 19 Pa. Co. Ct. 611, holding school founded as public charity not exempt from taxation after ceasing to be maintained as such; *Foulke v. Long Institute*, 26 Pa. Co. Ct. 562, holding institute supporting orphan girls generally, public charity exempt from taxation; *Re Blair County*, 8 Pa.

Dist. R. 42, holding land leased by county commissioners for industrial home for poor children not exempt from taxation; *Philadelphia v. Franklin Cemetery*, 2 Pa. Super. Ct. 571, holding cemetery property not exempt from municipal assessments of water pipe; *Mullen v. Juenet*, 6 Pa. Super. Ct. 7, holding Roman Catholic school not exempt from taxation; *Haverford College v. Rhoads*, 6 Pa. Super. Ct. 80, holding nonsectarian college a public charity exempt from taxation; *Kentucky Female Orphan School v. Bell*, 100 Ky. 505, 40 L. R. A. 127, 36 S. W. 921, holding school primarily for education of orphan girls exempt from taxation; *Louisville v. Southern Baptist Theological Seminary*, 100 Ky. 517, 36 S. W. 995, holding free theological seminary not refusing young men from any denomination exempt from taxation; *Fitterer v. Crawford*, 157 Mo. 59, 50 L. R. A. 193, footnote p. 191, 57 S. W. 532, denying exemption of Masonic lodge building, first and second stories of which are rented to pay debt and current expenses of lodge; *Mason v. Perry*, 22 R. I. 490, 48 Atl. 671, holding lodge of ancient free and accepted Masons not charitable institution; *Newport v. Masonic Temple Asso.* 108 Ky. 338, 49 L. R. A. 253, footnote p. 252, 56 S. W. 405, denying exemption of charity confined exclusively to members of Masonic order and their families; *Troutman v. De Boissiere Odd Fellows' Orphans' Home*, 66 Kan. 44, 71 Pac. 286, holding gift to provide orphan home and school for children of members of secret society not one for public charity; *Hastings v. Long*, 19 Lanc. L. Rev. 74, holding asylum for indigent white women, either single or widows, public charity.

Cited in footnotes to *Webster v. Wiggin*, 28 L. R. A. 510, which holds charitable, gift to promote efficiency of public schools; *Alden v. St. Peter's Parish*, 30 L. R. A. 232, which holds gift to rector, etc., of unincorporated religious society, for church purposes, for charitable use; *Gray Street Infirmary v. Louisville*, 55 L. R. A. 270, which denies exemption of infirmary maintained by proprietors of medical college.

Distinguished in *Hibernian Benev. Soc. v. Kelly*, 28 Or. 190, 30 L. R. A. 169, 52 Am. St. Rep. 769, 42 Pac. 3, holding benevolent society organized for paying sick and death benefits, "charitable institution."

23 L. R. A. 552, **PARKER v. PENNSYLVANIA CO.** 134 Ind. 673, 34 N. E. 504. **Negligent and wilful injury.**

Cited in *Evans v. Pittsburgh, C. C. & St. L. R. Co.* 142 Ind. 269, 41 N. E. 537, holding allegation in complaint that brakeman signaled engineer to stop, insufficient to show engineer's knowledge of plaintiff's peril; *Conner v. Citizens' Street R. Co.* 146 Ind. 436, 45 N. E. 662, holding knowledge by driver of plaintiff's dangerous position essential to charge carrier with wilful injury to plaintiff by sudden starting of car; *Fisher v. Louisville, N. A. & C. R. Co.* 146 Ind. 562, 45 N. E. 689, holding finding of wilful killing not warranted by mere fact that deceased could be seen from cab for half a mile, and that no signals were given; *Ullrich v. Cleveland, C. C. & St. L. R. Co.* 151 Ind. 362, 51 N. E. 95, holding mere allegation that, as deceased was on trestle, he could be seen from train for 2,000 feet, and was run down before he could escape, insufficient to charge wilful killing; *Baltimore & O. S. W. R. Co. v. Young*, 153 Ind. 165, 54 N. E. 791, holding complaint charging engineer with failure to stop engine by reversing, after seeing plaintiff's danger at crossing, insufficient allegation of wilfulness; *McCollum v. Cleveland, C. C. & St. L. R. Co.* 154 Ind. 100, 55 N. E.

1024, holding that wilfulness signifies presence of intention to injure, and negligence signifies its absence; *Linton Coal & Min. Co. v. Persons*, 15 Ind. App. 75, 43 N. E. 651, holding punitive damages not recoverable for mere negligence not wilful; *Lake Erie & W. R. Co. v. Brafford*, 15 Ind. App. 663, 43 N. E. 882, holding finding of wilful intent to injure justified by evidence of continuance of train at unlawful speed after engineer saw men signaling deaf mute to get off track; *Hancock v. Lake Erie & W. R. Co.* 21 Ind. App. 19, 51 N. E. 369, holding complaint for wilful injury insufficient in failing to allege that injury itself was wilfully inflicted; *Dull v. Cleveland, C. C. & St. L. R. Co.* 21 Ind. App. 578, 52 N. E. 1013, holding that there is no such thing as wilful negligence; *Huff v. Chicago, I. & L. R. Co.* 24 Ind. App. 496, 79 Am. St. Rep. 274, 56 N. E. 932, holding wilfulness not constituted by mere unlawful speed and omission of signals; *Illinois C. R. Co. v. Schmitt*, 100 Ill. App. 503, holding act done through mistake in judgment not negligent; *Pennsylvania Co. v. Meyers*, 136 Ind. 258, 36 N. E. 32, holding that there is no middle ground between negligent injury and wilful injury; *Brooks v. Pittsburgh, C. C. & St. L. R. Co.* 158 Ind. 70, 62 N. E. 694, holding carrier not guilty of wilful injury where no opportunity was offered engine crew after discovery of decedent's peril, to change from attitude of heedlessness to that of vigilance; *Indianapolis Street R. Co. v. Taylor*, 158 Ind. 277, 63 N. E. 456, holding that intention to injure one after falling under fender of car must be shown to render company liable for wilful injury; *Indiana Natural Gas & Oil Co. v. O'Brien*, 160 Ind. 273, 65 N. E. 918, holding negligence and wilfulness inconsistent and incompatible with each other; *Walker v. Wehking*, 29 Ind. App. 66, 63 N. E. 128, holding complaint charging "reckless disregard of human life," and "wilful intent to injure" by refusing to place proper guards, insufficient to support claim of wilful injury; *Manlove v. Cleveland, C. C. & St. L. R. Co.* 29 Ind. App. 700, 65 N. E. 212, holding wilful injury of licensee not established, where carrier's knowledge of his presence in place of danger not shown; *McGuire v. Vicksburg, S. & P. R. Co.* 46 La. Ann. 1559, 16 So. 457 (dissenting opinion), as to distinction between wilfulness and negligence.

Trespassers and licensees on railroad property.

Cited in *Cleveland, C. C. & St. L. R. Co. v. Adair*, 12 Ind. App. 594, 40 N. E. 822, holding that railroad company owed boy trespasser on tracks no duty to protect him from negligence; *Louisville & N. R. Co. v. Cronbach*, 12 Ind. App. 673, 41 N. E. 15, holding carrier's servants have right to presume that person walking in front of moving train will leave track in time to avoid danger; *Citizens Street R. Co. v. Merl*, 26 Ind. App. 292, 59 N. E. 491, holding that carrier owes trespasser only reasonable care against injury after inability to avoid danger is known; *Cleveland, C. C. & St. L. R. Co. v. Stephenson*, 139 Ind. 643, 37 N. E. 720, holding that carrier owes no duty of protection against its negligence to licensee loading hogs on car; *Baltimore & O. & C. R. Co. v. Paul*, 143 Ind. 27, 28 L. R. A. 218, 40 N. E. 519, holding carrier not liable for injuries to brakeman of another road by negligence of fellow servant while operating master's train on defendant's road.

Cited in footnotes to *Cleveland, C. C. & St. L. R. Co. v. Tartt*, 49 L. R. A. 99, which denies duty towards trespassers on track before discovery; *Becker v. Louisville & N. R. Co.* 53 L. R. A. 268, which requires stopping to enable trespasser discovered on railroad bridge to escape.

Proximate cause of injury.

Cited in *Cleveland C. C. & St. L. R. Co. v. Stewart*, 24 Ind. App. 380, 56 N. E. 917, holding damages not recoverable for nervous shock to woman, caused by impending danger to daughter.

Cited in footnote to *Schreiner v. Great Northern R. Co.* 58 L. R. A. 76, which holds failure to build fence not proximate cause of injury to one pushed on track by cow.

23 L. R. A. 555, *HAYES v. O'BRIEN*, 149 Ill. 403, 37 N. E. 73.

Suits involving freehold.

Cited in *McDole v. Kingsley*, 62 Ill. App. 30, holding freehold involved in suit for specific performance of contract to sell land.

Construction and enforcement of contracts.

Cited in *Guyer v. Warren*, 175 Ill. 335, 51 N. E. 580, holding optional contract to convey land enforceable when optional vendee accepts within time limit therefor; *Gibbs v. People's Nat. Bank*, 198 Ill. 311, 64 N. E. 1060, construing word "net" in contract of sale as used in its ordinary sense; *Hardesty v. Forest City Ins. Co.* 77 Ill. App. 418, holding policy not avoided by change of title in premises by death of insured; *Manning v. Ayres*, 23 C. C. A. 412, 46 U. S. App. 537, 77 Fed. 697, refusing specific performance of optional contract for sale of land, no price having been fixed or terms agreed on; *Fowler v. Fowler*, 204 Ill. 104, 68 N. E. 414, holding service by publication not sufficient to authorize decree of specific performance for sale of land against nonresident vendor; *Forthman v. Deters*, 206 Ill. 167, 99 Am. St. Rep. 145, 69 N. E. 97, holding that contract under seal to convey land must be regarded as having been made upon sufficient consideration.

Cited in footnotes to *Dyer v. Duffy*, 24 L. R. A. 339, which holds proposal to sell land not sale, till notice of acceptance given.

Indefinite contracts.

Cited in footnotes to *Hoffman v. Maffioli*, 47 L. R. A. 427, which holds that agreement to furnish paving contractor crushed stone in "such quantities as may be desired" does not require furnishing of all stone needed; *Hickey v. O'Brien*, 49 L. R. A. 594 which sustains contract by sellers of ice to purchase all ice necessary to carry on business for five years.

Options for sale of commodities.

Cited in footnotes to *Booth v. People*, 50 L. R. A. 762, which sustains statute making unlawful, options for sale of commodities which have been subject of gambling operations; *Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co.* 57 L. R. A. 696, which holds void, accepted offer to deliver at specified prices during specified period, articles in such amounts as acceptor may desire; *Loudenback Fertilizer Co. v. Tennessee Phosphate Co.* 61 L. R. A. 402, which sustains contract for purchase of entire consumption for term of years of phosphate rock in manufacturing fertilizer, estimated at specified amount, with right to demand double.

Cited in note (53 L. R. A. 294) on effect on contract of leaving price indefinite.

Construction of statutes.

Cited in *People ex rel. Akin v. Loeffler*, 175 Ill. 596, 51 N. E. 785, holding subordinates in offices of city clerk, city comptroller, and city treasurer subject to

civil service classification; *Davison v. Hough*, 165 Mo. 578, 65 S. W. 731, holding statute prohibiting injunction except in county where judgment is rendered or suit pending applicable only where main purpose of suit is annulling judgment or enjoining suit at law.

Option to renew lease, or purchase.

Cited in *Hawes v. FAVOR*, 161 Ill. 446, 43 N. E. 1076, holding coverture not bar to specific performance of agreement to sell at expiration of lease, lessee having performed conditions; *Thompson v. Seavor*, 91 Ill. App. 504, construing option to renew lease according to plain intent thereof, where language admitted of two interpretations; *Martens v. Reilly*, 109 Wis. 477, 84 N. W. 840, holding agreement in lease giving lessees first right to purchase, nugatory.

Defective description of land.

Cited in *Marske v. Willard*, 68 Ill. App. 85, holding defective description cured by proof that vendor put purchaser in possession of premises defectively described; *Fowler v. Fowler*, 204 Ill. 100, 68 N. E. 414, holding contract not void if, from words employed, description can be made certain by extrinsic evidence of facts, physical conditions, measurements, or monuments referred to in deed.

Powers of municipalities.

Cited in *Park Ridge v. Robinson*, 198 Ill. 585, 92 Am. St. Rep. 276, 65 N. E. 104, upholding power of municipality to limit liability for improvement to particular fund raised therefor.

23 L. R. A. 561, *FORD v. UNITY CHURCH SOC.* 120 Mo. 498, 41 Am. St. Rep. 711, 25 S. W. 394.

Description of land in deeds and wills.

Cited in *Briant v. Garrison*, 150 Mo. 667, 52 S. W. 361, construing word "between," used in describing land, to mean "through;" *Mudd v. Dillon*, 166 Mo. 121, 65 S. W. 973, holding that court will not enforce deed of gift, township and range being omitted in description.

Effect of conveyance as to after-acquired interests.

Cited in *Ely v. Pingry*, 56 Kan. 27, 42 Pac. 330, holding purchase-money mortgage superior to prior mortgage by purchaser before acquiring title; *Wilson v. Fisher*, 172 Mo. 22, 72 S. W. 665, holding that sheriff's deed does not pass an after-acquired interest of defendant in execution.

Cited in footnote to *New England Nat. Bank v. Northwestern Nat. Bank*, 60 L. R. A. 256, which holds mortgage of chattels to be acquired invalid against one taking possession under other mortgage executed by mortgagor after acquiring.

23 L. R. A. 571, *CARPENTER v. UNITED STATES L. INS. CO.* 161 Pa. 9, 41 Am. St. Rep. 880, 28 Atl. 943.

Report of second appeal in 174 Pa. 639, 34 Atl. 211.

Persons who may take proceeds of life insurance policies.

Cited in *McGraw v. Metropolitan L. Ins. Co.* 5 Pa. Super. Ct. 490, 28 Pittsb. L. J. N. S. 171, 41 W. N. C. 62, holding insurable interest of niece in life of uncle by whom she was brought up, proper question for jury; *Clement v. New York L. Ins. Co.* 101 Tenn. 36, 42 L. R. A. 251, 70 Am. St. Rep. 650, 46 S. W. 561, holding assignment of policy by insured to persons not creditors, and not having

insurable interest in his life, mere wager; *Grand Lodge, A. O. U. W. v. McKinstry*, 67 Mo. App. 88, holding that infant, delivered to stranger on promise to adopt, and reared and educated by him, may be designated as beneficiary of fraternal benefit certificate.

Cited in footnote to *Adams v. Reed*, 35 L. R. A. 692, which holds woman has insurable interest in life of son-in-law.

Cited in note (25 L. R. A. 630) on right to take life insurance for benefit of stranger.

Distinguished in *Foster v. Preferred Acci. Ins. Co.* 125 Fed. 538, holding that insured paying his own premiums may have policy payable to any beneficiary.

Testimony as to transaction with dead person.

Cited in *Danner v. Hess*, 8 Northampton Co. Rep. 317, holding payee, in action against maker, competent to testify that deceased person who furnished consideration made him present of the note.

23 L. R. A. 574, *McHUGH v. SCHLOSSER*, 159 Pa. 480, 39 Am. St. Rep. 699, 28 Atl. 291.

Damages for personal injury.

Cited in *Goodhart v. Pennsylvania R. Co.* 177 Pa. 16, 38 W. N. C. 548, 55 Am. St. Rep. 705, 35 Atl. 191, holding that age, health, business habits, and manner of living should be considered on question of earning capacity; *O'Reilly v. Monongahela Street R. Co.* 17 Pa. Super. Ct. 629, and *Wallace v. Pennsylvania R. Co.* 195 Pa. 129, 52 L. R. A. 34, 45 Atl. 685, holding that evidence of impairment of earning capacity must be produced to entitle jury to fix damages therefor; *McKenna v. Citizens' Natural Gas Co.* 198 Pa. 40, 47 Atl. 990, holding erroneous, instruction to allow for earning power, in absence of evidence as to such power; *Waters v. Atlantic Ref. Co.* 24 Pa. Co. Ct. 352, 9 Pa. Dist. R. 473, setting aside verdict of \$47,000 for loss of eyes by boy, no evidence having been given as to earning power; *Aiken v. Philadelphia*, 9 Pa. Super. Ct. 507, 43 W. N. C. 503, holding refusal to charge that profits from business are not earnings not erroneous, court having instructed jury to compensate for loss of earning power; *Birkel v. Chandler*, 26 Wash. 247, 66 Pac. 406, holding that in action for loss of services of minor, evidence as to past earnings and as to what they would have been worth in future properly admitted; *Martachowski v. Orawitz*, 14 Pa. Super. Ct. 186, holding instruction in action in trespass for false representation, leaving amount of damages to caprice of jury, erroneous.

Cited in note (55 L. R. A. 259) on liability for ejecting sick tenant, lodger, or other occupant from building, when right of occupancy has terminated.

23 L. R. A. 576, *MINNEAPOLIS THRESHING MACH. CO. v. FIREMEN'S INS. CO.* 57 Minn. 35, 47 Am. St. Rep. 572, 58 N. W. 819.

Construction of insurance policies.

Cited in *Slinkard v. Manchester Fire Assur. Co.* 122 Cal. 597, 55 Pac. 417, holding that policy on combined harvester "while in use" does not cover same while dismantled and stored.

Cited in footnote to *Thurston v. Burnett & B. D. Farmers' Mut. F. Ins. Co.* 41 L. R. A. 316, which denies liability on policy, where wood was used with coal in running threshing engine.

Cited in notes (26 L. R. A. 241) on location of movable property as affecting fire insurance thereon; (30 L. R. A. 636) on effect of riders or slips attached to insurance policy.

23 L. R. A. 578, *LOUCHEIMER v. WEIL*, 113 N. C. 181, 18 S. E. 103.

23 L. R. A. 581, *UNION P. R. CO. v. ARTIST*, 9 C. C. A. 14, 19 U. S. App. 612, 60 Fed. 365.

Followed without comment in *Pierce v. Union P. R. Co.* 13 C. C. A. 324, 32 U. S. App. 48, 66 Fed. 45.

Release of damages.

Cited in *Houston & T. C. R. Co. v. McCarty*, 94 Tex. 303, 53 L. R. A. 510, 86 Am. St. Rep. 854, 60 S. W. 429, Reversing 21 Tex. Civ. App. 572, 54 S. W. 421, holding release of damages for personal injuries not avoidable for mistake

Cited in footnote to *Och v. Missouri, K. & T. R. Co.* 36 L. R. A. 442, which holds release by woman while dazed and nervous from shock in railway accident binding on her, though obtained by misrepresenting contents.

Distinguished in *Green v. Chicago & N. W. R. Co.* 35 C. C. A. 74, 92 Fed. 870, holding parol evidence inadmissible to modify terms of release.

Limitation of general by particular words.

Cited in *Board of Education v. McLean*, 45 C. C. A. 659, 106 Fed. 819, holding general words in bond act limited by preceding particular recital of purpose of act.

Liability for negligence of medical or surgical attendants charitably furnished.

Cited in *Powers v. Massachusetts Homeopathic Hospital*, 47 C. C. A. 126, 109 Fed. 294, Affirming 101 Fed. 898, denying right of patient in charitable hospital to recover for negligence of nurse; *Louisville & N. R. Co. v. Foard*, 104 Ky. 463, 47 S. W. 342; *Quinn v. Kansas City, M. & B. R. Co.* 94 Tenn. 718, 28 L. R. A. 555, 45 Am. St. Rep. 767, 30 S. W. 1036; *Atchison, T. & S. F. R. Co. v. Zeiler*, 54 Kan. 351, 38 Pac. 282,—holding railroad company not liable to employee for mistake of surgeons furnished by it; *Texas & P. Coal Co. v. Connaughten*, 20 Tex. Civ. App. 645, 50 S. W. 173, and *Haggerty v. St. Louis, K. & N. W. R. Co.* 100 Mo. App. 445, 74 S. W. 456, holding railroad company making compulsory reduction in employee's wages for support of hospital liable for negligence of physician thereof; *Richardson v. Carbon Hill Coal Co.* 10 Wash. 656, 39 Pac. 95, holding corporation maintaining hospital out of money retained from wages of employees not liable for malpractice or negligence of physician; *Pittsburgh, C. C. & St. L. R. Co. v. Sullivan*, 141 Ind. 91, 27 L. R. A. 843, footnote p. 840, 50 Am. St. Rep. 313, 40 N. E. 138, holding corporation gratuitously furnishing medical services to employees liable only for care in selecting physician; *Downes v. Harper Hospital*, 101 Mich. 560, 25 L. R. A. 604, 45 Am. St. Rep. 427, 60 N. W. 42, and *Hearns v. Waterbury Hospital*, 66 Conn. 122, 31 L. R. A. 232, footnote p. 224, 33 Atl. 595, denying liability of charitable hospital for wrongful neglect of servants; *Collins v. New York Post Graduate Medical School*, 59 App. Div. 68, 69 N. Y. Supp. 106, holding post graduate school and hospital not liable for negligence in operating on patient paying only for board and attendance; *Long v. Rosedale Cemetery*, 84 Fed. 136, holding cemetery companies, under stat-

ute, not exempt from liability for negligence of servants; *Brown v. La Societe Fracaise De Bienfaisance Mutuelle*, 138 Cal. 478, 71 Pac. 516, holding private hospital run by mutual benefit society liable to pay patient not member of society, for negligence of surgeon.

Cited in footnotes to *Eighmy v. Union P. R. Co.* 27 L. R. A. 296, which holds railroad company not liable for negligence of physicians in hospitals voluntarily maintained for injured employees; *Hannon v. Siegel-Cooper Co.* 52 L. R. A. 429, which holds department store estopped to deny responsibility for malpractice of dentist.

Cited in note (28 L. R. A. 549) on master's duty to furnish medical aid to servant.

Statutes requiring payment of wages in lawful money.

Cited in note (28 L. R. A. 275) on validity and effect of statutes requiring wages to be paid in lawful money.

23 L. R. A. 584, *PHILLIPS v. MERCANTILE NAT. BANK*, 140 N. Y. 556, 37 Am. St. Rep. 596, 35 N. E. 982.

Commercial paper and frauds upon banks.

Cited in *Goshen Nat. Bank v. State*, 141 N. Y. 388, 36 N. E. 316, refusing to compel comptroller to refund money received for taxes paid by county treasurer, by misappropriation of funds of bank of which he was cashier; *Nassau Bank v. National Bank*, 159 N. Y. 459, 54 N. E. 66, upholding right of bank receiving money in restitution for undetected fraud to retain it as against bank from which fraudulently obtained; *Kelley v. Chenango Valley Sav. Bank*, 21 Misc. 244, 79 N. Y. S. R. 654, 45 N. Y. Supp. 651, holding savings bank liable for misappropriation of deposits by treasurer who, when taking same, exchanged depositor's books for pass books of national bank; *Wiggins v. Stevens*, 33 App. Div. 87, 53 N. Y. Supp. 90, holding giving of check by bank cashier upon fund in bank in his name as assignee, to correct cash account, not payment of deposit.

Cited in notes (26 L. R. A. 570) on negotiability of check; (50 L. R. A. 83) on who must bear loss where check or bill issued or indorsed to impostor.

Distinguished in *Fifth Nat. Bank v. Central Nat. Bank*, 82 Hun. 560, 31 N. Y. Supp. 541, and *Egner v. Corn Exch. Bank*, 42 Misc. 554, 86 N. Y. Supp. 107, holding rule as to effect of checks to fictitious persons not applicable to check not intended to be so drawn, and paid on forged indorsement; *Dundee Nat. Bank v. Huntington*, 20 App. Div. 108, 46 N. Y. Supp. 1003, holding note held by bank not paid by discharge of mortgage held by maker as executor, against president of bank.

23 L. R. A. 588, *JACKSON v. STANFIELD*, 137 Ind. 592, 36 N. E. 345, 37 N. E. 14.

Lawful and unlawful combinations; actions against.

Cited in *Barr v. Essex Trades Council*, 53 N. J. Eq. 116, 30 Atl. 881, holding damage to newspaper through "boycott," actionable; *State ex rel. Durner v. Huegin*, 110 Wis. 253, 62 L. R. A. 742, 85 N. W. 1046, holding combinations of several independent publishers to compel another publisher to reduce rates or lose customers, criminal conspiracy; *Master Builders' Asso. v. Domascio*, 16 Colo. App. 33, 63 Pac. 782, holding mere refusal of builders' association to compete in bidding if plaintiff's bid received by architect not actionable; *Brown v. Jacobs'*

Pharmacy Co. 115 Ga. 442, 57 L. R. A. 554, footnote p. 548, 41 S. E. 553, 90 Am. St. Rep. 126, 41 S. E. 553, holding action of combination of merchants to compel another to sell goods at prices fixed by it, enjoined; West Virginia Transp. Co. v. Standard Oil Co. 50 W. Va. 620, 56 L. R. A. 809, footnote p. 804, 88 Am. St. Rep. 895, 40 S. E. 591, holding malicious conspiracy to get customers from rival and obtain business for one's self, permissible, though carried out with malicious intent to ruin such rival; Walsh v. Association of Master Plumbers, 97 Mo. App. 290, 71 S. W. 455, holding agreement between plumbers' association, dealers and manufacturers, for purpose of fixing prices and limiting production, unlawful; Martell v. White, 185 Mass. 263, 64 L. R. A. 265, footnote p. 260, 69 N. E. 1085, holding action maintainable on behalf of quarry owner against members of association to which he does not belong, enforcing by-law imposing fine on members dealing with nonmembers.

Cited in footnotes to Cote v. Murphy, 23 L. R. A. 135, which holds lawful, combination of employers to prevent advance in wages; Macauley v. Tierney, 37 L. R. A. 455, which holds lawful, agreement by members of association of plumbers not to deal with wholesalers selling to nonmembers; Hartnett v. Plumber's Supply Asso. 38 L. R. A. 194, which holds plumbers' supply association subject to quo warranto for assuming to prevent giving credit by members to delinquent dealer; Brewster v. C. Miller's Sons, 38 L. R. A. 505, which sustains agreement between undertakers to refuse to render services to anyone failing to pay bill to any of them; Doremus v. Hennessy, 43 L. R. A. 797, which holds members of trade association combining to prevent other persons dealing with nonmember liable for resulting injury; Ertz v. Produce Exchange, 48 L. R. A. 90, which holds malicious, conspiracy to injury dealer by inducing other people not to deal with him; Gatzow v. Buening, 49 L. R. A. 475, which holds by-law of liverymen's association, prohibiting furnishing hearse or carriages to nonunion liverymen, illegal; Ertz v. Produce Exchange, 51 L. R. A. 825, which holds produce exchange discriminating against nonmembers and controlling delivery of goods an illegal combination; Downs v. Bennett, 55 L. R. A. 560, which denies right of one only remotely affected, to injunction against fining or expelling member for violation of by-law with nonmembers or those dealing with them.

Cited in note (62 L. R. A. 702) on effect of bad motive to make actionable what would otherwise not be.

Measure of damages.

Cited in Chicago & S. E. R. Co. v. Yawger, 24 Ind. App. 463, 56 N. E. 50, holding that on breach of contract for work and labor by employers, clear, certain, and usual profits arising from such work are recoverable.

Cited in note (52 L. R. A. 50) on damages for tort as affected by loss of profits.

23 L. R. A. 599, SIMMONS v. ATKINSON & L. CO. 69 Miss. 862, 12 So. 263.

Alteration of written instruments.

Cited in Exchange Nat. Bank v. Bank of Little Rock, 22 L. R. A. 690, 7 C. C. A. 121, 19 U. S. App. 152, 58 Fed. 143, holding bank, maker of draft, not liable for raising of same by confidential clerk to whose order it was drawn.

Cited in footnotes to Richards v. Dey, 23 L. R. A. 601, which holds signer of blank bond filled up with unauthorized terms not bound thereby; Brown v. Johnson Bros. 51 L. R. A. 403, which holds maker released by payee's addition of name of other person as comaker; Rochford v. McGee, 61 L. R. A. 335, which holds re-

removal of note written below perforated line on application for insurance, material alteration rendering it void; *Foxworthy v. Colby*, 62 L. R. A. 393, which holds unauthorized insertion of word "gold" before word "dollars," in instrument, material alteration.

Cited in note (35 L. R. A. 470) on alteration of note as affecting bona fide holders.

23 L. R. A. 601, *RICHARDS v. DAY*, 137 N. Y. 183, 33 Am. St. Rep. 704, 33 N. E. 146.

23 L. R. A. 603, *Re SANDERS*, 53 Kan. 191, 36 Pac. 348.

Title of act.

Cited in *Lynch v. Chase*, 55 Kan. 376, 40 Pac. 666, holding title to act providing for investigation of state institutions and officers, broad enough to authorize committee investigation of such institutions and officers thereof; *Rathbone v. Hopper*, 57 Kan. 245, 34 L. R. A. 676, 45 Pac. 610, construing words "municipal corporations," used in title of act, to include townships; *Otto Gas-engine Works v. Hare*, 64 Kan. 81, 67 Pac. 444, construing title of act authorizing regulation of conditional sales, to include power of making and preserving record of them.

Construction of statutes.

Cited in *Lewis v. Lewelling*, 53 Kan. 205, 23 L. R. A. 513, 36 Pac. 351, upholding power of governor to disband militia under statute providing for organization, government, and compensation of same; *Re Stokes*, 67 Kan. 669, 73 Pac. 911, holding justice of peace, under statute authorizing him to sentence only, without power to commit boy to reform school.

23 L. R. A. 606, *GRAEFF v. PHILADELPHIA & R. R. CO.* 161 Pa. 230, 41 Am. St. Rep. 885, 28 Atl. 1107.

Liability of railroad for wrongful acts of strangers.

Cited in *Kiernan v. Manhattan R. Co.* 28 Misc. 519, 59 N. Y. Supp. 626, holding carrier not liable for negligent act of passenger in swinging door against plaintiff; *Hansen v. North Jersey Street R. Co.* 64 N. J. L. 701, 46 Atl. 718, holding evidence that plaintiff was injured in alighting from car by its overcrowding sufficient for jury as to question of due care.

Cited in footnote to *Haines v. Atlantic City R. Co.* 50 L. R. A. 862, which denies liability for trespasser's unauthorized act in raising, and then lowering, railroad gates injuring passing team.

Cited in note (24 L. R. A. 711) on duty of carrier permitting cars to become overcrowded.

23 L. R. A. 609, *GOBRECHT v. CINCINNATI*, 51 Ohio St. 68, 36 N. E. 782.

Compensation of public officers.

Cited in footnote to *Henderson v. Koenig*, 57 L. R. A. 659, which holds void, statute requiring probate judge of one county only, to accept salary instead of fees.

23 L. R. A. 611, *BANK OF ANTIGO v. UNION TRUST CO.* 149 Ill. 343, 36 N. E. 1029.

Effect of payment by volunteer.

Cited in *Bouton v. Cameron*, 99 Ill. App. 621, holding volunteer without right of subrogation.

Cited in footnote to *United States use of Fidelity Nat. Bank v. Rundle*, 52 L. R. A. 505, which holds money furnished to pay labor claims not within bonds for paying persons supplying principal with labor or materials for prosecuting work.

Entire and divisible contracts.

Cited in *Keeler v. Clifford*, 165 Ill. 548, 46 N. E. 248, holding contract for removal of dirt, payable in definite instalments, severable; *Spring v. Slayden-Kirksey Woolen Mills*, 106 Ill. App. 582, and *Rothschild Bros. v. Wise*, 81 Ill. App. 99, holding contract for different articles bought at same time for different prices, severable.

Limit of power of agent for collection.

Cited in *Cooney v. United States Wringer Co.* 101 Ill. App. 474, holding agent to collect powerless to bind principal by anything except actual collection of money; *National Bank v. American Exch. Bank*, 151 Mo. 329, 74 Am. St. Rep. 527, 52 S. W. 265, holding that collecting bank takes check in payment of draft at its own risk; *Gowling v. American Exp. Co.* 102 Mo. App. 372, 76 S. W. 712, holding liability of collecting agency fixed by receiving draft instead of money in payment of check.

Assignment of fund in bank by check.

Cited in *Gage Hotel Co. v. Union Nat. Bank*, 171 Ill. 535, 39 L. R. A. 481, 63 Am. St. Rep. 270, 49 N. E. 420, holding that depositor cannot, by arrangement with bank, prevent application of future deposits in payment of check; *Merchants Nat. Bank v. Maple*, 65 Ill. App. 487, upholding right of bank to apply deposit to payment of note of drawer and another before presentment of checks withdrawing deposit; *Staninger v. Tabor*, 103 Ill. App. 336, holding delivery of check for payment of money, assignment *pro tanto* of funds on deposit; *Henderson v. United States Nat. Bank*, 59 Neb. 283, 80 N. W. 898, holding check for larger amount than sum on deposit not assignment thereof.

Cited in footnotes to *Cincinnati, H. & D. R. Co. v. Metropolitan Nat. Bank*, 31 L. R. A. 653, which holds acceptance of check necessary to give holder right of action against bank for refusal to pay; *Raesser v. National Exch. Bank*, 56 L. R. A. 174, which holds bank's authority to pay check, working assignment *pro tanto* of fund, not revoked by depositor's death.

Distinguished in *Pullen v. Placer County Bank*, 138 Cal. 174, 94 Am. St. Rep. 19, 71 Pac. 83, holding check, without consideration, presented after death of drawer not assignment *pro tanto* of fund on deposit; *First Nat. Bank v. Selden*, 62 L. R. A. 561, 56 C. C. A. 534, 120 Fed. 214, holding assignment by check not such as to entitle holder to preference over creditors of national bank after insolvency.

23 L. R. A. 615, *IRON CITY NAT. BANK v. FT. PITT NAT. BANK*, 159 Pa. 46, 28 Atl. 195.

Payment of forged paper.

Cited in *Land Title & T. Co. v. Northwestern Nat. Bank*, 196 Pa. 235, 50 L. R.

A. 81, 79 Am. St. Rep. 717, 46 Atl. 420, holding bank not liable for payment of forged check, where drawer delivered same to forger believing him to be payee; United Security Co. v. Central Nat. Bank, 42 W. N. C. 149, holding bank liable to corporation for payment of check on forged indorsement by corporation agent; State v. First Nat. Bank, 203 Pa. 73, 52 Atl. 13, holding bank not liable for payment of forged draft, drawn by mistake of executor in favor of dead legatee.

Cited in footnote to Critten v. Chemical Nat. Bank, 57 L. R. A. 530, which holds bank paying plainly altered check to clerk of drawer, without asking explanation, liable for loss from subsequent payment of similar checks.

23 L. R. A. 618, COREY v. WADSWORTH, 99 Ala. 68, 42 Am. St. Rep. 29, 11 So. 350.

Report of second appeal in 118 Ala. 526, 44 L. R. A. 779, 25 So. 503.

Preferences by insolvents.

Cited in Sabin v. Columbia River Lumber & Fuel Co. 25 Or. 30, 42 Am. St. Rep. 756, 35 Pac. 854, and O'Bear Jewelry Co. v. Volfer, 106 Ala. 213, 28 L. R. A. 719, 54 Am. St. Rep. 31, 17 So. 525, upholding right of going corporation to prefer creditors; Berney Nat. Bank v. Guyon, 111 Ala. 503, 20 So. 520, holding sale of corporation assets, in effect an unlawful preference of controlling directors, void: Corey v. Wadsworth, 118 Ala. 526, 44 L. R. A. 779, footnote p. 766, 25 So. 503, sustaining preference to stockholder, director, and president of insolvent corporation; Gay v. Brierfield Coal & I. Co. (omitted from official report in 94 Ala. 332). 16 L. R. A. 576, 11 So. 353, holding paid-in capital stock, pledge in trust primarily for security of all creditors; Ingwersen Bros. v. Edgecombe, 42 Neb. 744, 60 N. W. 1032, and W. P. Noble Mercantile Co. v. Mount Pleasant Co-op. Inst. 12 Utah, 235, 42 Pac. 869, holding preference of director of insolvent corporation over other creditors void; Adams & W. Co. v. Deyette, 8 S. D. 147, 31 L. R. A. 508, footnote p. 497, 59 Am. St. Rep. 751, 65 N. W. 471 (dissenting opinion), majority denying right to prefer debt for money borrowed by corporation to purchase its own stock; Lyons Thomas Hardware Co. v. Perry Stove Mfg. Co. 86 Tex. 165, 22 L. R. A. 815, holding preferential deed of trust by private trading corporation after insolvency void as against unsecured creditors; State v. Bank of Ogalalla, 65 Neb. 24, 90 N. W. 961, holding certificates of deposit issued to stockholders of insolvent bank void as to creditors.

Cited in footnotes to Illinois Steel Co. v. O'Donnell, 31 L. R. A. 265, which holds valid, securities given to directors by insolvent going concern to obtain money loaned at same time; American Exch. Nat. Bank v. Ward, 55 L. R. A. 356, which sustains chattel mortgage to secure just demands of directors of insolvent corporation; National Wall Paper Co. v. Columbia Nat. Bank, 56 L. R. A. 121, which denies right to prefer debt on which officers and directors bound as sureties; Nappanee Canning Co. v. Reid, M. & Co. 59 L. R. A. 199, which sustains right to prefer unsecured claims of directors and obligations on which they are liable.

Distinguished in Mary Lee Coal & R. Co. v. Knox, 110 Ala. 637, 19 So. 67, upholding preference of creditor corporation by going debtor corporation, directors and stockholders of both being same persons; American Nat. Bank v. Dallas Tinware Mfg. Co. 15 Tex. Civ. App. 635, 39 S. W. 955, upholding right to acquire preference by attachment on assets of going, although insolvent, corporation; Smith-Dimmick Lumber Co. v. Teague, 119 Ala. 393, 24 So. 4, holding that re-

lief from mortgages as improper preferences will not be granted where not demanded on ground of such preference.

Allegation of insolvency.

Distinguished in *Coal City Coal & Coke Co. v. Hazard Powder Co.* 108 Ala. 223, 19 So. 392, holding allegation that alleged fraudulent grantor is and was insolvent at time of grant, sufficient allegation of insolvency.

23 L. R. A. 622, *STROUSE v. LEIPF*, 101 Ala. 433, 46 Am. St. Rep. 122, 14 So. 667.

Contracts and torts of married woman.

Cited in note (30 L. R. A. 521) on liability of husband and wife for wife's libel and slander.

Qualified and held *obiter* in *Strauss v. Glass*, 108 Ala. 549, 18 So. 526, holding that married woman not engaged in trade or business, without power to make verbal contract, either with or without husband's consent.

Liability for harboring vicious dog.

Cited in *Speckmann v. Kreig*, 79 Mo. App. 381, holding that knowingly keeping vicious dog is at owner's peril.

Cited in footnotes to *Martinez v. Bernhard*, 55 L. R. A. 671, which denies liability for bite by dog not known to bite before; *Crowley v. Groonell*, 55 L. R. A. 876, which holds owner liable for assault by dog, due to known playful propensity.

Pleading inconsistent defenses.

Cited in note (48 L. R. A. 197, 209) on right to plead inconsistent defenses.

23 L. R. A. 628, *McNEILL v. HAGERTY*, 51 Ohio St. 255, 37 N. E. 526.

Insolvent estates.

Cited in *Havens v. Horton*, 53 Ohio St. 345, 41 N. E. 253, holding jurisdiction of probate court under deed of assignment not ousted by action by mortgagee to foreclose mortgage; *Wambaugh v. Northwestern Mut. L. Ins. Co.* 59 Ohio St. 246, 52 N. E. 839, holding that legal title to property upon removal of assignee and appointment of trustee vests in latter; *Re Pettibone Mfg. Co.* 3 Ohio N. P. 43, upholding jurisdiction of probate court or its successor to entertain petition to set aside assignment of claim against insolvent estate, induced by fraud; *Re Jones*, 5 Ohio N. P. 107, holding deed conveying all of grantor's property for creditors, ordinary deed of assignment; *Re Jackson Brewing Co.* 4 Ohio N. P. 244, holding personal property in hands of general assignee not taxable, although assignor's business continued by assignee; *Sandheger v. Banner Brewing Co.* 6 Ohio N. P. 411, upholding right of county treasurer to collect taxes on personal property in receiver's hands.

Distinguished in *French v. Bobe*, 64 Ohio St. 338, 60 N. E. 292, holding personal property in hands of assignee, held for manufacturing purposes, not exempt from taxation; *Re Robb*, 5 Ohio N. P. 53, holding funds of insolvent estate in hands of administrator subject to taxation; *Baker v. French*, 18 Ohio C. C. 422, holding real estate in hands of general assignee not exempt from taxation.

23 L. R. A. 632, RHODES v. WALSH, 55 Minn. 542, 57 N. W. 212.

Report of later appeal in 58 Minn. 200, 59 N. W. 1000.

Privileges from service of process or arrest.

Cited in State *ex rel.* Isenring v. Polacheck, 101 Wis. 434, 77 N. W. 708, holding exemption of legislator from arrest a mere personal privilege, entitling him to discharge on pleading it; Berlett v. Weary (Neb.) 60 L. R. A. 613, footnote p. 609, 93 N. W. 238, authorizing service of summons on member of legislature during legislative session; Greenleaf v. People's Bank, 133 N. C. 300, 63 L. R. A. 503, 93 Am. St. Rep. 709, 45 S. E. 638, upholding service of summons on nonresident attorney in state representing clients in matter pending in Federal court.

Cited in footnote to Worth v. Norton, 45 L. R. A. 563, which denies privilege from service in civil action to Congressman absent on private business.

Disapproved in effect in Central Trust Co. v. Milwaukee Street R. Co. 74 Fed. 444, setting aside service of subpoena on attorney coming within jurisdiction on business of client, made before he had had reasonable time to depart.

23 L. R. A. 639, OAKDALE MFG. CO. v. GARST, 18 R. I. 484, 49 Am. St. Rep. 784, 28 Atl. 973.

Contracts in restraint of trade.

Cited in Tillinghast v. Boothby, 20 R. I. 60, 37 Atl. 344, upholding contract not to practise dentistry in specified county; Lanzit v. J. W. Sefton Mfg. Co. 83 Ill. App. 179, upholding portion of contract in restraint of trade, in so far as it limited operation to two states named; Anchor Electric Co. v. Hawkes, 171 Mass. 106, 41 L. R. A. 192, 68 Am. St. Rep. 403, 50 N. E. 509, upholding agreement by officers of corporation not to engage in business for five years; Anderson v. Rowland, 18 Tex. Civ. App. 462, 44 S. W. 911, upholding validity of deed binding grantor not to permit running of saloon in same block for five years.

Cited in footnotes to Kramer v. Old, 34 L. R. A. 389, which sustains contract restricting seller from engaging in milling business in vicinity of certain city; Clark v. Needham, 51 L. R. A. 785, which holds void, lease of manufacturing machinery with agreement against lessor engaging in business for five years; Bancroft v. Union Embossing Co. 64 L. R. A. 298, which sustains contract by one selling right to manufacture and sell machine invented by him not to make, or transfer to others right to make, such machines.

Recognition or exclusion of foreign corporations.

Cited in note (24 L. R. A. 292) on recognition or exclusion of foreign corporations.

23 L. R. A. 642, YOUNG v. YOUNG, 89 Va. 675, 17 S. E. 470.

Contingent and expectant interests in property.

Cited in Methodist-Protestant Church v. Young, 130 N. C. 13, 40 S. E. 691, holding testator and daughter without interest in land so that it could be willed at their death, where church had received the fee subject to condition which was not broken until after their death; Perrigo v. Milwaukee, 92 Wis. 242, 65 N. W. 1025, holding expectancy of payment of balance of purchase price of land sold city not taxable; Howbert v. Cauthorn, 100 Va. 658, 42 S. E. 683, holding contingent remainder not subject to attachment for debt; Nichols v. Guthrie, 109 Tenn. 541, 73 S. W. 107, and Taylor v. Taylor, 118 Iowa, 416, 92 N. W. 71.

holding contingent interest in land not subject to levy and sale under execution, and referring particularly to annotation in 23 L. R. A. 642; McDonald v. Bayard Sav. Bank, 123 Iowa, 418, 98 N. W. 1025, holding, under statute, that contingent interest in estate may be conveyed by deed.

Cited in footnotes to Chase v. York County Sav. Bank, 32 L. R. A. 785, which holds interest in trust for division of proceeds of sales not subject to levy; Hardy v. Gunn, 45 L. R. A. 804, which holds homestead not subject to execution on judgment for use and occupation of other land.

Cited in note (32 L. R. A. 595) on validity of transaction between heir and ancestor, relating to former's expectancy.

23 L. R. A. 650, O'CONNOR v. WALTER, 37 Neb. 267, 40 Am. St. Rep. 486, 55 N. W. 867.

Evasion of exemption laws of debtor's domicile.

Cited in Singer Mfg. Co. v. Fleming, 39 Neb. 691, 23 L. R. A. 214, 42 Am. St. Rep. 613, 58 N. W. 226, holding wages due citizens of Nebraska, garnished in foreign state, recoverable under statute; Chicago, R. I. & P. R. Co. v. Sturm, 174 U. S. 718, 43 L. ed. 1147, 19 Sup. Ct. Rep. 797, holding that full faith should be given garnishment proceedings begun in courts of foreign states.

Cited in notes (36 L. R. A. 582) on debtor's right of action against creditor for collecting debt in another jurisdiction in evasion of exemption laws of their domicile; (47 L. R. A. 134) on effect of judgment against garnishee to merge or satisfy liability of principal debtor.

23 L. R. A. 652, FIDELITY & D. CO. v. HAINES, 78 Md. 454, 28 Atl. 393.

Statutes requiring trustees to file bonds.

Cited in Talbott v. Leatherbury, 92 Md. 169, 48 Atl. 733, holding deed to hold until given time and convey to *cestuis que trusts*, with incidental power of sale, not within statute requiring trustee to file bond; Keane v. Chamberlain, 14 App. D. C. 107, holding passing of title to land in foreign state to assignee subject to statute requiring filing of approved bond.

Distinguished in Moore v. Land Title & T. Co. 82 Md. 290, 33 Atl. 641, holding statute requiring general assignee to file approved bond not applicable to nonresident conveying personal property in state.

23 L. R. A. 654, CHICAGO & N. W. R. CO. v. PRESCOTT, 8 C. C. A. 109, 19 U. S. App. 291, 59 Fed. 237.

Proximate cause of injury.

Cited in footnote to Shields v. Louisville & N. R. Co. 27 L. R. A. 680, which holds obstruction of highway by excursion train not proximate cause of injury to travelers on highway by passenger's misconduct.

Duty of traveler to look at railroad crossings.

Cited in footnotes to Western & A. R. Co. v. Ferguson, 54 L. R. A. 803, which holds that failure to look when within 30 feet of track does not prevent recovery; Keenan v. Union Traction Co. 58 L. R. A. 217, which holds failure to look for train when within 35 feet of track, negligence.

Questions for jury.

Cited in Lundeen v. Livingston Electric Light Co. 17 Mont. 37, 41 Pac. 995,

holding question whether post and guy wire obstruct use of street, for jury; *Laible v. New York C. & H. R. R. Co.* 13 App. Div. 580, 43 N. Y. Supp. 1003, holding question whether carriers negligently obstructed highway and exercised due care in operation of trains, for jury.

Knowledge of defect as proof of contributory negligence.

Cited in footnote to *Wheat v. St. Louis*, 64 L. R. A. 292, which holds recovery for injury due to overturning of wagon by driving on manhole projecting above surface of street, prevented by knowledge of injured person of its existence.

23 L. R. A. 658, *HICKMAN v. KANSAS*, 120 Mo. 110, 42 Am. St. Rep. 684, 25 S. W. 225.

Self-executing constitutional provisions.

Cited in *State v. Kyle*, 166 Mo. 302, 56 L. R. A. 120, footnote p. 115, 65 S. W. 763, holding self-operating, constitutional amendment for criminal prosecution by indictment or information only.

Cited in footnotes to *Anderson v. Whatcom County*, 33 L. R. A. 137, which holds constitutional provision for justices of peace receiving salary instead of fees, self-executing; *Criswell v. Montana C. R. Co.* 33 L. R. A. 554, which holds act imposing liability on domestic railroad companies for fellow servant's negligence abrogated by adopting Constitution prohibiting special privileges to foreign corporations; *Illinois C. R. Co. v. Ihlenberg*, 34 L. R. A. 393, which holds constitutional provision that employee's knowledge of defect shall be no defense to action for injury, self-executing.

Cumulative remedies.

Cited in *Smith v. St. Joseph*, 122 Mo. 646, 27 S. W. 344, holding failure to appropriate money for damages to abutting owner by change of street grade as required by statute, no defense to action therefor; *Markowitz v. Kansas City*, 125 Mo. 489, 46 Am. St. Rep. 498, 28 S. W. 642, holding statutory remedy to ascertain damages by reason of changed street grade not exclusive; *MacMurray-Judge Architectural Iron Co. v. St. Louis*, 138 Mo. 618, 39 S. W. 467, holding damages not recoverable in injunction proceeding restraining city from changing grade of street; *People's R. Co. v. Grand Avenue R. Co.* 149 Mo. 253, 50 S. W. 829, holding statutory remedy, if adequate, must be pursued, where new duty or cause of action is created by such statute; *Bowles v. Abrahams*, 65 Mo. App. 13, holding statutory remedy for damage by animals running at large not exclusive; *Walker v. Sedalia*, 74 Mo. App. 74, upholding common-law right of action, independent of statute, for damages to abutting owner by change of street grade; *Johnson v. Johnson*, 72 Mo. App. 390, holding heirs not prevented from objecting to final settlement of administrator's accounts because of cumulative remedy on bond; *St. Louis v. Hollrah*, 175 Mo. 85, 74 S. W. 996, holding common-law action for necessities furnished lunatic not taken away by statute providing for presenting such claims to probate court; *Walsh v. Association of Master Plumbers*, 97 Mo. App. 295, 71 S. W. 455, holding prior remedy not taken away by statute providing additional remedy for combinations in restraint of trade.

Taking or damaging private property for public use.

Cited in *Ruckert v. Grand Ave. R. Co.* 163 Mo. 278, 63 S. W. 814, holding action for damages for laying of street railway not maintainable by abutting

owner, unless specially injured; *St. Louis, K. & N. W. R. Co. v. Knapp-Stout & Co.* 160 Mo. 414, 61 S. W. 300, holding rule as to taking of property for public use not affected by addition in Constitution of words "or damaged;" *Waldron v. Kansas City*, 69 Mo. App. 52, holding failure to instruct that consequential damages are recoverable only for material change of grade, immaterial where evidence showed 10-foot cut; *Eachus v. Los Angeles Consol. Electric R. Co.* 103 Cal. 621, 42 Am. St. Rep. 149, 37 Pac. 750, holding action maintainable by abutting owner against railroad for damages caused by excavation in street in front of premises; *Paris Fountain Water Co. v. Greenville*, 53 S. C. 89, 30 S. E. 699, holding damages recoverable by water company for change of grade of street; *Blair v. Charleston*, 43 W. Va. 65, 35 L. R. A. 855, footnote p. 852, 64 Am. St. Rep. 837, 26 S. E. 341, sustaining right of purchaser after paper grade line established to recover damages for change of grade; *Less v. Butte*, 28 Mont. 32, 61 L. R. A. 603, footnote p. 601, 98 Am. St. Rep. 545, 72 Pac. 140, requiring compensation for injury to abutting property by original establishment of street grade; *Barfield v. Gleason*, 111 Ky. 521, 63 S. W. 964, holding ordinance for street improvement not void because of failure to provide for compensation for injury to abutting property.

Cited in footnotes to *Ressegieu v. Sioux City*, 28 L. R. A. 389, which upholds right to recover for injury to building by change of street grade, established by ordinance only; *Searle v. Lead*, 39 L. R. A. 345, which denies right to grade street in front of premises without making compensation.

Interference with vested rights.

Cited in *Westport v. Mulholland*, 159 Mo. 97, 53 L. R. A. 444, 60 S. W. 77, Reversing 84 Mo. App. 322, holding railroad taken into city on extension of limits of municipality not exempt from municipal police regulation.

Rule as to deduction of "benefits."

Cited in *Cole v. St. Louis*, 132 Mo. 640, 34 S. W. 469, holding general benefits not deductible from damages to property by change of street grade; *Hook v. Chicago & A. R. Co.* 133 Mo. 321, 34 S. W. 549, holding that greater convenience of access of people to other local road leading to railroad station does not show peculiar benefit to company from opening of highway over its track; *St. Louis, O. H. & C. R. Co. v. Fowler*, 142 Mo. 680, 44 S. W. 771, holding switching privileges which railroad is bound by statute to provide to be special benefits; *Kent v. St. Joseph*, 72 Mo. App. 44, holding proper, instruction that deductible benefits are such as especially inured to plaintiff's property; *Clay v. Board*, 85 Mo. App. 242, holding substantial damages, less special benefits, recoverable against city officers changing street grade without ordinance therefor; *Pochila v. Calvert, W. & B. Valley R. Co.* 31 Tex. Civ. App. 400, 72 S. W. 255, holding that benefits not peculiar to specific property cannot be deducted from damages caused by excavating for right of way.

Cited in footnotes to *Schroeder v. Joliet*, 52 L. R. A. 634, which authorizes consideration of benefit from improvement in assessing damages from cutting down street; *Beveridge v. Lewis*, 59 L. R. A. 581, which denies right to deduct benefits from damages in exercise of eminent domain by individual.

Measure of damages.

Cited in *Slattery v. St. Louis*, 120 Mo. 188, 25 S. W. 521, holding as measure of damages caused by building of bridge, difference in value of property

before and after injury; *Kansas City & N. Connecting R. Co. v. Shoemaker*, 160 Mo. 434, 61 S. W. 205, holding failure to instruct that damage not difference between market value of land before and after taking not error; *Hampton v. Kansas City*, 74 Mo. App. 134, holding measure of damages for injury to abutting owner by change of street grade, to be injury at that time; *McElroy v. Kansas City & I. Air Line*, 172 Mo. 556, 72 S. W. 913, holding measure of damages for taking of land for right of way to be value of land taken, and damage to remainder, less benefits.

23 L. R. A. 665, *VAN MATRE v. SANKEY*, 148 Ill. 536, 36 N. E. 628.

Effect of foreign statutes and judgments.

Cited in *Firemen's Ins. Co. v. Thompson*, 155 Ill. 209, 46 Am. St. Rep. 355, 40 N. E. 488, holding judgment of foreign state on question of jurisdiction cannot be attacked for fraud; binding in sister state; *Bell v. Farwell*, 176 Ill. 495, 42 L. R. A. 807, 68 Am. St. Rep. 194, 54 N. E. 346, holding construction given foreign statutes by foreign courts binding in sister state; *Fred Miller Brewing Co. v. Capital Ins. Co.* 111 Iowa, 599, 82 Am. St. Rep. 529, 82 N. W. 1023, holding default judgment in compliance with Wisconsin statutes binding elsewhere; *Schmaltz v. York Mfg. Co.* 204 Pa. 18, 59 L. R. A. 914, 93 Am. St. Rep. 782, 53 Atl. 522, holding construction of statute by lower courts of state of enactment not binding in sister state; *Wanamaker v. Poorbaugh*, 91 Ill. App. 561, holding that foreign statutes must be strictly complied with where constructive service in foreign state is relied on; *Schmaltz v. York Mfg. Co.* 204 Pa. 18, 59 L. R. A. 914, 93 Am. St. Rep. 782, 53 Atl. 522, holding that construction of statute of state by its highest tribunal will ordinarily be received as conclusive by courts of other states.

Attack upon court's jurisdiction.

Cited in *Swift v. Yanaway*, 153 Ill. 203, 38 N. E. 589, holding finding of court of general jurisdiction as to its jurisdiction not assailable by evidence outside record in collateral proceeding; *Maher v. Title Guarantee & T. Co.* 95 Ill. App. 373, holding mere irregularities of procedure not ground for interference with judgment in equity; *Parsons v. Parsons*, 101 Wis. 80, 70 Am. St. Rep. 894, 77 N. W. 147, holding insufficiency of proof in adoption proceedings not jurisdictional error.

Status and rights of adopted children.

Cited in *Melvin v. Martin*, 18 R. I. 651, 30 Atl. 467, holding status of adopted child determinable by law of domicile; *Gray v. Holmes*, 57 Kan. 220, 33 L. R. A. 208, footnote p. 207, 45 Pac. 596, sustaining right of inheritance of child adopted in sister state; *Bray v. Miles*, 23 Ind. App. 465, 55 N. E. 446 (dissenting opinion), majority holding adopted child of deceased daughter entitled to take under bequest to testator's children with provision that share of any deceased child should go to her children; *Re McKeag*, 141 Cal. 411, 74 Pac. 1039, holding adoption proceedings not subject to collateral attack for mere irregularities.

Cited in footnotes to *Hartwell v. Tefft*, 34 L. R. A. 500, which holds adopted child "lawful issue" within meaning of will; *Clarkson v. Hatton*, 39 L. R. A. 748, which holds adopted child not within statute giving remainder to children or heirs of life tenant; *Butterfield v. Sawyer*, 52 L. R. A. 75, which holds adopted child within deed to woman for life, with remainder to her "child," if any,

otherwise to her "heirs generally;" *Glascott v. Bragg*, 56 L. R. A. 258, which holds will in favor of third person revoked by marriage and adoption of child.

Distinguished in *New York Life Ins. & T. Co. v. Viele*, 161 N. Y. 18, 76 Am. St. Rep. 238, 55 N. E. 311, holding adopted child not entitled to take under bequest to "lawful issue" of daughter, where testatrix intended property to go to descendants.

Affidavits in tax proceedings.

Cited in *Hammond v. Carter*, 155 Ill. 591, 40 N. E. 1019, holding statutory affidavit of "diligent inquiry" not required to specify particular persons to whom inquiry was made; *Sullivan v. Eddy*, 164 Ill. 397, 45 N. E. 837, holding exclusion of tax proceedings and deeds to show title not reversible error in ejectment action, where affidavits required by revenue law, upon which deeds were issued, were defective; *Glos v. Boettcher*, 193 Ill. 536, 61 N. E. 1017, holding void, affidavit of "diligent inquiry" in specified county only.

23 L. R. A. 674, *WATTS v. NORFOLK & W. R. CO.* 39 W. Va. 196, 45 Am. St. Rep. 894, 19 S. E. 521.

Grant or release of right of way.

Cited in *Nunnamaker v. Columbia Water Power Co.* 47 S. C. 487, 34 L. R. A. 222, 58 Am. St. Rep. 905, 25 S. E. 751, holding damages which would have been obtainable on condemnation of right of way, conclusively presumed to be included in purchase price; *Uhl v. Ohio River R. Co.* 51 W. Va. 111, 41 S. E. 340 (dissenting opinion), majority holding grant of right of way, taken alone, passes easement only.

Cited in footnote to *Fremont, E. & M. Valley R. Co. v. Harlin*, 30 L. R. A. 417, which holds damage by negligent construction of railroad ditches not included in release of damages from "construction, building, or use" of railroad.

Intermittent and permanent injuries.

Cited in *Henry v. Ohio River R. Co.* 40 W. Va. 243, 21 S. E. 863, holding nuisance caused by closing culvert, causing overflow, not permanent but recurring injury; *Guinn v. Ohio River R. Co.* 46 W. Va. 154, 76 Am. St. Rep. 806, 33 S. E. 87, holding injury to abutting owner by construction of railroad in street, original and permanent; *Ohio River R. Co. v. Johnson*, 50 W. Va. 505, 40 S. E. 407, upholding second action for damages to gravel bank by washing away, due to construction of railroad; *Cleveland, C. C. & St. L. R. Co. v. King*, 23 Ind. App. 577, 55 N. E. 875, holding injury caused plaintiff's property by dumping offensive material into pond not permanent; *Western U. Teleg. Co. v. Morris*, 28 C. C. A. 58, 55 U. S. App. 211, 83 Fed. 995, holding evidence in action for damages from surgical operation insufficient to warrant consideration of probability of permanent impairment of health; *Rowe v. Shenandoah Pulp Co.* 42 W. Va. 560, 57 Am. St. Rep. 870, 26 S. E. 320 (dissenting opinion by Bannon, J.), who holds overflowing of land by building of permanent dam to be permanent injury; *Ridley v. Seaboard & R. R. Co.* 118 N. C. 1007, 32 L. R. A. 711, footnote p. 708, 24 S. E. 730, authorizing recovery in single action of present and future damages from insufficient passageway in railroad embankment; *Hollenbeck v. Marion*, 116 Iowa, 79, 89 N. W. 210, raising, but not deciding, question whether recovery in action for damages for pollution of stream by sewage would bar another action.

Cited in footnotes to *Doran v. Seattle*, 54 L. R. A. 532, which authorizes recov-

ery for damages from continuing nuisance accruing within statutory period, regardless of time nuisance has existed; *Church of Holy Communion v. Paterson Extension R. Co.* 55 L. R. A. 81, which holds that receipt given in satisfaction for past damages, railroad agreeing to build retaining wall to prevent further damages, does not include future injuries due to insufficiency of retaining wall.

Way of necessity.

Distinguished in *Uhl v. Ohio River R. Co.* 47 W. Va. 63, 34 S. E. 934, holding way of necessity implied to pipe to residence, natural gas discovered after grant of right of way in fee to railroad.

Damages.

Cited in *Douglass v. Ohio River R. Co.* 51 W. Va. 528, 41 S. E. 911, holding that plaintiff must furnish jury tangible data for determining actual damages in order to recover for breach of covenant by carrier to fence.

Obstruction of floatable and navigable streams.

Cited in *State v. Elk Island Boom Co.* 41 W. Va. 799, 24 S. E. 590, affirming conviction of boom company for unreasonably obstructing floatable stream; *Leitzsey v. Columbia Water Power Co.* 47 S. C. 484, 34 L. R. A. 222, 25 S. E. 744, holding complaint for damages for maintenance of dam authorized by law, demurrable for failure to allege negligence.

Cited in notes (59 L. R. A. 51) on right to obstruct or destroy rights of navigation; (64 L. R. A. 984) on liability for injuries caused by attempted exercise of rights of navigation.

Removal of rock by blasting.

Cited in *Cary v. Morrison*, 65 L. R. A. 663, 129 Fed. 180, holding blasting by dynamite and gun powder reasonable method of removing rocks in bringing railroad to grade.

23 L. R. A. 681, *REITER v. STATE*, 51 Ohio St. 74, 36 N. E. 943.

Public offices and vacancies therein.

Cited in *State ex rel. Atty. Gen. v. Thompson*, 9 Ohio C. C. 166, holding vacancy created in office of county recorder by act postponing beginning of successor's term.

Cited in note (24 L. R. A. 494) on compelling citizen to accept office.

23 L. R. A. 685, *STATE, AVIS, PROSECUTOR, v. VINELAND*, 56 N. J. L. 474, 28 Atl. 1039.

Municipal control of highways.

Cited in *State, Tallon, Prosecutor, v. Hoboken*, 59 N. J. L. 393, 36 Atl. 693, holding subsequently purchasing lot owners bound by reservation of right to lay tracks in streets, in dedication to municipality.

Cited in footnotes to *Carmel v. Shaw*, 27 L. R. A. 580, which holds city has complete control over shade trees in public street; *Bradley v. Southern New England Teleph. Co.* 32 L. R. A. 280, which denies power of selectmen to cut and trim trees overhanging highway, without owner's consent; *Vanderhurst v. Tholke*, 35 L. R. A. 267, which holds determination of city council that trees on sidewalk are obstruction, conclusive; *Wyant v. Central Teleph. Co.* 47 L. R. A. 497, which sustains telephone company's right to do necessary trimming of trees

in highway without giving owner opportunity to do so; *Stretch v. Cassopolis*, 51 L. R. A. 345, which denies right to remove shade trees from street without notice to abutter; *Miller v. Detroit*, Y. & A. A. R. Co. 51 L. R. A. 955, which sustains street railway company's right to remove obstructing shade trees without compensation to abutter.

Cited in notes (36 L. R. A. 595) on power of municipal corporations to define, prevent, and abate nuisances; (39 L. R. A. 670) on municipal power over nuisances affecting highways and waters.

23 L. R. A. 687, *DUN v. CITY NAT. BANK*, 7 C. C. A. 152, 14 U. S. App. 695, 58 Fed. 174.

Liability for default of agent.

Cited in *Irwin v. Reeves Pulley Co.* 20 Ind. App. 110, 48 N. E. 601 (dissenting opinion), majority holding bank not liable for default of correspondent selected with due care.

Liability of subagent to principal.

Cited in footnote to *Milton v. Johnson*, 47 L. R. A. 529, which holds subagent applying proceeds of debt collected, to payment of claim due him from principal agent, liable to principal therefor.

23 L. R. A. 693, *MULLEN v. OWOSSO*, 100 Mich. 103, 43 Am. St. Rep. 436, 58 N. W. 663.

Imputable negligence.

Cited in *Fye v. Chapin*, 121 Mich. 679, 80 N. W. 797, holding negligence of parents in admitting dog to house not imputable to child injured by it; *Hartley State Bank v. McCorkell*, 91 Iowa, 660, 60 N. W. 197, holding question whether driver's negligence was imputable to plaintiff properly submitted to jury on conflicting evidence.

Cited in footnote to *Koplitz v. St. Paul*, 58 L. R. A. 74, which holds negligence of omnibus driver not imputable to member of picnic party carried.

Negligence of person riding with another.

Cited in footnotes to *Howe v. Minneapolis, St. P. & S. Ste. M. R. Co.* 30 L. R. A. 684, which holds negligence of one riding with another when injured at railroad crossing, question for jury; *Illinois C. R. Co. v. McLeod*, 52 L. R. A. 954, which holds hirer of driver and team bound to check driver's attempt to cross track without stopping and listening for train.

23 L. R. A. 695, *AMERICAN SUNDAY SCHOOL UNION v. TAYLOR*, 161 Pa. 307, 29 Atl. 26.

Property exempt from taxation.

Cited in *Pennsylvania Hospital v. Delaware County*, 169 Pa. 308, 36 W. N. C. 547, 32 Atl. 456, holding real estate used for benefit of charitable hospital, exempt; *Sisters of St. Francis v. Delaware County*, 7 Del. Co. Rep. 220, holding farm lands used for benefit of charitable corporation, not exempt; *Re Historical Soc.* 13 Montg. Co. L. Rep. 207, holding real estate of charitable historical society, exclusively used for purposes of the organization, exempt; *Re Blair County*, 8 Pa. Dist. R. 42, holding land leased by county commissioners for purposes of industrial home for poor children, not exempt; *Yale University v. New Haven*, 71

Conn. 329, 43 L. R. A. 494, 42 Atl. 87, holding college dormitories exempt: *Sisters of Peace v. Westervelt*, 64 N. J. L. 513, 45 Atl. 788, and *Parker v. Quinn*. 23 Utah, 341, 64 Pac. 961, holding rented property of charitable organization not exempt; *Lancaster County v. Warfel*, 19 Lanc. L. Rev. 79, holding land devised to trustees for indigent women, and held for sale, unused and unoccupied, not exempt.

Cited in footnotes to *Fitterer v. Crawford*, 50 L. R. A. 191, which denies exemption of Masonic lodge building, first and second stories of which are rented to pay debt and current expenses of lodge; *Young Men's Christian Asso. v. Douglas County*, 52 L. R. A. 123, which denies exemption to part of Y. M. C. A. building rented for business purposes; *Protestant Episcopal Church v. Prioleau*, 57 L. R. A. 606, which holds exempt, church parsonage rented, the rent being used to procure other residence for parson.

23 L. R. A. 699, ATTY. GEN. *ex rel.* *RICH v. JOCHIM*, 99 Mich. 358, 41 Am. St. Rep. 606, 58 N. W. 611.

Followed without comment in Atty. Gen. *ex rel.* *Rich v. Berry*, 99 Mich. 379, 58 N. W. 617, and Atty. Gen. *ex rel.* *Rich v. Hambitzer*, 99 Mich. 380, 58 N. W. 617.

Legislative powers and due process of law.

Cited in *Osborn v. Charlevoix Circuit Judge*, 114 Mich. 666, 72 N. W. 982, upholding act authorizing seizure and destruction of nets used in illegal fishing; *Detroit Citizens' Street R. Co. v. Detroit*, 125 Mich. 709, 84 Am. St. Rep. 589, 85 N. W. 96, holding city council not obliged to notify corporation objecting to assessment, which has been heard before its committee, to attend when it sits on appeal; *Atty. Gen. v. Sullivan*, 163 Mass. 451, 28 L. R. A. 457, 40 N. E. 843, holding president of common council in trial of title to office, without right of jury; *Wilkinson v. Police Commrs.* 107 Mich. 397, 65 N. W. 668, upholding right to mandamus police commissioners to reinstate wrongfully dismissed police officer; *People ex rel. Mitchell v. Sturges*, 21 Misc. 607, 47 N. Y. Supp. 999, upholding power of legislature to shorten term of village president; *Moore v. Strickling*, 46 W. Va. 519, 50 L. R. A. 280, footnote p. 279, 33 S. E. 274, holding public office not property within constitutional provision for due process of law; *Pratt v. Police & Fire Comrs.* 15 Utah, 12, 49 Pac. 747, holding summary dismissal of chief of police by police and fire commissioners void; *Taylor v. Beckham*, 178 U. S. 577, 44 L. ed. 1200, 20 Sup. Ct. Rep. 890, holding public office not title, right, privilege, or immunity secured by Constitution of United States; *The Judges' Cases*, 102 Tenn. 635, 46 L. R. A. 598, 53 S. W. 134 (dissenting opinion by Snodgrass, Ch. J.), who holds legislature without power wholly to deprive constitutional judges of jurisdiction and territory; *Adsit v. Smith*, 129 Mich. 9, 88 N. W. 65, upholding power of supervisors fixing additional compensation of judges, under statute, to revoke same; *Mial v. Ellington* (*State ex rel. Mial v. Ellington*), 134 N. C. 149, 65 L. R. A. 704, 46 S. E. 961, holding that public officer appointed by legislature has no vested interest in office, of which legislature may not deprive him; *People v. Detroit United R. Co.* (Mich.) 63 L. R. A. 750, 97 N. W. 36, holding ordinance requiring equipment of street cars with air brakes not invalid as taking of property without due process of law.

Who are public officers.

Cited in *Lyons v. Rutland R. Co.* 74 Vt. 19, 51 Atl. 1059, holding railroad company operating railroad not "public officer."

23 L. R. A. 707, *DRUMMOND v. CRANE*, 159 Mass. 577, 38 Am. St. Rep. 460, 35 N. E. 90.

Construction of, and actions on, contracts.

Cited in *Walsh v. Packard*, 165 Mass. 192, 40 L. R. A. 345, 52 Am. St. Rep. 508, 42 N. E. 577, upholding right of administrator to sue on covenant to pay rent to intestate; *Edge Moor Bridge Works v. Bristol County*, 170 Mass. 533, 49 N. E. 918, holding acceptance of bid and vote to avoid contract not agreement to enter into contract; *American Lighting Co. v. McCuen*, 92 Md. 706, 48 Atl. 352, holding contract made by acceptance of bid and awarding of contract for street lighting; *Brown v. Cushman*, 173 Mass. 370, 53 N. E. 860, holding contract of agency terminated by death of principal; *Rotch v. French*, 176 Mass. 3, 79 Am. St. Rep. 292, 56 N. E. 893, holding that guaranty to deceased of stock dividend did not run to executor; *Lydig v. Braman*, 177 Mass. 221, 58 N. E. 696, upholding right of trustee of bonds to maintain action for damages for refusal to repurchase same; *Wabasha Electric Co. v. Wymore*, 60 Neb. 202, 82 N. W. 626, refusing injunction to restrain city from discontinuance of certain lights contracted for.

Cited in footnotes to *Marvel v. Phillips*, 26 L. R. A. 416, which holds contract by assignee of invention, to advance funds for joint benefit, discharged by his death; *Hughes v. Gross*, 32 L. R. A. 620, which holds contract of employment by firm not dissolved by death of member; *Gay v. Ward*, 32 L. R. A. 818, which holds continuing guaranty revoked by notice of guarantor's death; *Cox v. Martin*, 36 L. R. A. 800, which holds executory contract requiring peculiar skill or trust terminated by death; *Deweese v. Muff*, 42 L. R. A. 789, which sustains payment of note after principal's death to agent having it in possession, indorsed for collection; *Madden v. Jacobs*, 50 L. R. A. 827, which holds clerk's employment for year not terminated by burning of property and dissolution of employing firm.

Cited in note (29 L. R. A. 433) on sufficiency of contract by offer and acceptance without execution of contemplated formal instrument.

Measure of damages for breach of contract.

Cited in *Smith v. Brown*, 164 Mass. 586, 42 N. E. 101, upholding finding of substantial damages for breach of contract not to engage in drug business; *Cutter v. Gillette*, 163 Mass. 97, 39 N. E. 1010, upholding right of wrongfully discharged employee to recover for contract period subsequent to trial; *Grime v. Borden*, 166 Mass. 201, 44 N. E. 216, holding substantial damages recoverable by trustee for wife on breach of separation agreement; *Farr v. Rouillard*, 172 Mass. 305, 52 N. E. 443, holding damages for breach of common-law bond measurable by interest of *cestui que trust*.

Municipal water supply.

Cited in note (61 L. R. A. 108) on establishment and regulation of municipal water supply.

23 L. R. A. 715, *WARD v. SOUTHERN P. CO.* 25 Or. 433, 36 Pac. 166.

Duty of carrier to licensees.

Cited in *Young v. Clark*, 16 Utah, 50, 50 Pac. 832, holding carrier bound to use reasonable care to prevent injury to child on bridge used as foot crossing by public for seventeen years; *Mills v. New York C. & H. R. R. Co.* 5 App. Div. 19, 39

N. Y. Supp. 280, holding carrier not liable for injury to mail clerk hurt while walking under coal trestle; *Cahill v. Chicago, M. & St. P. R. Co.* 20 C. C. A. 137, 46 U. S. App. 85, 74 Fed. 288, holding permissive use of crossing by several thousands of persons daily imposes duty upon carrier of reasonable precautions to prevent their injury.

Cited in footnotes to *Pennsylvania R. Co. v. Hammill*, 24 L. R. A. 531, which holds duty owed to one using footway alongside railroad bridge in accordance with recognized custom; *Ashworth v. Southern R. Co.* 59 L. R. A. 592, which holds company liable for injury to young child while riding on running board of engine according to known custom of children.

Distinguished in *Cederson v. Oregon R. & Nav. Co.* 38 Or. 359, 62 Pac. 637, holding duty of active vigilance owed by carrier to licensee by invitation.

Duty of carrier to trespassers.

Cited in *Rathbone v. Oregon R. Co.* 40 Or. 227, 66 Pac. 909, holding carrier only bound to use reasonable care to avoid injury to trespasser on hand car after discovery; *Egan v. Montana C. R. Co.* 24 Mont. 574, 63 Pac. 831, holding engineer not bound to keep lookout for trespassers; *Schug v. Chicago, M. & St. P. R. Co.* 102 Wis. 522, 78 N. W. 1090, holding carrier running train at high speed not liable for injury to boy trespasser; *Bias v. Chesapeake & O. R. Co.* 46 W. Va. 359, 33 S. E. 240 (dissenting opinion), majority holding carrier liable for negligent killing of trespasser.

Cited in footnotes to *Cleveland, C. C. & St. L. R. Co. v. Tartt*, 49 L. R. A. 99, which denies duty towards trespassers on track before discovery; *Becker v. Louisville & N. R. Co.* 53 L. R. A. 268, which requires stopping of train to enable trespasser discovered on railroad bridge to escape; *Schreiner v. Great Northern R. Co.* 58 L. R. A. 76, which holds that persons walking on tracks for their own convenience cannot require carrier to protect them from apparent dangers.

Cited in notes (25 L. R. A. 290) on duty to maintain lookout on railroad train; (25 L. R. A. 787) on care required of railroad companies to prevent injuring small children on track.

License by acquiescence.

Cited in *Ewing v. Rhea*, 37 Or. 587, 52 L. R. A. 142, 82 Am. St. Rep. 783, 62 Pac. 790, holding license by acquiescence in construction of ditch revocable at will; *Atchison, T. & S. F. R. Co. v. Potter*, 64 Kan. 22, 56 L. R. A. 580, footnote p. 575, 67 Pac. 534, defining what constitutes license to cross railroad track at place other than public crossing.

Last clear chance.

Cited in note (55 L. R. A. 458) on doctrine of last clear chance.

23 L. R. A. 719, *TRABUE v. DWELLING HOUSE INS. CO.* 121 Mo. 75, 42 Am. St. Rep. 523, 25 S. W. 848.

Change of interest as affecting insurance policy.

Distinguished in *Collings v. American Cent. Ins. Co.* 70 Mo. App. 17, holding deed by heirs to widow for life, of interest in ancestor's homestead, not change of title avoiding policy to widow and heirs.

Entire and divisible contracts.

Followed in *Hollaway v. Dwelling House Ins. Co.* 121 Mo. 88, 25 S. W. 850, holding policy covering real estate and personal property, divisible; *Stephens v.*

German Ins. Co. 61 Mo. App. 199, holding insurance on contents not invalidated by breach of warranty as to building; *Fowler v. Phoenix Ins. Co.* 35 Or. 567, 57 Pac. 421, holding entire policy avoided by false swearing as to proof of loss of part of it; *Southern F. Ins. Co. v. Knight*, 111 Ga. 634, 52 L. R. A. 74, footnote p. 70, 78 Am. St. Rep. 216, 36 S. E. 821, holding policy on different classes of property for premium payable in gross sum, indivisible.

Cited in footnotes to *Agricultural Ins. Co. v. Hamilton*, 30 L. R. A. 633, which holds insurance on personalty as well as on building avoided by nonoccupancy; *Dumas v. Northwestern Nat. Ins. Co.* 40 L. R. A. 358, which holds entirely void, for breach of condition as to part, policy for certain amount on furniture as a whole.

Distinguished in *Pettit v. American Cent. Ins. Co.* 69 Mo. App. 321, holding claims for burning of house and furniture by same fire under same policy, constitute single demand; *Huttig Sash & Door Co. v. M'Mahon*, 81 Mo. App. 447, holding promissory notes illegal in part, wholly void.

Pleading.

Distinguished in *Rissler v. American Cent. Ins. Co.* 150 Mo. 373, 51 S. W. 755, upholding refusal to require plaintiff to elect on which cause of action he will rely under petition alleging loss, by one fire, of two classes of property insured in designated amounts.

23 L. R. A. 723, *GRANT v. STATE*, 33 Fla. 291, 14 So. 757.

Criminal verdicts and sentences.

Cited in *Jenkins v. State*, 35 Fla. 835, 48 Am. St. Rep. 267, 18 So. 182, holding verdict in case involving charge of murder, of guilty as charged, with recommendation of one defendant to mercy, a nullity; *State v. McCaffery*, 16 Mont. 39, 40 Pac. 63, holding plea of former jeopardy inadmissible where jury in former trial did not return verdict as required by Code.

Cited in footnote to *Hechter v. State*, 56 L. R. A. 457, which holds sealed verdict of guilty on some counts of indictment not invalidated by adding not guilty as to others before recording.

Cited in note (45 L. R. A. 136) on effect of excessive sentence.

Change in form of verdict.

Cited in *Bryant v. State*, 34 Fla. 298, 16 So. 177, holding direction of court to jury to substitute for words "the prisoner," the name of defendant, proper.

23 L. R. A. 737, *EVANS v. JOHNSON*, 39 W. Va. 209, 45 Am. St. Rep. 912, 19 S. E. 623.

Proceedings without due notice.

Cited in *Goff v. Price*, 42 W. Va. 390, 26 S. E. 287, holding that judgment on affirmative matter in answer cannot be taken against codefendant without service of process to reply to such answer; *South Penn Oil Co. v. McIntire*, 44 W. Va. 305, 28 S. E. 922, holding appointment of committee of insane person, without notice, void; *Re Wellman*, 3 Kan. App. 104, 45 Pac. 726; *Jones v. Learned*, 17 Colo. App. 78, 66 Pac. 1071; *Stewart v. Taylor*, 111 Ky. 254, 63 S. W. 783,—holding adjudication of insanity, without notice, void; *Cox v. Von Ashlefeldt*, 105 La. 582, 30 So. 175, holding that one cannot be denied status of person *sui juris* without formal proceedings based on notice; *People ex rel. Ordway v. St. Sav.*

ious's Sanitarium, 34 App. Div. 373, 56 N. Y. Supp. 431, holding commitment of inebriate, without notice, void.

Cited in footnotes to *Porter v. Ritch*, 39 L. R. A. 353, which upholds order by judge for temporary confinement of alleged lunatic pending proceedings to determine question of sanity; *Re Lambert*, 55 L. R. A. 856, which holds void, statute authorizing commitment to insane hospital without notice to alleged insane person.

Enforcement of vendor's lien.

Cited in *Shields v. Tarleton*, 48 W. Va. 346, 37 S. E. 589, refusing enforcement of vendor's lien because of laches; *Burbridge v. Sadler*, 46 W. Va. 43, 32 S. E. 1028, holding vendor's lien presumed paid after lapse of twenty years.

Statute of limitations.

Cited in *Seymour v. Alkire*, 47 W. Va. 304, 34 S. E. 953, holding personal decree against defendant, on claim barred by statute, erroneous, although lien exists for same on land.

23 L. R. A. 746, *POTTER v. THE MAJESTIC*, 9 C. C. A. 161, 20 U. S. App. 503, 60 Fed. 624.

Denial of petition to certify cause to supreme court in *Oceanic Steam Nav. Co. v. Potter*, 13 C. C. A. 676, 14 U. S. App. 710, 69 Fed. 844.

Conflict of laws.

Cited in *Wupperman v. The Carib Prince*, 63 Fed. 208, upholding foreign contract limiting liability for damages from latent defects, under foreign law; *Southern R. Co. v. Harrison*, 119 Ala. 545, 43 L. R. A. 387, 72 Am. St. Rep. 936, 24 So. 552, holding contract of shipment from one state to another governed by law of state where made.

Cited in note (63 L. R. A. 529) on conflict of laws as to carrier's contracts.

Distinguished in *The New England*, 110 Fed. 417, holding stipulation in foreign contract exempting carrier from liability for loss of baggage from negligence of its servant, void.

Stipulations limiting carrier's liability.

Reversed in 166 U. S. 375, 41 L. ed. 1039, 17 Sup. Ct. Rep. 597, holding "conditions" on back of ticket to be notices, and not, as matter of law, part of contract, though words "See back," are printed on face of ticket.

Cited in *Calderon v. Atlas S. S. Co.* 16 C. C. A. 333, 35 C. C. A. 587, 69 Fed. 575, Reversing 64 Fed. 876, upholding stipulation limiting liability for goods above value of \$100, unless special agreement made with reference thereto; *The Kensington*, 36 C. C. A. 535, 94 Fed. 887, upholding stipulation in ticket limiting liability for loss of baggage to 250 francs; *Aiken v. Wabash R. Co.* 86 Mo. App. 15, and *The Priscilla*, 106 Fed. 740, upholding contract on ticket limiting liability for loss of baggage to \$100; *Louisville & N. R. Co. v. Turner*, 100 Tenn. 222, 43 L. R. A. 142, footnote p. 140, 47 S. W. 223, holding mere stamping or printing of limitation on railroad ticket or posting of notice in waiting rooms insufficient to bind passenger.

Cited in footnotes to *Rogers v. Kennebec S. B. Co.* 23 L. R. A. 491, which holds one traveling with friend on pass of latter bound by unknown condition as to risks; *O'Rourke v. Citizens' Street R. Co.* 46 L. R. A. 614, which holds void, conditions on transfer check requiring passengers to ascertain correctness of date,

time, and direction; *Watson v. Louisville & N. R. Co.* 49 L. R. A. 454, which holds condition requiring return coupon of round-trip ticket to be stamped, reasonable; *Crary v. Lehigh Valley R. Co.* 59 L. R. A. 815, which requires proof of negligence causing injury to passenger using excursion ticket, by which passenger assumes risk of accident.

Loss by perils of the sea.

Cited in *Bancroft-Whitney Co. v. The Queen*, 78 Fed. 167, holding evidence leaving in doubt question of how leak occurred not sufficient to bring carrier within exceptions of loss by perils of sea.

23 L. R. A. 753, *CROAN v. PHELPS*, 94 Ky. 213, 21 S. W. 874.

Rights of parents and children as affected by illegitimacy.

Cited in *Adams v. Sneed*, 41 Fla. 158, 25 So. 893, holding children of slave marriages not ratified after emancipation, neither legitimates nor bastards within statutes of descent; *Johnson v. Bodine*, 108 Iowa, 599, 79 N. W. 348, upholding right of children of illegitimate daughter of testator's brother to share in devise to his heirs; *McCully v. Warrick*, 61 N. J. Eq. 610, 46 Atl. 949, holding illegitimate brothers and sisters not entitled to take under statute providing for payment of personal estate of intestate illegitimate to mother, where such illegitimate survives the mother.

Cited in footnotes to *Williams v. Kimball*, 26 L. R. A. 746, which denies right of offspring of slave marriages to inherit property acquired by ancestors after emancipation; *Murphy v. Portrum*, 30 L. R. A. 263, which denies right of inheritance, as next of kin of father, of illegitimate child adopted but not legitimated; *McDonald v. Pittsburgh, C. C. & St. L. R. Co.* 32 L. R. A. 309, which denies right of action to father for death of illegitimate child; *Leonard v. Braswell*, 36 L. R. A. 707, which sustains right of offspring of bigamous marriage, void where entered into, to inherit lands in state declaring such issue legitimate; *Van Horn v. Van Horn*, 45 L. R. A. 93, which holds recognition of illegitimate son in other state sufficient to make him heir under Iowa statute; *Alabama & V. R. Co. v. Williams*, 51 L. R. A. 836, which denies mother's right to recover for death of illegitimate child; *Moore v. Moore*, 58 L. R. A. 451, which sustains bastard's right to inherit from brother of deceased mother.

23 L. R. A. 758, *FISHER v. WEST VIRGINIA & P. R. CO.* 39 W. Va. 366, 19 S. E. 578.

Second appeal in 42 W. Va. 201, 33 L. R. A. 76, 24 S. E. 570.

Lease of railroads and resulting liabilities.

Cited in footnotes to *Van Steuben v. Central R. Co.* 34 L. R. A. 577, which holds void, unauthorized lease of railroad; *Lee v. Southern P. R. Co.* 38 L. R. A. 71, which holds lessor of railroad liable to employee of lessee for injury due to defects of rails and track.

Cited in note (44 L. R. A. 739) on liability of lessor of railroad for injury caused by negligence of another company using road under lease, license, or other contract.

Distinguished in *State v. Morgan's L. & T. R. & S. S. Co.* 106 La. 524, 31 So. 115, holding lessor railroad not bound by judgment in action in which it was not made a party.

Carrier's duty toward passengers.

Cited in *Wheeler v. Grand Trunk R. Co.* 70 N. H. 620, 54 L. R. A. 959, footnote p. 955, 50 Atl. 103, holding carrier liable for fall of drunken passenger permitted to dance and stagger near door of baggage car; *Burke v. Chicago & N. W. R. Co.* 108 Ill. App. 573, holding carrier liable for injury resulting from negligently depositing passenger known to it to be helplessly intoxicated, in dangerous place.

Cited in footnotes to *Price v. Philadelphia, W. & B. R. Co.* 36 L. R. A. 213, which holds negligence of trespasser sitting down on railroad track not excused by drunkenness; *Bageard v. Consolidated Traction Co.* 49 L. R. A. 424, which denies carrier's liability for injury to sick passenger supposed to be intoxicated, while going towards back of station after being helped to front, where way open to street; *Southern P. Co. v. Tarin*, 54 L. R. A. 240, which holds carrier liable for injury to unwarned passenger in car left standing till undermined by freshet; *Chesapeake & O. R. Co. v. Saulsberry*, 56 L. R. A. 580, which denies liability to drunken passenger ejected at station where ticket expires, for injuries in attempting to re-enter train; *Southern R. Co. v. Hobbs*, 63 L. R. A. 68, which holds carrier liable to partially blind passenger carried beyond her station without having reasonable opportunity to alight, despite conductor's promise to assist her; *Korn v. Chesapeake & O. R. Co.* 63 L. R. A. 873, which holds conductor not negligent in ejecting a short distance from the station, for refusal to pay fare, one who, while apparently intoxicated, was able to walk, and converse intelligently.

Cited in note (40 L. R. A. 131) on intoxication as affecting negligence.

Instructions to jury.

Cited in *Webb v. Big Kanawha & O. R. Packet Co.* 43 W. Va. 809, 29 S. E. 519, holding instruction containing abstract propositions of law, applicable to only one of two conflicting theories in case, erroneous; *McVey v. Chesapeake & O. R. Co.* 46 W. Va. 119, 32 S. E. 1012, holding instruction that carrier is bound to same degree of care towards person using its right of way, as if tracks ran through public street, erroneous; *McVey v. St. Clair Co.* 49 W. Va. 418, 38 S. E. 648, holding instruction failing to negative contributory negligence, erroneous.

Contributory negligence.

Cited in *Cleveland, C. C. & St. L. R. Co. v. Moneyhun*, 146 Ind. 155, 34 L. R. A. 143, 44 N. E. 1106, holding boy going on lower step of car platform to vomit, guilty of contributory negligence.

23 L. R. A. 768, *ATCHISON, T. & S. F. R. CO. v. REESMAN*, 9 C. C. A. 20, 19 U. S. App. 596, 60 Fed. 370.

Master's duty to provide safe places and appliances.

Cited in *Deserant v. Cerillos Coal R. Co.* 178 U. S. 420, 44 L. ed. 1133, 20 Sup. Ct. Rep. 967, and *Sommer v. Carbon Hill Coal Co.* 32 C. C. A. 160, 59 U. S. App. 519, 89 Fed. 58, holding master liable for injury to servant, due to failure to remove gas from mine; *Cudahy Packing Co. v. Anthes*, 54 C. C. A. 506, 117 Fed. 120, holding master liable for injury to servant for failure to provide safe rope for elevator; *Terre Haute & I. R. Co. v. Williams*, 172 Ill. 382, 64 Am. St. Rep. 44, 50 N. E. 116, Affirming 60 Ill. App. 394, holding carrier liable for failure to erect fences, causing death of engineer through derailment of train by striking stray cattle.

Cited in note (25 L. R. A. 321) on obligation of railroad company to employee as to fencing track.

Vice principalship.

Cited in note (54 L. R. A. 65) on vice principalship as determined with reference to character of act which caused injury.

Rebuttal of incompetent testimony.

Cited in *Roark v. Greeno*, 61 Kan. 310, 59 Pac. 655, holding that incompetent testimony, erroneously admitted, may be rebutted.

Violation of master's rules by servant.

Cited in *Richmond & D. R. Co. v. Finley*, 12 C. C. A. 599, 25 U. S. App. 16, 63 Fed. 231, holding engineer without power to waive rule of master requiring brakeman to use stick in coupling; *Kansas & A. Valley R. Co. v. Dye*, 16 C. C. A. 608, 36 U. S. App. 23, 70 Fed. 28, holding section foreman failing to flag hand car as required by rule, guilty of contributory negligence; *Lake Erie & W. R. Co. v. Craig*, 25 C. C. A. 591, 47 U. S. App. 647, 80 Fed. 495, holding master not liable for injury to servant, due to violation of rules in going between cars to uncouple them; *Erie R. Co. v. Kane*, 55 C. C. A. 141, 118 Fed. 235, denying recovery for death of fireman while cleaning number on front of engine in violation of rules.

Cited in note (43 L. R. A. 349) on duties of master to servant as to rules promulgated for safe conduct of business.

Proximate cause of injury.

Cited in *Pittsburg, C. & St. L. R. Co. v. Hood*, 36 C. C. A. 429, 94 Fed. 624, holding blowing off of steam and moving of train, which frightened horses, proximate cause of resulting injuries to driver.

23 L. R. A. 774, *HAILE v. TEXAS & P. R. CO.* 9 C. C. A. 134, 23 U. S. App. 80, 60 Fed. 557.

Injuries due to mere fright or mental disturbance.

Cited in *Haas v. Metz*, 78 Ill. App. 52, denying right of recovery for physical injuries caused by mental disturbance due to words spoken by defendant; *Kalen v. Terre Haute & I. R. R. Co.* 18 Ind. App. 207, 63 Am. St. Rep. 343, 47 N. E. 694, holding damages not recoverable for fright and mental anguish unaccompanied by physical injury; *Mitchell v. Rochester R. Co.* 151 N. Y. 109, 34 L. R. A. 783, 56 Am. St. Rep. 604, 45 N. E. 354; *Braun v. Craven*, 175 Ill. 411, 42 L. R. A. 203, 51 N. E. 657; *Spade v. Lynn & B. R. Co.* 168 Mass. 290, 38 L. R. A. 514, 60 Am. St. Rep. 393, 47 N. E. 88,—denying right of recovery for injury due to mere fright and mental disturbance; *Cleveland, C. C. & St. L. R. Co. v. Stewart*, 24 Ind. App. 382, 56 N. E. 917, holding damages for impairment of health by fright, due to impending danger to plaintiff's daughter through defendant's negligence, not recoverable; *Western U. Teleg. Co. v. Ferguson*, 26 Ind. App. 220, 59 N. E. 416, holding action maintainable against telegraph company for mental anguish due to its failure to deliver message.

Cited in footnotes to *Smith v. Postal Teleg. Cable Co.* 47 L. R. A. 323, which denies right of recovery for sickness due to fright caused by grossly negligent act of one knowing such result would follow; *Homans v. Boston Elev. R. Co.* 57 L. R. A. 291, which holds carrier liable for nervous shock to passenger resulting from jar to nervous system, accompanying blow, caused by being negligently

thrown on seat; *Watson v. Dilts*, 57 L. R. A. 559, which holds one liable for frightening woman, causing nervous prostration, by stealthily entering her home in nighttime; *Kline v. Kline*, 58 L. R. A. 397, which sustains right to damages for mental suffering for assault by pointing gun, with threat to shoot unless house abandoned; *Sanderson v. Northern P. R. Co.* 60 L. R. A. 403, which denies right to recover for fright resulting in physical injury, but without contemporaneous injury, unless fright proximate result of legal wrong; *Reed v. Maley*, 62 L. R. A. 900, which holds that merely soliciting woman to have sexual intercourse gives her no right of action because of wounded feelings and humiliation.

Disapproved in effect in *Watkins v. Kaolin Mfg. Co.* 131 N. C. 543, 60 L. R. A. 620, 42 S. E. 983, and *Mack v. South Bound R. Co.* 52 S. C. 334, 40 L. R. A. 684, 68 Am. St. Rep. 913, 29 S. E. 905, holding damages for injury caused by fright due to negligence, recoverable; *Cowan v. Western U. Teleg. Co.* 122 Iowa, 382, 64 L. R. A. 549, 101 Am. St. Rep. 268, 98 N. W. 281, holding damages for mental pain and suffering, resulting from negligent transmission of telegram, recoverable.

Proximate cause of injury.

Cited in *Stone v. Boston & A. R. Co.* 171 Mass. 542, 41 L. R. A. 798, 51 N. E. 1, holding railroad company carelessly storing oil not liable for negligent act of stranger igniting it, fire spreading to adjacent buildings.

23 L. R. A. 777, *BOGGESS v. CHESAPEAKE & O. R. CO.* 37 W. Va. 227, 16 S. E. 525.

Risks of employment.

Cited in *Woodell v. West Virginia Improv. Co.* 38 W. Va. 46, 17 S. E. 336, holding risk of dangerous limb of tree projecting over railroad assumed by employee, continuing in service after knowledge of it.

Contributory negligence.

Cited in footnotes to *Distler v. Long Island R. Co.* 35 L. R. A. 762, which holds stepping from station platform on to slowly moving train not negligence *per se*; *Jones v. New York C. & H. R. R. Co.* 41 L. R. A. 490, which denies right of one attempting to enter car of mixed train at distance from station, to recover for injury from sudden jolting of car in coupling.

Rights of persons riding on freight trains.

Cited in footnotes to *Richmond v. Southern P. Co.* 57 L. R. A. 616, which holds unenforceable, agreement by purchaser of mileage ticket at reduced rate not to hold carrier liable for injury on freight train; *Purple v. Union P. R. Co.* 57 L. R. A. 700, which holds one riding on train prohibited from carrying passengers, a trespasser.

23 L. R. A. 780, *ROBINSON v. GRAY*, 90 Iowa, 699, 57 N. W. 614.

Right of chattel mortgagee to immediate possession of property.

Cited in footnote to *Singer Mfg. Co. v. Rios*, 60 L. R. A. 143, which sustains provision authorizing mortgagee to take possession of chattels on default in payment.

Distinguished in *Koster v. Seney*, 100 Iowa, 564, 69 N. W. 868, holding that right of chattel mortgagee to take possession of mortgaged property does not include right to sell until debt, or some part of it, becomes due.

23 L. R. A. 785, *PEOPLE ex rel. NEW YORK HOTEL & RESTAURANT CO. v. BARKER*, 140 N. Y. 437, 55 N. Y. S. R. 796, 35 N. E. 657.

Corporations as persons.

Cited in footnote to *Fleming v. Texas Loan Agency*, 26 L. R. A. 250, which holds corporation a "person" within statute creating liability for death of one person by another.

23 L. R. A. 787, *PEOPLE ex rel. CONNOR v. STAPLETON*, 18 Colo. 568, 33 Pac. 167.

Contempt of court.

Cited in *Bloom v. People*, 23 Colo. 420, 48 Pac. 519, holding mere disclaimer of improper motives will not purge publisher of contempt; *People ex rel. Alexander v. District Court*, 29 Colo. 220, 68 Pac. 242, holding as contempt of court, assessment by board of assessors pending hearing in supreme court of application for writ to prohibit district court from enforcing injunction forbidding assessment; *State ex rel. Haskell v. Faulds*, 17 Mont. 145, 42 Pac. 285, holding publication of editorial charging supreme court judges with dealing out injustice, and entering into "dirty deal" to do so, contempt of court; *State v. Bee*, Pub. Co. 60 Neb. 295, 50 L. R. A. 197, footnote p. 195, 83 Am. St. Rep. 531, 83 N. W. 204, sustaining punishment for contempt of newspaper publishing articles threatening judges with public odium if they decide pending cause in certain way; *Re Hughes*, 8 N. M. 241, 43 Pac. 692, upholding punishment by imprisonment for publication of article charging supreme court judges with improper motives in institution of disbarment proceedings; *Burke v. Territory*, 2 Okla. 521, 37 Pac. 829, holding published statement charging action of court as "attempt to browbeat grand jury," contempt of court; *State v. Tugwell*, 19 Wash. 255, 43 L. R. A. 723, footnote p. 717, 52 Pac. 1056, holding publication of embarrassing articles within time allowed for modification of opinion, a contempt; *Taylor v. Goodrich*, 25 Tex. Civ. App. 116, 40 S. W. 515, raising, but not deciding, question whether libelous criticism of judicial action after final disposition of case is punishable as contempt; *State ex rel. Crow v. Shepherd*, 177 Mo. 235, 99 Am. St. Rep. 624, 76 S. W. 79, holding legislature powerless to take away, abridge, impair, limit, or regulate power of courts to punish for contempt.

Cited in footnotes to *State ex rel. Ashbaugh v. Circuit Court*, 38 L. R. A. 554, which denies power to punish for criminal contempt, newspapers charging candidate for re-election as judge with corruption and partiality in actions already ended; *Ex parte Foster*, 60 L. R. A. 631, which denies court's power to adjudge, on own motion, publisher in contempt for disobeying oral order not to publish testimony in pending case.

Cited in note (36 L. R. A. 255) on legislative power to abridge power of court to punish for contempt.

23 L. R. A. 795, *LOBECK v. LEE-CLARK-ANDREESSEN HARDWARE CO.* 37 Neb. 158, 55 N. W. 650.

23 L. R. A. 802, *WILSON v. KING*, 59 Ark. 32, 26 S. W. 18.

23 L. R. A. 803, HOOKE'S SUCCESSION, 46 La. Ann. 353, 15 So. 150.

Matrimonial community of acquets and gains.

Cited in Verrier v. Loris, 48 La. Ann. 722, 19 So. 677, holding that administrator of succession of deceased wife cannot take control of property held in community between deceased and surviving husband and usufructuary; Messick v. Mayer, 52 La. Ann. 1175, 27 So. 815, holding entire community assets liable for debts of husband and partner, leaving widow and heir.

23 L. R. A. 805, HOPSON v. FOWLKES, 92 Tenn. 697, 36 Am. St. Rep. 120, 23 S. W. 55.

Tenancy by entirety.

Cited in Russell v. Russell, 122 Mo. 238, 26 S. W. 677, holding woman divorced from husband entitled to partition of land held by entirety during marriage.

Cited in note (30 L. R. A. 334) on tenancy by entireties.

Distinguished in Cole Mfg. Co. v. Collier, 95 Ten. 120, 30 L. R. A. 318, 49 Am. St. Rep. 921, 31 S. W. 1000, refusing possession to purchaser of estate by entirety, at execution sale for husband's debts, wife being alive.

23 L. R. A. 807, MT. VERNON v. PEOPLE, 147 Ill. 359, 35 N. E. 533.

Local assessments.

Cited in note (35 L. R. A. 38) on liability to local assessments for benefits, of property exempt from general taxation.

23 L. R. A. 812, WADSWORTH v. UNION P. R. CO. 18 Colo. 600, 36 Am. St. Rep. 309, 33 Pac. 515.

Followed without comment in Union P. R. Co. v. Kerr, 19 Colo. 273, 35 Pac. 47, action for killing of live stock.

Appealable orders and judgments.

Distinguished in Monteith v. Union P. D. & G. R. Co. 13 Colo. App. 423, 53 Pac. 338, holding order granting or refusing new trial not appealable.

Correct judgment based on erroneous reasons.

Cited in Home Ins. Co. v. Atchison, T. & S. F. R. Co. 19 Colo. 48, 34 Pac. 281, holding correct judgment not reversible because based on erroneous reason.

Obiter dictum.

Cited in Olin v. Denver & R. G. R. Co. 25 Colo. 184, 53 Pac. 454, holding *dictum* of court on question not involved in case not controlling; Rupert v. People, 20 Colo. 431, 38 Pac. 702 (dissenting opinion by Elliott, J.), who holds that general expressions in opinions are to be taken in connection with case in which used; Crissey & F. Lumber Co. v. Denver & R. G. R. Co. 17 Colo. App. 302, 68 Pac. 670, holding that general expressions in opinion, going beyond case, may be disregarded.

Validity of statutes and ordinances.

Cited in Valverde v. Shattuck, 19 Colo. 110, 41 Am. St. Rep. 208, 34 Pac. 947, upholding statute authorizing submission of question of annexation of town, to voters who were taxpayers at next preceding election; Denver v. Coulehan.

20 Colo. 478, 27 L. R. A. 754, 39 Pac. 425, holding provision in act for annexation to city of uncontiguous territory, void; *Smith v. Seattle*, 25 Wash. 308, 65 Pac. 612, holding constitutional limit on indebtedness to be incurred for water, light, and sewers, not applicable to local assessments for laying water mains; *Re Morgan*, 26 Colo. App. 441, 47 L. R. A. 63, 77 Am. St. Rep. 269, 58 Pac. 1071, holding eight-hour law unconstitutional.

Cited in note (21 L. R. A. 789, 791) on constitutionality of statutes restricting contracts and business.

— **Acts relating to fires and killing of stock by railroads.**

Followed in *Sweetland v. Atchison*, T. & S. F. R. Co. 22 Colo. 220, 43 Pac. 1006, and *Rio Grande Western R. Co. v. Vaughn*, 3 Colo. App. 468, 34 Pac. 264, holding stock-killing act unconstitutional; *Rio Grande Western R. Co. v. Chamberlin*, 4 Colo. App. 150, 34 Pac. 1113; *Rio Grande Western R. Co. v. Whitson*, 4 Colo. App. 427, 36 Pac. 159; *Union P. R. Co. v. Bullis*, 6 Colo. App. 65, 39 Pac. 897; *Denver & R. G. R. Co. v. Wheatley*, 7 Colo. App. 286, 43 Pac. 450; *Denver & R. G. R. Co. v. Thompson*, 12 Colo. App. 3, 54 Pac. 402,—holding Colorado stock-killing act unconstitutional.

Cited in *Atchison, T. & S. F. R. Co. v. Tanner*, 19 Colo. 563, 36 Pac. 541, holding act imposing double liability for killing of live stock, penal; *Burlington & M. River R. Co. v. Campbell*, 14 Colo. App. 143, 59 Pac. 424, holding complaint failing to charge defendant with negligence in killing of stock, under statute, defective.

Cited in note (25 L. R. A. 163) on constitutionality of statutes making railroad companies absolutely liable for damage by fires set out by them, or for stock killed by them, regardless of negligence.

23 L. R. A. 818, *DAVIS v. STEEPS*, 87 Wis. 472, 41 Am. St. Rep. 51, 58 N. W. 789.

Mistakes in records and in writing of names.

Cited in *Western Sav. Co. v. Currey*, 39 Or. 412, 87 Am. St. Rep. 660, 65 Pac. 360, holding entry of judgment not stating when docketed not sufficient to create lien.

Cited in footnotes to *State v. Higgins*, 27 L. R. A. 74, which holds second initial a material part of name where only initial of first name given; *Stuyvesant v. Weil*, 53 L. R. A. 562, which holds mistake in Christian name of defendant, duly served and notified that he is person intended, not prevent jurisdiction.

Fraudulent indorsement of one's own name.

Cited in footnote to *Beattie v. National Bank*, 43 L. R. A. 654, which holds forgery not committed by fraudulently indorsing own name on paper belonging to other person with same name.

23 L. R. A. 821, *COHN v. PEOPLE*, 149 Ill. 486, 41 Am. St. Rep. 304, 37 N. E. 60.

Trademarks and labels.

Cited in *Lippman v. People*, 175 Ill. 109, 51 N. E. 872, holding trademark act for protection of manufacturers, bottlers, and dealers in certain beverages, unconstitutional; *Hetterman Bros. v. Powers*, 102 Ky. 141, 39 L. R. A. 213, 80

Am. St. Rep. 348, 43 S. W. 180, upholding right of labor union to selection and exclusive use of particular trade label; Tracy v. Banker, 170 Mass. 271, 39 L. R. A. 510, 49 N. E. 308, holding trade union entitled to benefit of act for protection of "manufacturers from use of counterfeit labels and stamps;" State v. Bishop, 128 Mo. 383, 29 L. R. A. 207, 49 Am. St. Rep. 569, 31 S. W. 9, upholding constitutionality of statute making it a misdemeanor to use label adopted by trade union; State v. Berlinsheimer, 62 Mo. App. 175, reversing conviction for use of counterfeit label, because of failure to prove that goods sold were not entitled to bear genuine label; Schmalz v. Wooley, 56 N. J. Eq. 655, 39 Atl. 539, holding act relating to labels, trademarks, etc., adopted by associations or unions of workmen, unconstitutional as granting exclusive privileges.

Cited in note (29 L. R. A. 206) on protection of trade union labels or trademarks.

Construction of statutes.

Cited in Hogan v. Akin, 181 Ill. 453, 55 N. E. 137, construing word "void" as used in chattel mortgage statute not to mean "absolutely void;" Thompson v. Akin, 81 Ill. App. 64, construing word "void" as used in chattel mortgage statute to mean "absolutely void."

Title to statutes.

Cited in Cook v. Marshall County, 119 Iowa, 399, 93 N. W. 372, holding section providing for tax against persons dealing in cigarettes sufficiently expressed in title of act relating to "crimes and their punishment;" State *ex rel.* Smith v. Board of Dental Examiners, 31 Wash. 498, 72 Pac. 110, holding act to regulate dentistry, and providing a penalty, not unconstitutional because of failure of title to specify that penalty was provided.

23 L. R. A. 824, LAMBERTON v. PERELES, 87 Wis. 449, 58 N. W. 776.

Jurisdiction.

Cited in Kruczinski v. Neuendorf, 99 Wis. 270, 74 N. W. 974, holding action maintainable in equity by owners of title to land not in possession, to remove clouds from title; Wells, F. & Co. v. Walsh, 88 Wis. 538, 60 N. W. 824, upholding jurisdiction of circuit court to entertain action to enforce trust of trustee appointed by county court; Hill v. True, 104 Wis. 301, 80 N. W. 462, upholding jurisdiction of circuit court in action to determine rights of *cestui que trust* in real estate.

Express trusts.

Cited in Boyd v. Mutual Fire Asso. 116 Wis. 179, 61 L. R. A. 928, 96 Am. St. Rep. 948, 64 N. W. 171, holding officers of corporation not express trustees.

Exemption of trust estate from debts.

Cited in Williams v. Smith, 117 Wis. 148, 93 N. W. 464, holding statute exempting income of trust from liability for debt not applicable to personal property.

Common-law rule as to perpetuities.

Cited in Becker v. Chester, 115 Wis. 143, 91 N. W. 87 (dissenting opinion), majority holding common-law rule as to perpetuities not in force in Wisconsin.

23 L. R. A. 830, *PEOPLE v. HAYES*, 140 N. Y. 484, 56 N. Y. S. R. 456, 37 Am. St. Rep. 572, 35 N. E. 951.

Trial of criminal charge during pendency of civil action.

Cited in *Greene v. People*, 182 Ill. 283, 55 N. E. 341, and *Hereford v. People*, 197 Ill. 231, 64 N. E. 310, holding that trial for perjury may proceed before conclusion of proceeding in which it is charged to have been made.

Ex post facto laws.

Cited in footnotes to *State v. Kyle*, 56 L. R. A. 115, which sustains statute authorizing prosecution by information of crimes already committed; *People ex rel. Chandler v. McDonald*, 29 L. R. A. 834, which holds statute not *ex post facto* for abrogating provision for change of magistrate or of venue for prejudice.

Confidential communications.

Cited in *Lecour v. Importers & T. Nat. Bank*, 61 App. Div. 169, 70 N. Y. Supp. 419, holding communication made openly to lawyer's clerk in presence of two other persons not confidential.

23 L. R. A. 835, *Re McCARRAN*, 8 Misc. 482, 29 N. Y. Supp. 582.

23 L. R. A. 836, *FLANNAGAN v. CALIFORNIA NAT. BANK*, 56 Fed. 959.

Powers of banks.

Cited in *Cox v. Robinson*, 27 C. C. A. 132, 48 U. S. App. 388, 82 Fed. 289, holding jury justified in finding vice president of bank had authority to assign judgment, having been held out to public as invested with authority to manage affairs of bank; *Bowen v. Needles Nat. Bank*, 36 C. C. A. 559, 94 Fed. 931, Affirming 87 Fed. 439 (dissenting opinion), majority holding agreement of national bank to guarantee payment of debt of third party for his benefit, *ultra vires*.

Cited in footnote to *Thomas v. City Nat. Bank*, 24 L. R. A. 263, which upholds national bank's power to guarantee payment of commercial paper.

23 L. R. A. 838, *PEOPLE ex rel. WELLS v. BERKELEY*, 102 Cal. 298, 36 Pac. 591.

Number of votes necessary to carry election.

Cited in *Re Denny*, 156 Ind. 119, 51 L. R. A. 728, footnote p. 722, 59 N. E. 359, requiring majority of all votes cast for any purpose at election, to adopt constitutional amendment; *Davis v. Brown*, 46 W. Va. 719, 34 S. E. 839, holding vote for relocation of county seat carried by three fifths of votes on question, although less than three fifths of whole number cast.

Cited in footnotes to *Belknap v. Louisville*, 34 L. R. A. 256, which requires two thirds of all votes cast for any purpose necessary to authorize municipal indebtedness; *Bryan v. Stephenson*, 35 L. R. A. 752, which requires majority of all votes cast at election to authorize issue of bonds; *Citizens & Taxpayers v. Williams*, 37 L. R. A. 761, which holds only majority of taxpayers actually voting at election necessary to authorize increase of taxes; *Montgomery County Fiscal Court v. Trimble*, 42 L. R. A. 738, which holds two thirds of those voting on question of creating county indebtedness sufficient; *State ex rel. McClurg v. Powell*, 48 L. R. A. 652, which requires majority of all electors voting at election for any purpose, to adopt constitutional amendment.

23 L. R. A. 842, *KERR v. LYDECKER*, 51 Ohio St. 240, 37 N. E. 267.

Followed without comment in *Gray v. Clyde*, 53 Ohio St. 673, 44 N. E. 1137, and *Walling v. Humble*, 51 Ohio St. 628.

Statute of limitations.

Cited in *Zuellig v. Hemerlie*, 60 Ohio St. 33, 71 Am. St. Rep. 707, 53 N. E. 447, holding action by surety for subrogation to mortgage subject to ten-year statute of limitations; *Bradfield v. Hale*, 67 Ohio St. 322, 65 N. E. 1008, holding twenty-one-year statute of limitations applicable to mortgagee's action in ejectment; *Teegarden v. Burton*, 62 Neb. 641, 87 N. W. 337, holding that right of action on mortgage accrues within ten years after date of last payment on note secured by it; *New York L. Ins. Co. v. Lord*, 40 C. C. A. 591, 100 Fed. 23, holding title not rendered unmarketable by uncanceled mortgages of record, forty-seven and forty-nine years old; *Waterfield v. Rice*, 49 C. C. A. 509, 111 Fed. 625, holding suit to enforce lien established upon land by direction in will for payment of annuity not barred in six years; *Wilson v. Pickering*, 23 Mont. 440, 72 Pac. 821, holding mortgage barred only when debt it secures is barred.

Foreclosure as affecting wife's dower.

Cited in *Sprague v. Law*, 17 Ohio C. C. 737, holding judgment debtor cannot set up foreclosure proceedings to defeat wife's right of dower in land mortgaged by husband before marriage.

23 L. R. A. 846, *BUSWELL v. SUPREME SITTING, O. OF I. H.* 161 Mass. 224, 36 N. E. 1065.

Comity of states as to insolvent estates.

Cited in *Ewing v. King*, 169 Mass. 100, 47 N. E. 597, holding question of foreign receiver's right to sue waived by failure to raise it on demurrer or argument; *Witters v. Globe Sav. Bank*, 171 Mass. 426, 50 N. E. 932, upholding rights of trustee under foreign assignment over title of foreign creditor by subsequent attachment; *Howarth v. Lombard*, 175 Mass. 579, 49 L. R. A. 307, 56 N. E. 888, holding legal assessment against domestic holder of shares in foreign corporation recoverable by foreign receiver; *Homer v. Barr Pumping Engine Co.* 180 Mass. 164, 91 Am. St. Rep. 269, 61 N. E. 883, holding action not maintainable by foreign receiver in his own name, unless actually or virtually assignee of the claim; *Baldwin v. Hosmer*, 101 Mich. 132, 25 L. R. A. 743, footnote p. 739, 59 N. W. 432, denying right of local branch of foreign society to refuse to turn over assessments to ancillary receiver; *Cowen v. Failey*, 149 Ind. 384, 49 N. E. 270, allowing foreign claimants to intervene and prove claims, although portion of claims had been paid by local receiver under order of foreign court; *MacMurray v. Sidwell*, 155 Ind. 566, 80 Am. St. Rep. 255, 58 N. E. 722, refusing to prefer claims of domestic stockholders of insolvent foreign corporation as to funds in hands of domestic receiver; *Hale v. Harris*, 112 Iowa, 375, 83 N. W. 1046, upholding right of foreign receiver to foreclose mortgage assigned to him; *Mosher v. Supreme Sitting, O. I. H.* 88 Hun, 400, 34 N. Y. Supp. 816, upholding power of court to order transfer of funds in hands of domestic receiver to foreign receiver; *Barley v. Gittings*, 15 App. D. C. 439, holding that foreign receiver may be permitted to sue or intervene in suit in District of Columbia as a privilege; *Southern Bldg. & L. Assn. v. Miller*, 55 C. C. A. 198, 118 Fed.

372, and *Smith v. Taggart*, 30 C. C. A. 567, 57 U. S. App. 493, 87 Fed. 98, holding that local state receivers should be directed to transmit assets of insolvent mutual benefit association to receiver in principal action; *Sands v. E. S. Greeley & Co.* 31 C. C. A. 426, 59 U. S. App. 610, 88 Fed. 133, refusing to order claims of domestic creditors paid before turning over assets in hands of domestic to foreign receiver; *Shinney v. North American Sav. Loan & Bldg. Co.* 97 Fed. 11, upholding power of court of equity to appoint receiver of foreign corporation assets within its jurisdiction.

Cited in footnotes to *Fawcett v. Supreme Sitting*, O. I. H. 24 L. R. A. 815, which refuses to turn over to foreign receiver of foreign corporation funds in hands of local receiver; *Failey v. Fee*, 32 L. R. A. 311, which requires payment of established debts before sending assets to receiver at domicile of foreign insolvent corporation; *Castleman v. Templeman*, 41 L. R. A. 367, which denies receiver's power to consent to decree in other state for payment of assessments by stockholders to creditors.

Cited in note (38 L. R. A. 98, 108) on distribution of assets of insolvent insurance company.

Rules and laws of benefit associations.

Cited in *Palmer v. Northern Mut. Relief Asso.* 175 Mass. 397, 78 Am. St. Rep. 503, 56 N. E. 828, holding that death benefit fund of mutual benefit association not subject to attachment in action to enforce judgment founded on death benefit certificate; *Garham v. Mutual Aid Soc.* 161 Mass. 367, 37 N. E. 447, holding membership of organization is to be determined according to constitution and by-laws of the supreme lodge and subordinate lodges.

Priority of payment of insolvency claims.

Cited in *American Loan & T. Co. v. Northwestern Guaranty Co.* 166 Mass. 344, 44 N. E. 340, holding claimants of trust fund not entitled to priority as between themselves, because of written demand on trustee; *National Park Bank v. Clark*, 92 App. Div. 269, 87 N. Y. Supp. 185, holding funds collected by assessments for death claims not impressed with trust in favor of beneficiaries.

23 L. R. A. 853, *VAN WINKLE v. SATTERFIELD*, 58 Ark. 617, 25 S. W. 1113.

Actions against employers for wrongful discharge.

Cited in *Bassett v. French*, 10 Misc. 675, 31 N. Y. Supp. 667, holding that wrongfully discharged servant cannot recover damages beyond date of trial; *Lee v. Dow*, 71 N. H. 328, 51 Atl. 1072, upholding right of wrongfully discharged servant to recover for remainder of term beyond time of trial; *Weil v. Finneran*, 70 Ark. 511, 69 S. W. 310, holding wrongfully discharged attorney, engaged on percentage basis, entitled to recover expenses and for value of services, where suit was brought before termination of original action.

Cited in footnote to *Edgecomb v. Buckhout*, 28 L. R. A. 816, which denies right to discharge housekeeper for marriage or contemplated marriage.

23 L. R. A. 856, *PEOPLE ex rel. FORSYTH v. COURT OF SESSIONS*, 141 N. Y. 288, 57 N. Y. S. R. 404, 36 N. E. 386.

Criminal sentences, pardons, and paroles.

Cited in *People ex rel. Dunnigan v. Webster*, 14 Misc. 618, 36 N. Y. Supp. 745, upholding power of courts of special sessions to suspend sentence; *Neal v.*

State, 104 Ga. 513, 42 L. R. A. 192, footnote p. 190, 69 Am. St. Rep. 175, 30 S. E. 858, holding void, attempt to suspend execution of sentence after pronouncing it; *People ex rel. Boenert v. Barrett*, 202 Ill. 295, 63 L. R. A. 85, 95 Am. St. Rep. 230, 67 N. E. 23, holding court's jurisdiction to pronounce sentence lost by two years' delay after conviction; *Miller v. Evans*, 115 Iowa, 103, 56 L. R. A. 102, footnote p. 101, 91 Am. St. Rep. 143, 88 N. W. 198, denying defendant's right to relief or failure to execute mittimus under judgment sentencing to imprisonment on failure to pay fine, until lapse of time of imprisonment; *Re Webb*, 89 Wis. 357, 27 L. R. A. 357, footnote p. 356, 46 Am. St. Rep. 846, 62 N. W. 177, denying authority to suspend sentence already pronounced.

Cited in footnotes to *State v. Crook*, 29 L. R. A. 260, which holds power of court after suspension of sentence not lost by committing for refusal to pay costs as ordered; *Miller v. State*, 40 L. R. A. 109, which upholds statute for indeterminate sentence of criminals; *Weber v. State*, 41 L. R. A. 472, which sustains power of court to suspend sentence and set aside suspension at any time during term; *Re Conditional Discharge of Convicts*, 56 L. R. A. 658, which sustains statute empowering board to grant paroles after expiration of minimum sentence provided for; *Parker v. State*, 23 L. R. A. 859, holding granting of stay of execution pending appeal not reprieve; *Territory v. Richardson*, 49 L. R. A. 440, which holds invalid, statutory limitations and pardoning power of governor; *People ex rel. Boenert v. Barrett*, 63 L. R. A. 82, which denies court's power to indefinitely suspend sentence after conviction.

Cited in note (34 L. R. A. 255) on legislative power to grant pardon or amnesty.

Review by mandamus.

Cited in *People ex rel. Sackett v. Woodbury*, 70 App. Div. 421, 75 N. Y. Supp. 236, holding action of surrogate in refusing to issue execution without notice to administrator not reviewable by mandamus.

Restoration to civil rights.

Cited in *Singleton v. State*, 38 Fla. 304, 34 L. R. A. 255, 56 Am. St. Rep. 177, 21 So. 21, holding ability to testify not restored by act of legislature providing that person convicted of larceny should be restored to civil rights.

23 L. R. A. 859, *PARKER v. STATE*, 135 Ind. 534, 35 N. E. 179.

Reprieves and pardons.

Cited in footnotes to *People ex rel. Forsyth v. Court of Sessions*, 23 L. R. A. 856, which holds valid, act authorizing court to suspend sentence; *Rich v. Chamberlain*, 27 L. R. A. 573, which holds valid, act establishing board of pardons to investigate facts on petition for pardon and to make recommendations to governor; *Territory v. Richardson*, 49 L. R. A. 440, which holds invalid, statutory limitations and pardoning power of governor; *Re Conditional Discharge of Convicts*, 56 L. R. A. 658, which sustains statute empowering board to grant paroles after expiration of minimum sentence provided for.

Cited in note (34 L. R. A. 255) on legislative power to grant pardon or amnesty.

Interest on judgments.

Cited in *Hoyt v. Beach*, 104 Iowa, 260, 65 Am. St. Rep. 461, 73 N. W. 492, holding interest allowable on judgment for costs and attorney's fees from date of entry of judgment.

23 L. R. A. 861, CHICAGO, ST. L. & P. R. CO. v. CHAMPION (Ind.) 32 N. E. 874.

Proof of experiments.

Cited in Byers v. Nashville, C. & St. L. R. Co. 94 Tenn. 354, 29 S. W. 128, holding competent, proof of *ex parte* experiment by locomotive engineer after accident.

Cited in footnote to People v. Searcey, 41 L. R. A. 157, which holds box of sand containing tracks made with shoes of accused person admissible.

23 L. R. A. 863, ROTHROCK v. DWELLING-HOUSE INS. CO. 161 Mass. 423, 42 Am. St. Rep. 418, 37 N. E. 206.

Service of process upon corporations.

Cited in Union Guaranty & T. Co. v. Craddock, 59 Ark. 607, 28 S. W. 424, holding service of foreign insurance corporation complying with statutes, not made on state auditor or designated agent, void; Sparks v. National Masonic Acci. Asso. 100 Iowa, 466, 69 N. W. 678, upholding power of state to designate method of service upon corporations doing business therein.

23 L. R. A. 864, BOOTH & H. ABSTRACT CO. v. PHELPS, 8 Wash. 549, 40 Am. St. Rep. 921, 36 Pac. 489.

Property capable of sale.

Cited in Washington Bank v. Fidelity Abstract & Secur. Co. 15 Wash. 490, 37 L. R. A. 116, footnote p. 115, 55 Am. St. Rep. 902, 46 Pac. 1036, authorizing sale under mortgage thereon of books and maps containing record of land titles in certain county; Hanley v. Fidelity Ins. Trust & S. D. Co. 8 Pa. Dist. R. 207, 24 Pa. Co. Ct. 503, holding secret formula and process capable of sale.

Cited in note (51 L. R. A. 358, 381) on common-law rights of authors and others in intellectual productions.









